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**Transitional Justice Mechanisms:
Experience of Foreign Countries and Prospects in Ukraine**

Виконав: студент 6 курсу, групи СПЛ17/М
спеціальності

081 «Право»

(шифр і назва спеціальності)

Король К.О.

(прізвище та ініціали)

Керівник **Заверуха І. Б.**

(прізвище та ініціали)

Рецензент **Цимбрівський Т. С.**

(прізвище та ініціали)

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INTRODUCTION

Relevance of the study

Among historical processes that occurred in the 20th century and at the beginning of this millennium, the most notable ones are processes of transitional justice. They were initiated for different purposes, such as reconciliation, establishing the truth, recovery and further development etc.; and by various actors, namely, the United Nations, non-governmental actors, local governments and initiatives. These processes were also implemented differently — through political action, via legislation or by reforming judiciary (or, simply put, through judicial norms and establishment of institutions). However, there is something that unites all of them — they have appeared after a tough historical period and are aimed at promoting democratic values and improving the way society operates within a state or a certain area.

According to Professor Šimonović, some of these measures and strategies implementing transitional justice system succeeded, some were difficult to implement and some were not implemented at all.¹ This is, in part, due to the nature of conflicts or periods prior to their implementation, i.e. Argentina's experience of shifting to democracy differs from severe atrocities in South African Republic. Other causes relate to cultural, or even more specifically, national peculiarities, that bring a vast array of complexities. For instance, the functioning of the International Criminal Tribunal for former Yugoslavia and the International Criminal Tribunal for Rwanda turned out to be costly and extremely delayed because of the need to translate the procedure and related documents as well as providing interpreters.² Finally, success of the measures employed is heavily dependent on measures' suitability for the attainment of set objectives.

Ukraine is the country that currently undergoes both a post-conflict and an ongoing conflict period, which is also complicated by unique characteristics. It inherited a lot from the Soviet Union, namely some of the legislation, i.e. the Housing Code of Ukraine (укр. *Житловий Кодекс України*) enacted in 1983, prior to

¹ Ivan Šimonović, *Attitudes and Types of Reaction Toward Past War Crimes and Human Rights Abuses* (The Yale Journal of International Law, 2004), 343-344.

² Jessica Almqvist, *The Impact of Cultural Diversity on International Criminal Proceedings* (Journal of International Criminal Justice, 2005), 9-11.

Ukraine's independence. The country's sociocultural life was severely affected by the Soviet ideology and imagery, which led to decommunization. Also, Euromaidan events exposed certain individuals involved in politics as corrupt, an issue which Ukraine's current government tried to liquidate by enacting lustration laws, later criticized and challenged before the Constitutional Court of Ukraine. The country has a lot to reconcile with since two revolutions and pre-independence period. One cannot forget to mention the importance of declarations lodged before the International Court of Justice and the International Criminal Court, against the Russian Federation and some of its citizens. Although many of these measures are already in place, a number of them, i.e. lustration and decommunization, are still in progress and government bodies often struggle to implement them effectively. Taking into consideration all of the above, this research is relevant as the topic is not well-developed for Ukraine.

Purpose of study

One may conclude there is a need to conduct a comprehensive research on the topic. Considering the fact that other countries in the region have implemented similar measures, it is relevant for Ukraine to also research their approaches. So far, Ukraine has employed several approaches to dealing with its ongoing and post-conflict situation. Some worth mentioning are lustration, decommunization, addressing the situation to the International Criminal Court, establishing the Anti-Corruption Court as well as, in part, the judicial reform. However, due to the difficulties in their implementation Ukrainian authorities were faced with, additional analysis is needed. The research aims at improving the current model of transitional justice in Ukraine by suggesting new measures, as well as filling the gaps in existing ones.

The purpose of the study is to compare objectives, strategies, and measures of transitional justice, international standards, experience of other countries and conduct subsequent analysis of their relevance for Ukraine, given the current state of legislation and institutions in terms of measures already in place.

Primary research goal

The primary research goal is to explore ways of dealing with post-conflict and ongoing conflict periods in Ukraine by suggesting a model of transitional justice already in place in other countries of the region and provide recommendations on

improving existing norms and institutions. The goal is, however, limited by the scope of research, and shall cover the address of Ukraine to the International Criminal Court, lustration and decommunization laws and their implementation.

Object and subject of study

The object is both empirical and theoretical — the relevant experience of Central and Eastern European countries, Baltic countries, Ukraine in particular, and the concept of transitional justice respectively. Specific experience of the aforementioned countries will further find its correlation with Ukraine's experience in the last chapter of the work. The subject is legislation leading to implementation of norms and institutions recognized as 'transitional justice' models as well as judicial practice of courts, both international and domestic, in terms of implementing and reviewing these measures and their review.

Methodology

The study relies on the teleological and comparative approaches. Teleological method is invoked when legislation and other statutory provisions are analyzed for their object and purpose. The thesis adopts a comparative method by examining experience of Poland, Moldova, Lithuania and other states in conjunction with processes in Ukraine. Legalistic approach is of significant nature in analyzing and comparing legislation, case law and other primary sources, however, academic commentaries are also utilized to get a deeper understanding of the topic. The research strategy enjoys doctrinal approach where appropriate or where required to understand the wording of a law. Historical method is employed when analyzing transitional processes, in particular, past events that contributed to their emergence. Law and society method introduced in this study by referencing to Roman David enables to evaluate context, motives, and interest of enacting laws and their implementation.

Research sources

As of now, a number of publications and projects were launched to further develop transitional justice measures for Ukraine. USAID's Fair Justice Project prepared numerous reports on the current state-of-the-art measures. It is important to mention that with the help of USAID and within the framework of the Human Rights in Action Program implemented by the Ukrainian Helsinki Human Rights Union a

collective monograph called the “Baseline Study on Implementation of Transitional Justice in Ukraine” was released. This recent scholarly work includes coverage on three subject blocks outlined in the abstract, namely review of other countries’ experience; practically-oriented assessment of the current situation in Ukraine (legislation, statistics, and existing practices); and finally, assessment of prospects for the implementation of the transitional justice principles and formation of its national model.³

The international scholarship has developed a wide array of approaches to transitional justice, there is plentiful of publications allowing to expand the current vision of transitional justice in Ukraine. “Baseline Study on Implementation of Transitional Justice in Ukraine” monograph is only the first attempt in Ukraine to establish a framework to review current legal and institutional changes from a post-conflict perspective. Therefore, mostly foreign sources will be utilized. Amongst main sources are primary sources: draft laws and enacted laws, decrees, court judgments of Ukraine and other countries, international instruments, reports of international organizations etc. This research cites works of well-renowned jurists and/or scholars such as C. Bassiouni, W. Schabas, K. Loewenstein, N. Kritz, N. Roht-Ariazza, R. Teitel, J. Elster, I. Šimonović, T. Lachowski, I. Marchuk, R. David, C. Horne, M. Hnatovsky, S. Sayapin, M. Bilak, O. Uvarova, and many others.

The organization of the thesis

The first part is dedicated to measures (strategies) of transitional justice in general to lay theoretical groundwork for the research. The second part is to analyze transitional justice measures regarding an ongoing war in Ukraine and to conduct a comparative study of other countries’ experience. Consequently, the study analyzes Ukraine’s situation with submissions to international courts, namely, declarations to the ICC. The third part is dedicated to Ukraine’s experience with lustration, decommunization, post-Euromaidan problems and social division, comparing them to other countries and international standards. Conclusions are dedicated to proposing improvements to the model of transitional justice that is viable for Ukraine.

³ Arkadiy Bushchenko, Mykola Gnatovskyi et al., *Baseline Study on Implementation of Transitional Justice in Ukraine: abstract review* 4 (2017).

CHAPTER I

OBJECTIVES OF TRANSITIONAL JUSTICE

1.1. Definition of “transitional justice” as a way to reveal its objectives

The very concept of transitional justice is relatively new to political science and law. Yet, some argue that transitional justice processes have emerged way before the twentieth century. In particular, Professor Elster writes about the restoration of democracy in Ancient Athens in 411 B.C. and 403 B.C., following the temporary establishment of oligarch rule. He further develops an idea that the reason for both, not just one occasions of power shifts towards oligarchy was the wrong initial approach to dealing with post-conflict situation. Forceful retribution of property from oligarchs that accompanied reestablishment of democracy has led to the second instance of a coup. The first time, people of Athens failed to identify and address the root causes of oligarchs' coup. In contrast, the second time they applied a more sophisticated approach — social reconciliation with future in mind. In that case, Patrocleides introduced a bill that had a major impact on subsequent developments. While some oligarchy supporters were convicted as criminals, many were amnestied (like Spartans), and it was later recognized that oligarchs may remain oligarchs if they want to, as well as to form their enclave in Eleusis. The bill was referred to by many as a “reconciliation agreement” as it had introduced clauses such as “the two groups swore to maintain peace with one another”.⁴

By considering a rather simple example from the past, it may be concluded that even in case a post-conflict situation emerges, not all measures are suitable to resolve it. Although every measure has an objective, not every objective of a measure can be justified as the such that is aimed at supporting transitional justice. Moreover, a cultural aspect must be taken into consideration, as well as historical background of a country or even a region at hand.

Objectives of transitional justice are clearly specified on a case-by-case basis. However, the definition of transitional justice might provide at least some insight into

⁴ Jon Elster, *A Case Study of Transitional Justice. Athens in 411 and 403 B.C.* (Justice in Time: Responding to Historical Injustice 2004), 223-238.

general objectives that all measures share in common. Transitional justice is defined in the United Nations documents as well as in the works of scholars. All of these definitions share something in common — transitional justice stands for achieving justice, peace, and democracy. The United Nations definition comprises one paragraph in the Secretary-General report as of 23 August 2004, where transitional justice is interpreted as “the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation”.⁵ Therefore, transitional justice means processes and mechanisms which are specific for each particular case that are aimed at ensuring accountability, serving justice and achieving reconciliation. Interesting to say, this definition does not state that only successful measures constitute transitional justice but rather that a society simply “attempts to come to terms with a legacy of large-scale past abuses”.⁶ The use of such an ambiguous wording makes sense considering the fact that not all UN initiatives have proved to be particularly successful or that not all expectations were met (i.e. the longevity of procedure in international tribunals and their cost of almost a quarter of a billion dollars for operations in total).⁷ As a result, the objectives here derive from the definition and should be called general objectives and are therefore, applicable to all states.

Other definitions can be found in scholarly works. Professor Brownwyn begins by defining transitional justice as “the conception of justice in periods of political transition”.⁸ However, then she initializes a dispute over what this transition leads to, citing Professor Roht-Arriaza’s “what the state is transitioning to” question.⁹ Thus, the definition receives political connotation, when the transition occurs from authoritarian regime to democracy. In this case transitional justice has a narrow meaning of going from one regime to the other, which is not particularly true for all cases in the post-Cold War era. This position is also supported in the UN report of 2004 on transitional

⁵ Report of the Secretary-General: The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, 23 August 2004, S/2004/616 4.

⁶ David Wippman, *The Costs of International Justice* (The American Journal of International Law, vol. 100, no. 4 2006) 861-881.

⁷ Ibid.

⁸ Brownwyn Anne Leebaw, *The Irreconcilable Goals of Transitional Justice*, 30 Hum. Rts. Q. 98 (2008).

⁹ Naomi Roht-Ariazza, *The New Landscape of Transitional Justice* (Transitional Justice in the Twenty-First Century Beyond Truth Versus Justice 2006) 1.

justice, where “transition” is occurring from a conflict to a post-conflict period that needs resolution and establishment of the rule of law.¹⁰ Therefore, it may be concluded from this definition that the objective will be to overcome authoritarian regime of any kind and provide a framework that inevitably leads to what is called a democratic society.

Such narrow definition of what transitional justice is has few yet significant drawbacks and does not allow to fully recognize the objectives of transitional justice. It is often omitted that transitional justice can also be applied in cases of an ongoing conflict and not simply after a regime. In ancient times, societies were faces mainly with fundamental struggles such as political regimes. In the twentieth century, however, more detailed and sophisticated ones have emerged going beyond just political element. Facilitation of return of displaced persons is a bright example of such newly emerged issue.

Scholars Teitel and Elster both take a different path — they define transitional justice as a process that provides a legal response to wrongdoings of predecessor regimes.¹¹ Professor Elster also includes private forms of retribution when specific individuals are penalized in a variety of ways.¹² This definition brings an important aspect of objectives of transitional justice which is retribution by means of legislative measures.

However, transitional justice is not about retribution only, nor it is only about legislative measures but also about volunteering, peacekeeping missions and reintegration. According to Professor Uvarova, recognizing wrongdoings in history books, building memorials is often a part of transitional justice.¹³ Moreover, not all measures are aimed at gaining retribution. For instance, the Lomé Peace Agreement in Sierra Leone brought the Revolutionary United Front (RUF) into the government, notwithstanding the fact that RUF were rebels responsible for the conflict. Finally, not every conflict involves “wrongdoings” in their original meaning — an improper

¹⁰ UN Report 2004, *supra* 5, at 5.

¹¹ Ruti G. Teitel, *Transitional Justice Genealogy*, 16 Harv. Hum. Rts. J. 69 (2003).

¹² Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective* (2004).

¹³ Olena Uvarova, *Characteristics of Transitional Period* (Baseline Study on Implementation of Transitional Justice in Ukraine 2017), 9.

behavior or action.¹⁴ Sometimes, the most appropriate response would be not just a legal response to wrongdoings, but also a forgetting strategy employed on a state level. The decommunization law in Ukraine serves as an example in the part which prohibits any propaganda and usage of symbols closely tied to the Communist and Nazi regimes. While these regimes themselves were recognized as closely associated with “wrongdoings”, the prohibition of symbols is not related to any wrongful acts, or at least not in a direct way.

These are only a few examples of many definitions by scholars that provide either a too narrow or a too wide approach to “transitional justice”. On one hand, a narrow approach excludes cultural, economic and social rights affected in a post-conflict society. On the other a wide approach causes “transitional justice” to lose its subject and therefore, objectives become too unclear.¹⁵

1.2. General and specific objectives of transitional justice: a concept

This paper attempts to establish objectives of transitional justice by analyzing definitions given to it. Considering the aforementioned, it should be concluded that the general and recognized definition is the one provided in the UN report of 2004 as it encompasses all processes and mechanisms aimed at establishing accountability, ensuring reconciliation and promoting justice. Such objectives are general and applicable to ongoing conflicts as well as to the post-conflict matters. While it can be presumed that justice as an idealistic notion is the single end goal, in practice, the single-sided processes designed to reach this objective do not allow for adequate justice. This correlates with scholars Kritz and Šimonović, who identified general objectives of four different categories: establishing the truth, delivering justice by means of punishing perpetrators and retributions for victims, democratic reform, and building peace to assure that violence cannot reoccur.¹⁶ It should be stressed that in certain cases “forgetting the past” works better than establishing the truth as it can

¹⁴ Merriam-Webster, *Definition of “wrongdoing”*, <https://www.merriam-webster.com/dictionary/wrongdoing> (accessed Oct. 31, 2018).

¹⁵ Naomi Roht-Arriaza & Javier Mariezcurrena, *Transitional Justice in the Twenty-First Century. Beyond Truth versus Justice* (Cambridge University Press 2006) 174.

¹⁶ Šimonović, *supra* note 1, at 344, also Neil J. Kritz, *Where We Are and How We Got Here: An Overview of Developments in the Search for Justice and Reconciliation* (The Legacy of Abuse — Confronting the Past, Facing the Future 2002) 21.

potentially catalyze reconciliation. In the aftermath of non-heinous acts peace can be better delivered by means of amnesty. However, the problem with regard to this is that peace is not justice, and justice cannot mean “impunity” in aggravated crimes cases such as war crimes, crimes against humanity, genocide, and other international crimes. While there might be an objective that is on demand, it is not always legitimate. It can also be in violation of a principle well-recognized in international community to employ a purely victim-centered approach in the aftermath of conflict. However, for the purposes of this research, country-specific objectives play a key role.

Ukraine has been working in various directions to establish a new democratic society with respect for the rule of law and promotion of justice. The measures that have been employed to achieve this goal include restoration of justice through the judicial reform of 2014-2018 (ongoing), where the structure of the court system was redesigned and new institutions established, such as the Anti-Corruption Court of Ukraine or the reformed Supreme Council of Justice; decommunization; disarmament that has begun back in 1994 with nuclear proliferation and the NPT membership; lustration (vetting); Ukraine’s requests for redress from international courts — the list is non-exhaustive. All of these measures have objectives of both general and specific nature. For South American countries transitioning from the authoritarian regime to democracy as a general objective was associated with military coup and combatants; for Ukraine this objective acquires a different context of prior Communist regime. Thereby, as it was necessary to analyze the notion of transitional justice as a general term encompassing numerous measures to identify and classify its objectives, it is now important to conduct a detailed review of general objectives of transitional justice to further advance the context for the objectives of specific nature.

1.3. General objectives of transitional justice and their implementation

These objectives can be reviewed not only in the context of general-specific aims but also as ultimate end goals that every country of the transitional period must achieve. Key objectives were widely discussed in academia and there are different approaches to defining them. For instance Professor Bassiouni lays down seven principles of post-conflict justice: prosecution of perpetrators for gross violations of

human rights; formal investigations of past violations; development of remedies and reparations for victims; introduction of vetting policies and administrative measures; provision of support for memorialization of victims, education on past violence and preservation of historical memory; support of traditional, religious, and indigenous approaches to justice and healing; and support for the rule of law and good governance. These principles accentuate specific aspects that other scholars do not cover such as the significance of context-based approach and gendered nature of violence.¹⁷ The very notion of general objectives leads to the thinking that they can be consolidated into one fundamental objective of establishing a democratic society that has reconciled, instituted a human rights protection framework, dealt with the past legally, culturally, economically and politically, and is stable in terms of preventing further conflicts and violence. The establishment of such society in itself has to have objectives that are applicable to all states: a) to restore peace and democracy; b) to pursue justice and accountability to deal with the past; c) to establish the truth; and d) to establish the rule of law. While this division is simplified, these underlined objectives will be reviewed in detail to bring legal clarity.

Restoration of peace means elimination of conflicts on a countrywide and individual levels and further promotion of social cooperation, constructiveness in resolution of conflict and creation of a society that can maintain a non-conflict environment. Professor Galtung construes peace as a twofold notion integrating negative peace and positive peace. Negative peace in this context is only the first step on the path to restoration as it means preventing a conflict, such as releasing a legal document that declares peace, or a ceasefire. Positive peace is more of a continuation and its achievement do not require all conflicts to be resolved — on the contrary, it is worth mentioning that conflicts will always be present in a society.¹⁸ What is more, the means of conflict resolution have to be legitimate and in line with respect to the dignity of others for it to be considered as an achievement of peace. Thus, as regards peace, transitional justice has to have a long-term objective to attain a combination of negative peace and positive peace.

¹⁷ M. Cherif Bassiouni, *The Chicago Principles on Post-Conflict Justice* (International Human Rights Institute 2007) 16-17.

¹⁸ Johan Galtung, *Peace, Positive and Negative* (The Encyclopedia of Peace Psychology 2012) 1-2.

Such process is closely tied to the way measures are implemented, and to whether there is trust in and legitimacy of national institutions. It often occurs that international initiatives take place in rogue states. Sometimes they succeed or at least they reach set goals as in case with peacekeeping missions, but sometimes they lack trust and therefore, restoration of peace fails or gets delayed. The very issue here is non-participation of all parties involved in a conflict earlier, or simply flawed processes in the criminal justice mechanism.¹⁹ In certain countries such as Sierra Leone a decent level of trust was achieved by implementing not a fully international prosecution body but a so-called “hybrid” court, consisting of both international personnel from the United Nations mission and domestic law specialists. Others utilized truth commissions, international tribunals or referred cases to the International Criminal Court. However, none of these were flawless during the implementation. Judicial bodies prosecuted only a small number of perpetrators at a high cost of proceedings, tribunals were established through the United Nation and many considered them as a heavily politicized instrument to deal with certain political supporters. Similarly, the International Criminal Court lacks trust to some extent as it surely deals with individuals from states that are parties to the Rome Statute, and disregards officials from the United States, Russia, China that are, to say the least, related to modern conflicts around the globe. It would be less problematic if countries in transition could quickly construct their own efficient court system. However, the legal systems are often dysfunctional or nonexistent.²⁰ Therefore, instead of bringing peace, they would most likely bring destabilization, public distrust and impunity.

Restoration of peace therefore is only possible if there is trust and legitimacy. They are often difficult to achieve due to specific issues: lack of resources, excessive personnel and expense for the gains achieved, underqualified personnel, lack of public education and awareness, abbreviated time frames, and seeming arbitrariness in terms of which crimes, which time periods, which victims, and which perpetrators. As in the example with Kosovo, restorative measures, despite their seeming effectiveness, are

¹⁹ Yasmin Sooka, *Dealing with the Past and Transitional Justice: Building Peace Through Accountability* (International Review of the Red Cross vol. 88 num. 862 2006) 313.

²⁰ Bassiouni, *supra* note 15, at 9.

perceived as justice imposed by “victors”.²¹ In other cases, approach of an institution such as that of the East Timor’s truth commission, regardless of its legitimacy, caused public distrust after everyone interviewed within the years of commission’s operation were non-perpetrators. In South Africa the act establishing the truth commission used neutral and ambiguous concepts to avoid similarities with definitions in domestic law. Therefore, some definitions of gross human rights violations were “killing” and “abduction” rather than more defined murder and kidnapping.²² In Chile only murders were investigated after the dictatorship ending in 1990 but not cases of torture up until 2016.²³ Many aspects of social life kick in, and sometimes even with a decent investment into restoration, participation of all parties, and independence of institutions long-term peace cannot be achieved. Since there is no true remedy for suffering from brutal acts of authoritarian regime, peace will be fulfilled when the truth of suffering is acknowledged and there is accountability that is necessary to build the future.²⁴

The similar issue is with establishing democracy. Democracy is usually one of the objectives in transitional period as it is usually an authoritarian regime from which the transition occurs. However, considering that other general objectives are not only related to a political context, such as the rule of law objective, democracy as a goal can be achievable via building trust in state authorities and judiciary through stabilizing processes and legitimization of their actions. Democracy in this regard extends to civil service that is reliable and efficient in addressing the needs of people. People after the post-conflict period should understand that the role of the government is not to control, oppress or humiliate, but to serve the population.

Moreover, democratic reciprocity between conflicting parties or the governed and governors is a prerequisite to a democratic society. This is where democracy and peace fulfill each other as goals of transitional justice. Reconciliation will “calm down” political processes and reduce exposure of radical views. Working on establishing a

²¹ Charles T. Call, *Is Transitional Justice Really Just*, 11 *Brown J. World Aff.* (2004) 109.

²² The Report of the Truth and Reconciliation Commission in South Africa as of 29 October 1998, <http://www.justice.gov.za/trc/report/finalreport/Volume%201.pdf> (accessed Oct. 31, 2018).

²³ OHCHR, *Committee Against Torture Examines Chile’s Report* (Geneva, 31 July 2018), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23423&LangID=E> (accessed Oct. 31, 2018).

²⁴ Bassiouni, *supra* note 15, at 11.

democratic society will introduce tolerance of political and ethnic diversity and respect for human rights.²⁵ These are indeed become requirements for a long-term peace.

When conflict ends, measures should not only work to build peace and democracy but to deal with the past in a way that satisfies all parties involved, as well as pursue justice for victims and perpetrators. Sometimes it becomes really difficult to manage such situations, especially when the actual “past” has severe consequences. In a fragile society, even reminding of the past in the context of history is painful. More than that, in some cases it can be so disturbing, that a society chooses to go with certain legal limitations on “reminding” of the past.

In this regard, it was considered for a long time that pursuit of justice may hurt processes of reconciliation. There is always a conflict between “the desire to demarcate oneself from an earlier regime and the desire to punish that regime as severely as it deserves”.²⁶ Some think that justice may conflict with stability and that accountability should be waived. However, as some examples have showed (i.e. in Sierra Leone), the pursuit of justice is important in order for recovering authorities to attempt to re-establish the previous state of victims as this process allows them to regain credibility and trust. It is also a vital step for some communities to undergo a painful process in the beginning so that later there is no need to raise issues associated with a conflict period. If this is not done, further processes cannot develop as there will be people who are not satisfied with their retribution. While it is not an easy task to accomplish, justice should always be delivered in a post-conflict society. Justice, peace and democracy are not mutually exclusive objectives but appear to be mutually reinforcing imperatives during transitional period.²⁷ However, there is no single measure that allows to jubilate a presence of all three.

When it comes to justice, the first thing that is often associated with this term is judiciary. However, every conflict is unique and it is certainly unnecessary to establish international tribunals or prosecute via domestic courts in every country which had a conflict in the past. There should be a careful consideration of transitional period risks. Taking Argentina, which had President Alfonsín law passed to prosecute

²⁵ Brownwyn, *supra* note 6, at 106.

²⁶ *Id.*, 101, citing Elster, *supra* note 10, at 22.

²⁷ UN Report 2004, *supra* note 5, at 1.

those responsible for “disappearance” of people prior to 1983, as an example, severe prosecutions can lead to the threat of a military rebellion. It further halted the transitional period because of President Alfonsín passing amnesty law for soldiers and later President Menem issuing general pardons to those few who had been convicted or charges brought against them.²⁸ It was surely an issue for the victims who did not want an unconditional impunity. It took the country almost twenty years until the 2005 decision of the Supreme Court to recognize that such laws contradicted Argentina’s obligations under international humanitarian law. Contrary to this experience, alternative accountability mechanisms were introduced in Chile and South Africa — truth commissions. While some critics state they did not fulfill an “international duty to prosecute”,²⁹ they revealed and condemned human rights violations in accordance with international standards.

Prohibition of symbols of a former regime is another vibrant example — it restrains references to the past as well as certain political parties in order to prevent future exposure to the past. It is again, a different approach that is aimed at dealing with the past by prohibiting emblems associated with past crimes committed by a regime, and to prevent its reappearance on the political arena. Purge laws can also become useful, especially in case when the past is associated with specific individuals that were in politics or in the authorities during a regime.

Considering the fact that there are many ways to bring justice and deal with the past, non-judicial ones as well, it can be concluded that these objectives also depend on the approach to defining “justice” and “to deal with the past”. Justice has different meanings, one of them rooted in the United Nations report — “an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs”.³⁰ Another one is common among scholars, with minor deviations from author to author — restitution and compensations for victims to the most possible extent, accountability, punishment and retribution for

²⁸ Rebecca Lichtenfeld, *Accountability in Argentina: 20 Years Later, Transitional Justice Maintains Momentum* (International Center for Transitional Justice: Case Study Series 2005) 2-3.

²⁹ Brownwyn, *supra* note 6, at 99, citing Diane Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 *Yale L. Rev.* 2537 (1991).

³⁰ UN Report 2004, *supra* note 5, at 5.

perpetrators. Justice in this regard should satisfy victims and penalize perpetrators, the preventing history from repeating itself.

It is also important to stress that different actors have different views on justice. Victims want satisfaction that is sometimes impossible to achieve as they could have lost their close ones or will never be able to get restitution. Perpetrators may address the way a current government comes into power as unjust (as in case with Viktor Yanukovich, the former President of Ukraine who denied the legitimacy of the new Ukrainian government). International authority will condemn those crimes that are aggravated and most heinous, as in case with Slobodan Milošević, the former President of Serbia and the Federal Republic of Yugoslavia who was convicted by the domestic court for corruption and political assassination and not by the tribunal for international crimes. Finally, a post-conflict society may request a full cleansing of all government authorities as the only just way to resolve the situation. While for some criminal proceedings may be the only acceptable, “just” way to provide reconciliation and satisfaction for victims, it is often quite an adversarial experience for the very victims considering interruptions and vigorous cross-examination that is required for indictments.³¹

There are certain measures that the judiciary striving to justice and accountability shall introduce. Primacy of domestic courts is one of them. This is closely related to building trust in the judiciary. In the modern world when there are international courts to deal with past atrocities, they shall only exercise their jurisdiction if the judicial system of the country is flawed and cannot or is unwilling to render justice up to standards. International cooperation is another one. While domestic courts shall be the ones dealing with judicial proceedings for those accused of gross violations of human rights, other countries shall assist too. This is achieved through disclosure of information, investigations, extraditions, and implementation of foreign judgments.³² Such healthy cooperation not only allows for establishing efficient legal procedure, but also helps build trust into judicial institutions. It is also worth noting that courts, in addition to providing efficient procedure, should work on other aspects

³¹ Eisikovits, Nir, *Transitional Justice*, (The Stanford Encyclopedia of Philosophy Fall 2017, ed. Edward N. Zalta), <https://plato.stanford.edu/archives/fall2017/entries/justice-transitional/> (accessed Oct. 31, 2018).

³² Bassiouni, *supra* note 15, at 30-31.

crucial to trust and credibility such as public outreach and general awareness, witness protection and protection of the court staff.

When it comes to defining “to deal with the past”, various approaches appear, too. Professor Šimonović defines four common directions in how a society can deal with the past — forgetting, establishing the truth, alternative responsibility and justice (judicial proceedings). Interestingly, the scholar equates justice and judicial proceedings which is another confirmation that forgetting cannot be considered true justice as impunity does not restore the previous state of victims. Nevertheless, he elaborates by stating that in the modern world there is a trend towards justice.³³ This is partially because of the development of human rights mechanisms and establishment of a recognized position that they must never be violated, otherwise there is liability. It is also because international institutions like the European Court of Human Rights and the International Criminal Court created a framework, following modern principles of the rule of law, which stipulates that some violations do have to be punished (human rights violations and specific actions recognized as war crimes, crimes against humanity etc.).

Forgetting the past, usually through amnesty, creates a space where a society can reunite faster without going deeper into historical events and research. It has drawbacks — amnesty does not allow for reconciliation and satisfaction of victims. For some societies it might work but for most it will only bring instability. Establishing the truth allows to uncover important pieces of information about the past and learn from it by building connections. It is also a feasible way to attribute specific actions to specific individuals and reduce ambiguity. In South Africa murderers who contributed to apartheid could not be released from responsibility, but in case of trials the country would fall into a civil war or a similar conflict. As a result, the Truth and Reconciliation Commission was established, and a conditional amnesty was introduced — the Promotion of National Unity and Reconciliation Act of 1995 allowed for applications to be released from prosecution if motivation was an ideology or political movement and such actions were proportionate to the objective.³⁴ Alternative responsibility

³³ Šimonović, *supra* note 1, at 345.

³⁴ Chapter 4 of the Promotion of National Unity and Reconciliation Act 34 of 1995, <http://www.justice.gov.za/legislation/acts/1995-034.pdf> (accessed Oct. 31, 2018).

usually takes form of lustration. While not directly punishing for the committed, this way of dealing with the past allows for political power to be renewed and work towards peace and democracy. Lustration was chosen as a suitable way to resolve the situation in many post-Soviet countries. While carrying it out was not an easy and unimpeded task, it worked as a good way to stop access to both authorities and politics for those who had previously committed to a regime. Such process is usually difficult to implement — it requires a well-developed legislation to define who cannot participate in political life. It is also only partially a punishment for those who were supporting the regime that killed many and violated human rights on a regular basis — and surely not a substitution for criminal proceedings. Finally, justice is brought through criminal responsibility. Today civil society's institutions (NGOs, groups, research centers) are so developed that there is no way to avoid criticism in case criminal proceedings are substituted with something as lenient as lustration or unconditional as blanket amnesty.³⁵ However, to prosecute, legislation must be reworked, especially after the authoritarian regime, courts must be composed of independent and unbiased judges, penitentiary should allow for a required level of imprisonment conditions.

To summarize, the only reasonable way to deal with the past and bring justice is to implement several context-based mechanisms at once. South Africa serves as an example of combining truth commissions and conditional amnesty. In case of criminal proceedings, there should be a different way of prosecuting depending on the actions of a particular individual — as in case of Milošević mentioned above. While approaches are as unique as societies are different, it seems that for countries from the same region, such as post-Soviet countries, measures of the same kind, such as lustration, are as well applicable.

Scholars highlight the “right to truth” or “the right to know the truth” as one of the triggers of mechanisms such as truth commissions to operate in post-conflict societies. Victims and their families need an effective remedy and knowing the truth is one of them. This includes information about the actual abuses, the identity of perpetrators, the causes of violations as well as information about what happened to

³⁵ Šimonović, *supra* note 1, at 353.

people who disappeared or were forcibly displaced during the conflict.³⁶ While this right is not embodied in legislation of any country or international legal instruments, it was recognized by domestic courts and some international institutions. The right to truth is also linked to the right to commemorate and mourn in an appropriate manner, an effective remedy and investigation, as well as procedural aspects of judicial process such as public disclosure of facts. Some also integrate it into the freedom of information and freedom of expression.³⁷

Speaking of the recognition of such right, it derives mostly from conventions. The Protocol Additional I to the Geneva Conventions of 12 August 1949 in its Section III provides an extensive explanation as to what “right to truth” embodies in the scope of international humanitarian law. Article 32 of the document confirms the right of relatives to learn about the fate of missing and deceased persons. Corresponding to this article, an obligation of all State parties to provide such information as well as to investigate is stipulated in Article 33. The right is also embodied in soft law documents and resolutions of the UN organs.³⁸

While the right to truth is only a concept developed throughout the years, its implementation can be different. The state in a post-conflict society can choose to reveal the truth during judicial investigations or choose a different measure. Judicial investigations are effective because they are mandatory for finding evidence required for a criminal procedure and for subsequent conviction of a suspect. On the other hand, there are drawbacks to this measure. First, it can affect victims psychologically as they will have to be examined for investigation. Sometimes even by way of forceful examination of victims, which is a morally controversial measure. In case of people who outlived their loved ones or survived heinous crimes application of this approach is outrageous. It will also be especially devastating for victims as they are the ones who are supposed to benefit from the investigation and criminal procedure, in part by way of receiving just satisfaction. Second, for many systems it is practically impossible to

³⁶ United Nations Human Rights Commission, Human Rights Resolution 9/11, “Right to the truth”, September 24, 2008, A/HRC/RES/9/11.

³⁷ Eduardo González and Howard Varney, eds., *Truth Seeking: Elements of Creating an Effective Truth Commission*. (Brasilia: Amnesty Commission of the Ministry of Justice of Brazil; New York: International Center for Transitional Justice 2013) 3-4.

³⁸ Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 32-33, Dec. 7, 1978, 1125 UNTS 3.

exercise judicial functions properly in a post-conflict society. Court system may be corrupt, and the truth established via such institutions as then the truth will not be unbiased and provided in a just manner. Finally, courts initiate costly proceedings that take a long time. This means that victims might get affected by the lengthy time frame to reveal “the truth”. There is also a risk that because such procedures are so massive, only the most serious ones will be investigated. In Rwanda, for instance, the tribunal has indicted 61 individuals, while thousands of cases were left to be decided by domestic courts and still have not been reviewed.³⁹

There is certainly a need to establish the truth in some cases. This will not only reconcile conflicting parties but will allow people to understand the causes of the conflict and reasoning behind their actions. In a perfect conflict resolution scheme knowing the truth would allow for understanding mistakes and how not to repeat them. Truth can be established by a particularly well-developed mechanism, such as truth commissions. They are aimed both at issuing reports that codify the history and provide background on some events that occurred in the past and were kept in secret by the government⁴⁰ and at providing the basis for further reconciliation measures and historical record. Professor Bassiouni further elaborates on additional functions of truth commissions: “challenging impunity through objective research useful for policymakers and others; facilitating national reconciliation and the open acknowledgment of wrongdoing; and, recommending reparations, institutional reforms, and other policies”.⁴¹ Truth commissions also advocate reparations as a measure of redress, however rarely. In Morocco’s Equity and Reconciliation Commission one of the primary goals was to provide reparations for families of people who disappeared and were tortured by the regime of the governing elite Makhzen.⁴² Effective work of truth commissions can be observed in significant number of other countries as well. In South Africa the will to seek for the truth was so strong, the commission accepted confessions and offered amnesties on that basis simply to

³⁹ Legacy website of the International Criminal Tribunal for Rwanda, <http://unictr.irmct.org/en/cases> (accessed Oct. 31, 2018).

⁴⁰ Mark R. Amstutz, *The Healing of Nations: The Promise and Limits of Political Forgiveness* 25 (2005).

⁴¹ Bassiouni, *supra* note 15, at 38.

⁴² National Human Rights Council of Kingdom of Morocco, *Summary of the Final Report of the Equity and Reconciliation Commission (IER)* (Rabat 2006) 6.

establish the historical record.⁴³ It is also important that many commissions are aimed to “heal” victims in some way. In Gambia, a newly established commission will be dealing with past human rights abuses applying a victim-centered approach.⁴⁴

Truth commissions are easier to operate, they do not have formal requirements as courts do. They usually have a set goal and operate temporarily. The way they function is best described by Hayner in her work on the truth commission’s mandate: “[Truth commissions] may employ hundreds of staff to collect individual statements, organize public hearings and undertake case investigations and thematic research. Some have been given subpoena powers or the right to gain access to official offices and official documents without warning. Others have had to rely on the voluntary cooperation — not only of high-level officials but also of direct perpetrators, sometimes in return for promises of confidentiality.”⁴⁵ However, it should not be considered that truth commissions do not possess legal competence and are non-judicial. They can supply legal proceedings with additional information, as well as support civil or criminal legal actions.

In order to establish the truth, truth commissions should operate within certain rules and requirements which ensure commissions’ lasting commitment to advancing transitional justice objectives in a society. First, it is not uncommon to assign only foreign representatives to truth commissions, which is criticized by some scholars for objective reasons. For instance, in case with El Salvador, the commission conducted decent research on the past and delivered results, but due to the panel composition they received little trust. Results were met with skepticism from local people.⁴⁶ Therefore, it is important to either appoint local experts and work under international community’s supervision, or even better, work out a hybrid commission with both foreigners and locals on the panel. This way the results and reports will be met with higher acceptance of the established facts and this would surely meet an objective of seeking the truth. Second, such commissions shall be established only after changes to the legislation are

⁴³ The Report as of 29 October 1998, *supra* note 22.

⁴⁴ U.S. Embassy in the Gambia, *U.S. Embassy Commends Launch of Truth, Reconciliation, and Reparations Commission* (2018), <https://gm.usembassy.gov/u-s-embassy-commends-launch-of-truth-reconciliation-and-reparations-commission/> (accessed Oct. 31, 2018).

⁴⁵ Priscilla B. Hayner, *Truth Commissions: A Schematic Overview* (International Review of the Red Cross vol. 88 num. 862 2006) 295.

⁴⁶ Šimonović, *supra* note 1, at 355.

introduced. They should have a mandate broad enough to allow them to hear witnesses and access evidence. Considering the fact that they are usually not a part of the country's court system, such mandate should be established separately. Nevertheless, truth commissions can also operate without a direct mandate — and still deliver decent results and recommendations on institutional changes to prevent the past from reoccurring.

Some argue that truth commissions are the most effective way of establishing the truth — many countries employed such institutions, for they are easy to implement. Even developed countries such as Canada and the United States established them for different purposes (residential schools and Greensboro massacre respectively). To date, more than 40 countries used truth commissions or similar bodies to deal with the past. They worked not only on establishing historical record but also on commemorative aspect of conflict. In countries like Poland and Ukraine there are institutes of national remembrance. In Ukraine, for instance, it conducts researches on grave violations of human rights particular to the region as well as codifies the practice of applying legislation, drafts international agreements, initiates restoration of rights of those who were oppressed, and initiates building of historical monuments to crystallize historical events.⁴⁷

Truth commissions do a better job delivering truth comparing to courts as courts limit the truth only to the extent it is needed in the proceedings. As stated by Bassiouni, truth commissions may deliver various perspectives on “truth”, giving it subjective and experiential rather than court-like fact-based and evidence-based meaning.⁴⁸ When the truth is limited, it causes revisionism and prevents a politically legitimate account of the past.⁴⁹ However, truth commissions have drawbacks. It is well recognized that all heinous crimes (like genocide) would not be committed without an aid of “willing executioners”.⁵⁰ Therefore, while truth commissions can bring reconciliation, they will not fill in the justice gap themselves. Transition must occur within limitations the situation brings, and sometimes truth commissions struggle to “heal” the victims due

⁴⁷ Cabinet of Ministers of Ukraine Decree no. 684 as of Nov. 12, 2014.

⁴⁸ Bassiouni, *supra* note 15, at 39.

⁴⁹ Paul Van Zyl, *Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission*, 52. J. Int'l Aff. 658-61, 667 (1999).

⁵⁰ Daniel Jonah Goldhagen, *Hitler's Willing Executioners: Ordinary Germans and the Holocaust* 21 (1996).

to problems with legislation and non-participation of all parties. The Commission of Truth and Reconciliation in former Yugoslavia did not deliver substantive reports, worked under the pressure of controversies, generally seemed leaning towards the President Koštunica, and was annulled because the mandate expired with the elimination of the Federal Presidency.⁵¹ It is also a vital component of truth commission operations to establish legal terms of “victim” and “perpetrator”. They shall be used by the commission and due to the guilt of two sides of a particular conflict, sometimes even equalized, these are very important terms to define, avoiding ambiguity and blaming. Article 5 of the Law of 975 in Colombia defines “victim” as anyone, who individually or collectively has suffered direct harm (...) from acts of transgression of criminal legislation, carried out by organized armed groups at the margins of law.⁵² By comparison, definition of “perpetrator” cannot be politicized as it is always the case when people who oppose the regime and people of the regime are both human rights violators. In South Africa both apartheid and African National Congress supporters were accused of human rights violations.⁵³ It is important to give these terms a neutral meaning as the whole system of establishing the truth and prosecuting perpetrators relies on who these categories include.

To sum up, considerations of truth commissions when establishing truth are worthwhile. Although not every society needs and wants to know the truth, at least some clarification regarding the past is required for it to not be repeated and to learn from its mistakes. For instance, post-Soviet states did not have truth commissions but opened secret police documents. However, truth commissions are not the single best way to deal with past crimes — sometimes a collective approach is needed as they do not fully fill the justice gap. In addition, they require some legislation advancements, a solid mandate and competent staff to operate effectively.

The UN report specifies the rule of law as the principle of governance, namely “in which all persons, institutions and entities, public and private, including the State

⁵¹ Priscilla B. Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of the Truth Commissions* 2nd ed. 252 (2011).

⁵² CRC, Law 975 of 2005 art. 5 *translation as in* Jemima García-Godos & Knut Andreas O. Lid, *Transitional Justice and Victims' Rights before the End of a Conflict: The Unusual Case of Colombia* (Journal of Latin American Studies Vol. 42, No. 3, August 2010) 500.

⁵³ Lydia Kemunto Bosire, *Overpromised, Underdelivered: Transitional Justice in Sub-Saharan Africa* (Sur. Revista Internacional de Direitos Humanos 3(5) 2006) 84.

itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards”.⁵⁴ It is something that transitional period is aiming at, even making it the most important objective. The rule of law allows for sustainable peace and stability, ensures rights of all people are respected, victims are duly compensated and the court system pursues principles of fairness and independence. Considering that all previous objectives derive to some extent from legislation, the rule of law is at the heart of all of them.

While the rule of law can be an objective, it is also an instrument to achieving every other objective that transitional justice is aimed at. The rule of law might have different meanings in different eras. Since many transitional societies appeared prior to development of a sustainable human rights framework, the UN definition given above might only be applicable nowadays, when there is direct correlation between the rule of law in domestic legislation and international human rights and standards. None of the past and present cases of transitional justice processes were simple and they simultaneously involved objectives such as reconciliation and retribution, peace and justice, as well as vindication, validation, deterrence, prevention, reform, and development.⁵⁵ Taking this scope of goals, the society shall take a balanced approach to conflicting objectives such as reconciliation and retribution. It is also true that for some transitional societies the rule of law might take on different meaning in their transitional period and the one coming afterwards. For this reason, the rule of law is the most difficult objective to achieve.

To clarify, the rule of law shall be taken with a certain approach. The approach has to have a clear goal — the rule of law in its modern understanding. The issue is, many countries had institutions that are of a democratic nature, however, flawed. Police, judiciary, technically elected representatives could operate within the limits of legislation that exists during that period. In times of conflict, such legislation is often regarded as just and therefore, perceived to be valid. Adopting a positivistic approach, such laws have one advantage — they, to a certain extent, fix legal ambiguity and bring

⁵⁴ UN Report 2004, *supra* note 5, at 4.

⁵⁵ William Schabas, Paper Presented at the Annual Meeting of the Japanese Society of International Law: Transitional Justice and the Norms of International Law 3, Oct. 8, 2011, 4-5.

legal certainty. However, apart from the legal certainty, two other principles must be met — expediency and justice.⁵⁶ In other words, the law must be not only clear, but also foreseeable, adequately accessible and possess other requirements of a modern “quality law”.⁵⁷ For instance, during the Third Reich in Germany all convictions were rendered within a legal framework of that period which was later found as inhumane, discriminatory and illegitimate.⁵⁸ In a post-conflict society, former laws should be scrupulously analyzed, and the human rights framework should be applied. The risk is in a twofold role law can take — it can be either an instrument to bring justice or an instrument of oppression used by a regime.

The rule of law in transitional justice may be affected by the lack of trust to judiciary and by flawed institutions that need to be reformed. In conflict situations there is a need for a rapid reaction of law-making institutions to any changes. Emergency laws and executive decrees are the instruments commonly used by legislature to achieve desired regulatory result.⁵⁹ Some human rights might be limited in the course of conflict or post-conflict developments. In case of the situation in Ukraine human rights were limited in the conflict zone in some parts of Luhansk and Donetsk region. Namely, state obligations under Articles 5, 6, 8 and 13 of the European Convention on Human Rights (hereinafter — ECHR Convention) were denounced through the decree of the parliament of Ukraine (hereinafter — Verkhovna Rada)⁶⁰ and through the derogation mechanism in Article 15.⁶¹ It is possible to argue that such procedure is actually the rule of law procedure performed with due regard to international law requirements. However, it is clear that such rule of law is different and more restrictive from the one in a peaceful and stable society to which transitional justice strives.

This is what the UN report refers to as “filling a rule of law vacuum”.⁶² When national judicial, police and correction systems lack resources to implement adequate

⁵⁶ Gustav Radbruch, *Gesetzliches Unrecht und übergesetzliches Recht* § 3 (Süddeutsche Juristenzeitung 1946).

⁵⁷ *Silver v United Kingdom*, ECHR (Application nos. 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75, 7136/75, Chamber Judgement of 25 March 1983) § 86-§ 88, <http://hudoc.echr.coe.int/eng?i=001-57577> (accessed Oct. 31, 2018).

⁵⁸ Radbruch, *supra* note 50, at § 2.

⁵⁹ UN Report 2004, *supra* note 5, at 10.

⁶⁰ Decree of the Verkhovna Rada of Ukraine 462-VIII as of May 25, 2015.

⁶¹ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, art. 15, https://www.echr.coe.int/Documents/Convention_ENG.pdf (accessed Oct. 15, 2018)

⁶² UN Report 2004, *supra* note 5, at 10.

laws, other measures must be introduced. The UN approach to this is to bring such measures “from the outside” either through the mechanism of peacekeepers or through a different mechanism such as international tribunal, truth commission, or an internationally-recognized court — the International Criminal Court. In case of peacekeepers, the UN report provides that because of lawlessness there is a risk inherent to conducting such operations, therefore prior preparation is needed. When there is no functioning criminal justice mechanism at all, there might be situations when peacekeepers encounter wrongdoers “in the midst of committing serious criminal acts of a direct threat to civilians and to the [peacekeeping] operation”.⁶³ Considering the fact that peacekeepers have little training to address such cases, civilian police can undertake certain executive functions such as arrest and detention. In case of institutions introduced by the UN, they prefer a victim-centered approach, attempt to undertake some functions that are currently difficult to implement for domestic institutions (e.g. judicial proceedings, prosecution) and introduce a framework of human rights that for many years was foreign and unknown for some states in the past. For instance, human rights commissions in Afghanistan, Rwanda, Sri Lanka, Uganda and several other countries began performing quasi-judicial functions that were aimed at peaceful dispute resolution and protection programs.⁶⁴ When “filling a rule of law vacuum”, not only legal measures must be introduced, but also those that go beyond regular changes to a legislation, judiciary or other institutions’ operations. For instance, reintegration of displaced civilians and former fighters must be taken into account. The UN provides assistance in these matters to many societies through sponsoring and conducting activities such as preparing informational materials, conducting seminars, allowing for media to support campaigns aimed at reintegration.⁶⁵ The rule of law nowadays extends beyond the law itself.

In a globalized community it is difficult to remain without any external support. Yet, some measures can be initiated on a domestic level without the UN intervention. As an example, a simple reformation of legislation to allow freedom of speech will enable the non-governmental sector to help reconcile the society and help vulnerable

⁶³ Ibid.

⁶⁴ Id., 11.

⁶⁵ Id., 10.

groups to regain their status in it. Such non-governmental organizations can address the issue of victimization of these groups and promote measures against sexual abuse, traumatization and exploitation. In addition, a mere reformation of penitentiary will greatly contribute to the rule of law, since then detention facilities will not only be resourced and supervised, but also effective in providing adequate conditions and generally humane. Thus, not all actions require intervention from the “outside”.

In this context, the rule of law in transitional justice may seem as a simple measure that can be directly implemented if key institutions work together towards bringing human rights framework into effect. However, the process of achieving it requires more than just a regular objective and there are certain challenges that apply only to the transitional justice period.

The centrality of victims is one of them. There is no clear position on how to implement a victim-centered approach. The United Nations support it by stating that the “centrality of victims in the design and implementation of transitional justice processes and mechanisms is to be ensured as one of the guiding principles of transitional justice”.⁶⁶ The Prosecutor of the International Criminal Court has stated that the sole purpose of the functioning of the court is victims and justice for them.⁶⁷ While many international organizations have a universal commitment to such approach, it is clear that some do not necessarily focus on victims. Robins states that many institutions struggle helping victims and addressing their needs.⁶⁸ This is because it might be more beneficial for the whole state not to address them or avoid them. Many victims seek punishment as severe as possible for perpetrators. Nonetheless, there has never been a law strict enough to fulfill all their requests in a requested manner. Nazi Germany can be an exception in certain aspects. While at the end everyone gains from enduring peace and stability, it is more of a state-centric approach to addressing needs because they prioritize building a liberal and legitimate state over what some might call revenge. Regardless of that, truth commissions, while not being a purely legal

⁶⁶ Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice (the UN, 2010).

⁶⁷ Statement to the Press by the Prosecutor of the International Criminal Court (Abidjan, Côte d’Ivoire, 20 July 2013), https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/statement-otp-20-07-2013.aspx (accessed Oct. 31, 2018).

⁶⁸ Simon Robins, *Failing Victims? The Limits of Transitional Justice in Addressing the Needs of Victims of Violations* (White Rose Human Rights and International Legal Discourse) 43.

measure, are effective with reaching the centrality of victims as they deliver a result that is focused on victim testimonies, public truth-telling and reconnecting victims to a society.⁶⁹

Developing the challenge of addressing the victims of the conflict, it is worth noting that trials are an essential part of all the rule of law processes. Impunity does not contribute to reconciliation in general as victims feel the process of reconciliation is incomplete without individuals at fault brought to justice. However, trials often do not fully contribute to victim's recovery from the conflict. Due to the nature of taking testimonies in adversarial process (usually under the pressure of trying to find out as much information as possible to convict a person), as well as formalities and publicity of judicial proceedings, such experience can surely be traumatizing. O'Connell calls it an "intellectual void" and states that trials can be effective but also retraumatize victims. During his study he concluded that some victims considered the process to be necessary and "validating", while some declined and stated that it was stressful and negative attitude made the situation even worse.⁷⁰ To conclude, there is a risk of such processes not helping and not "healing" victims but only bringing distress and additional negative effects on their psychological health. This only supports the idea that the rule of law in transitional justice must employ other measures, e.g. non-judicial ones, in order to be successfully implemented and serve as a basis for overcoming a post-conflict period.

Another challenge is access to justice. While the rule of law implies institutions that are fair, legitimate, and duly established, an institutional approach might not serve the best need of victims. This way, as *Robins* writes, such approach "restricts the interest of a transitional justice to the minority of victims". Institutional approach entails a legal procedure that is formal, and such formality might be a challenge for victims who have endured great suffering and do not want to initiate any official procedure to invoke restoration. Another problem is that to recover from the conflict, a society must understand how it has transformed and what measures are already in place. In Cambodia and Timor-Leste victims were unaware of the national judicial

⁶⁹ Ibid.

⁷⁰ Jamie O'Connell, *Gambling with the Psyche: Does Prosecuting Human Rights Violators Console Their Victims?* (46 (2) Harvard International Law Journal, 2005) 295–346.

process or truth commissions.⁷¹ Finally, while in most of the countries international institutions have proved their effectiveness, fairness and non-bias, they can only address a limited number of cases. It means that despite contributions of international community to the resolution of conflicts throughout the world, it can only affect and help a limited number of victims. Therefore, such measures unintentionally lead to certain exclusions, deferrals and marginalization.⁷²

Some specific fields require special attention. Victims are not the only people that should enjoy the rule of law. Military, intelligence, and domestic security forces must also be able to operate in accordance with standards. For this purpose, the civilian control over their operation should first be instituted. Afterwards, the appropriate education on human rights and humanitarian law for such forces is needed. To finalize, military, intelligence, and domestic security forces must have a clear mandate that limits their operations to security and information gathering — this would allow institutions to enjoy the rule of law through legitimate limitations that prevent abuse of authority.⁷³

To sum up, transitioning countries must establish the rule of law that conforms to the modern human rights framework. The rule of law in this regard serves a bilateral role. It not only becomes an objective most of the countries that went through a conflict need to achieve in order to prevent its reoccurrence, but also becomes one of the measures to supplement others. However, there might be a potential discrepancy between implementing the rule of law and victim-centered approach. In case the rule of law is developed through judiciary, victims' interests might clash with the ones of the entire population. Sometimes the rule of law must prevail in its classic form to bring what *Šimonović* has called “no peace without justice”.⁷⁴ Some bright examples might include former Yugoslavia and Nazi Germany. Yet, in other cases the rule of law must adapt to the needs of victims, mostly to their need to be “healed”, in a form of non-judicial and other measures. Examples would be some post-Soviet countries, truth commissions in states like South Africa, Cambodia, Timor-Leste and many others.

⁷¹ Phuong N. Pham & Patrick Vinck & Mychelle Balthazard, Judith Strasser, Chariya Om, *Justice for victims in trials of mass crimes: Symbolism or substance?* (21 (2) International Review of Victimology, 2015) 161–185.

⁷² Robins, *supra* note 58, at 45-46.

⁷³ Bassiouni, *supra* note 15, at 56-57.

⁷⁴ Šimonović, *supra* note 1, at 345.

1.4. Summarizing objectives of transitional justice

Objectives of any process must be clear so there is certainty in the final result. The peculiarity of transitional justice processes is that they are important in their very notion and the process itself is the key. Even though the approaches to the implementation of this process might differ from country to country, the general objectives these approaches serve to achieve remain unaltered. Moreover, general objectives are so closely intertwined as to require their simultaneous attainment in order to bring peace and stability to the society. This thesis suggests that peace, democracy, justice and reconciliation are all related to the rule of law. However, the concept of the rule of law has broadened throughout the years, which also broadens the scope of transitional justice. It now not only deals with aspects of law and jurisprudence but goes beyond this. Implementation of various political measures, promotion of democratic values in media, promotion of public participation in politics, “healing” society with projects that are supported by both public and non-governmental sectors greatly contribute to the rule of law. Some of these measures can be implemented domestically, however, in a globalized society international organization can also be of a great help. The UN takes a case-by-case approach and might introduce tools that allow the society to achieve all the mentioned objectives.

While clearly defining the objectives of the process is an important prerequisite to seeing this process through, the way such processes are conducted is important as well. There were instances when measures taken in the transitioning countries were legitimate in their nature but due to weak institutions and corrupt individuals in power were conducted with flaws that do not allow for building a strong democratic society. Therefore, the theory behind implementing transitional justice is just a part of the whole story.

This is where country-specific objectives are introduced. The situation with the rule of law may be different in every country and therefore it requires a specific approach to eliminating those factors that prevent a country from moving towards peace and stability. Some countries require retribution via justice that is sometimes too harsh of a measure and inapplicable to cases when victims must only know the truth

but not go through investigation, testimonies and conviction procedures as witnesses in order to reconcile.

Nevertheless, transitional justice perception has changed because of the objectives being developed. It no longer means only a transition from authoritarian power to democracy, but rather a set of more complex measures that altogether work for rebuilding and reworking all aspects of society. Transitional justice has now one primary parameter that needs to be addressed — human rights. If measures are aimed at establishing a society that values human rights and there are instruments that allow for their protection and prevention of their violation, it will help to develop specific approaches to transitional justice.

CHAPTER II

TRANSITIONAL JUSTICE IN UKRAINE DURING AN ONGOING WAR CONFLICT: LEGAL ANALYSIS

1.1. Introduction of the background

Ukraine has entered a state of civil unrest in late 2013, when the former President of Ukraine Viktor Yanukovich refused to proceed with the EU-Ukraine Association Agreement and turned towards strengthening relations with Russia instead. Political course chosen by the President prompted civil protests of a peaceful nature that the government attempted to stop by the use force, even against young students. Later these events evolved into a revolution that is now known as the Euromaidan. During the Euromaidan, there occurred periodic clashes in Kyiv and around Ukraine between protesters and government-led special forces called *Berkut*. The revolution is also notable for the series of laws (laws of January 16, 2014), enacted through the flawed procedure in the Verkhovna Rada of Ukraine, that drastically limited freedom of assembly and expression.⁷⁵ Euromaidan has come to its most heated point in February when the use of weapons against protesters by the armed forces resulted in hundreds of casualties. Mr. Yanukovich unexpectedly left his post and fled to Russia at the end of February. The interim government was established, and new President of Ukraine, Petro Poroshenko was elected in May.

In the spring of 2014, the opposition to the interim government arose in Southern and Eastern regions of Ukraine.⁷⁶ It coincided with Russia's attempts of "returning Crimea to Russia".⁷⁷ Therefore, pro-Russia protests sparked in those regions, led by Russia's troops that occupied the Crimean Peninsula.⁷⁸ Later on, on March 16, 2014, an illegal referendum was held in Crimea that led to the illegal

⁷⁵ Freedom House, *Ukraine Move Closer to Outlawing Dissent* (2014), https://freedomhouse.org/article/ukraine-moves-closer-outlawing-dissent#.UtjVJ_RdXoo (accessed Dec. 13, 2018).

⁷⁶ Lina Kushch & Thomas Grove, *Pro-Russia Protesters Seize Ukraine Buildings, Kiev Blames Putin* (Reuters World News 2014), <https://www.reuters.com/article/us-ukraine-crisis-storm-idUSBREA350B420140406> (accessed Dec. 13, 2018).

⁷⁷ AFP, *Putin Describes Secret Operation to Seize Crimea* (Yahoo News 2014), <https://news.yahoo.com/putin-describes-secret-operation-seize-crimea-212858356.html> (accessed Dec. 13, 2018).

⁷⁸ Direct Line with Vladimir Putin (President of Russia Official Website 2014), <http://en.kremlin.ru/events/president/news/20796> (accessed Dec. 13, 2018) as cited in ODIHR/HCNM, *Human Rights Assessment Mission* (OSCE Publication, Hague/Warsaw 2014), 24, <https://www.osce.org/odihr/118476?download=true> (accessed Dec. 13, 2018)

annexation of the Crimean Peninsula by Russia.⁷⁹ The annexation was condemned by the international society in the UN resolution 68/262.⁸⁰ Since Russian troops stepped on Ukrainian ground various human rights violations in the territory of the peninsula were documented and confirmed by international organizations.⁸¹ Pro-Ukrainian individuals and Crimean Tatars became targets of Russian authorities, There are numerous occasions of abductions, murders, illegal deprivation of liberty, torture, and other aggravated crimes.⁸²

Gradually, protests in Eastern Ukraine that occurred on the territory of Donetsk and Luhansk regions (historically called Donbas), escalated into armed conflicts. Pro-Russia insurgents were supported by Russia as it provided weaponry and other resources, including human resources, to the latter. The border of Ukraine in those areas is no longer under control of Ukraine, and Russian troops are reported to make up between 40 000 and 77 000 troops.⁸³ While Russia denies its military presence in Ukraine, international reports confirm the involvement of Russian armed forces in the conflict.⁸⁴ There is no proclaimed state of war, but Ukraine's position supported by the international community the conflict amounts to an international armed conflict with Russia.⁸⁵ Armed conflicts in Eastern Ukraine led to battles between Ukrainian forces and collective pro-Russia insurgents and Russia's paramilitary and caused numerous casualties and destruction in the region, where the so-called "DPR" and "LPR" were established as self-proclaimed republics. International condemnation followed the events through sanctions imposed on Russia. Normandy format was invoked to force Russia and Ukraine to come to a ceasefire and amnesty, but the meetings resulted in two agreements (the Minsk agreements) that are not complied with by Russia and the insurgents. Currently, the situation in the Azov region (near Crimea) has escalated to

⁷⁹ UN Resolution A/RES/68/262, *Territorial Integrity of Ukraine* (27 March 2014, GA/11493, 100-11-58).

⁸⁰ *Ibid.*

⁸¹ See for example Human Rights Watch, *Rights in Retreat: Abuses in Crimea* (978-1-6231-32064, November 2014)8, https://www.hrw.org/sites/default/files/reports/crimea1114_ForUpload.pdf (accessed Dec. 13, 2018).

⁸² *Id.*, 8-23.

⁸³ Ministry of Defense Portal, *Interview of Minister of Defense of Ukraine Stepan Poltorak* (Uryadovyi Kurier, April 5, 2018), <https://www.kmu.gov.ua/ua/news/intervyu-ministra-oboroni-vidannyu-uryadovij-kuryer> (accessed Dec. 13, 2018).

⁸⁴ There are reports by OSCE, Ukrainian state officials, think tanks and media (both Western and Russian). See for example Bellingcat, *OSINT Investigation on Ukraine 2014-2017*, <https://www.bellingcat.com/tag/ukraine/> (accessed Dec. 13, 2018).

⁸⁵ Sergey Sayapin et al., *The Use of Force against Ukraine and International Law: Jus ad Bellum, Jus in Bello, Jus post Bellum* (T.M.C. Asser Press 2018) 111-122.

Russia's special forces attacking in late 2018 Ukraine's naval ships that attempted to pass through the Kerch Strait from the Ukrainian city of Odesa to the Ukrainian city of Mariupol.⁸⁶ The human rights situation is unclear, civilian casualties have been reported. The passenger aircraft of Malaysia Airlines was struck down by the Russian launcher on 17 July 2014 from that territory.⁸⁷ The war has taken thousands of lives on both sides and resulted in destruction of hundreds of thousands of households and 1,5 million internally displaced persons (IDPs).⁸⁸

It shall be recognized that other means, including national proceedings and non-judicial measures, have to contribute to the resolution of the situation. However, the legal scope of the work will be limited to the analysis of the two declarations to the International Criminal Court (hereinafter — ICC) lodged by the Ukrainian government on 17 April 2014 and on 8 September 2015 that were relayed to the Office of the Prosecutor (hereinafter — OTP). It is very important that the OTP proceeds to investigation of cases referred by Ukraine, as even investigation, let alone actual ICC proceedings and convictions, could potentially influence the situation in the country. Other international means such as international assistance, condemnation by numerous countries, and sanctions against Russia seem to be measures slow and ineffective in resolving the post-conflict situation in Ukraine and the ongoing conflict.

1.2. Legal measures already in place: national and international aspects

Since 2014, legal and other measures were implemented in Ukraine in regard to post-Euromaidan situation, situation with Crimea, and war in Donbas. Euromaidan events triggered a series of post-conflict measures. A special state award (“The Order of the Heavenly Hundred Heroes”) was introduced by relevant legislative amendments and was given posthumously to those who were murdered during Euromaidan.⁸⁹ Street

⁸⁶ Matthew Bodner & Patrick Greenfield, *Ukraine President Proposes Martial Law After Russia Seizes Ships* (The Guardian, 26 November 2018), <https://www.theguardian.com/world/2018/nov/25/russia-border-guards-ram-tugboat-ukraine-navy-crimea> (accessed Dec. 13, 2018).

⁸⁷ Intelligence and Security Committee of Parliament of the United Kingdom, *Annual Report 2016-2017* (Controller of Her Majesty's Stationery Office 2017), para. 142.

⁸⁸ Ministry of Social Policy of Ukraine, *1 517 320 IDPs Registered* (August 23, 2018), <https://www.msp.gov.ua/news/15637.html> (accessed Dec. 13, 2018).

⁸⁹ Information Department of the Verkhovna Rada of Ukraine Secretariat, “*On Amendments to Article 7 of the Law of Ukraine “On National Awards of Ukraine”*” (VRU Official Web-Portal, 2014), <http://portal.rada.gov.ua/en/news/News/News/page/en/news/News/News/95089.html> (accessed Dec. 13, 2018).

names were changed to represent the grief and sadness of the events. Local initiatives launched to help rebuilding parts of Kyiv that were damaged during the revolution. Ukraine has introduced social incentives for the IDPs: from simplification of bureaucratic procedures, such as registration of a vehicle, to social benefits and grant initiatives.⁹⁰ International organizations and non-profits have also contributed to helping the society with the struggle.⁹¹ Social grants to help with business initiatives and to make the transition and relocation smoother, as well as grant project aimed at promoting protection of IDPs were launched on various levels.⁹² Among legal measures related to Euromaidan, laws of January 16, 2014 were rendered void,⁹³ and the Constitution of Ukraine was reverted back to the 2004 edition, limiting powers of the president.⁹⁴ Regarding Crimea and the war in Donbas, reintegration laws were introduced and the Anti-Terrorist Operation (reformed into Joint Forces Operation in 2018) initiated in Donbas to counter insurgents and Russia's paramilitary.

The issue of achieving justice was still imminent. This is where national prosecutor's offices and courts appeared to be not as active as it was expected by the victims. Among more than 4700 Euromaidan crimes investigated,⁹⁵ only in 279 cases individuals were convicted.⁹⁶ As of 2018 only around 40-50 cases had a final verdict.⁹⁷ Following the judicial reform, responsibility to prosecute Euromaidan crimes was transferred from the General Prosecutor's Office to the State Bureau of Investigations (a newly established agency).⁹⁸ Since the latter was only recently formed, the results of investigations remain uncertain. Cases were brought regarding crimes committed by higher officials such as Yanukovich, Zakharchenko (ex-Minister of Internal Affairs),

⁹⁰ See for example the Decree of the Cabinet of Ministers of Ukraine no. 1388 as of September 7, 1998 (amended as of September 1, 2018) para. 24.

⁹¹ UNCHR and KrymSOS, Examples of UNCHR and KrymSOS Cooperation with IDPs' Communities, <http://krymsos.com/files/9/4/94d2e45-examples-of-the-projects-for-the-site--1-.pdf> (accessed Dec. 13, 2018).

⁹² See for example IDP (I Don't Part) social initiative, sponsored by the Embassy of the United States, <https://www.facebook.com/idontpart/> (accessed Dec. 13, 2018).

⁹³ Law of Ukraine "On Making Amendments to Certain Laws of Ukraine Regarding Suspension of Provisions of Laws, enacted on January 16, 2014" 767-VII as of February 23, 2014 (amended as of October 5, 2016), also confirmed by the international community.

⁹⁴ Law of Ukraine 742-VII as of February 21, 2014.

⁹⁵ Serhiy Horbatiuk, *Briefing on Results of Investigations of Murders of Activists during the Revolution of Dignity (video)* (RadioFreeLiberty, 21 November 2018), <https://www.radiosvoboda.org/a/video-rozsliduvannia-zlochyniv-proty-aktyvistiv/29613142.html>, accessed (Dec. 13, 2018).

⁹⁶ Ibid.

⁹⁷ Ibid.

⁹⁸ Law of Ukraine 794-VIII "On the State Bureau of Investigations" as of November 12, 2015 (amended as of August 28, 2018).

Koryak (ex-head of Ukrainian police forces).⁹⁹ Yet, the proceedings are conducted *ex parte* or using video conference as officials and many *Berkut* members fled to other countries (mostly Russia). In regard to crimes committed in Crimea, Ukraine was not able to implement any sufficient measures, except for investigating cases of treason committed by higher officials of state authorities of the Crimea and bringing 57 indictments to Ukrainian courts.¹⁰⁰ The situation in Donbas deserves some special attention. The Law of Ukraine 1632-VII introduced measures on defining jurisdiction for cases regarding acts committed in the area of the conflict and indicated prosecutor's offices responsible for investigating such cases.¹⁰¹ Military prosecutor's offices were returned in 2014 by amending the law on prosecution as agencies investigating crimes committed by combatants, military personnel and in the area of the conflict. Considering the fact that the situation met the state of emergency threshold, the Verkhovna Rada of Ukraine issued a decree in 2015 that constituted Ukraine's derogation from state obligations in regard to certain human rights. Specifically, derogation concerned Article 5 of the ECHR (right to liberty and security), Article 6 of the ECHR (right to a fair trial), Article 8 of the ECHR (right to respect for private and family life), and Article 13 of the ECHR (right to an effective remedy).¹⁰² Ukraine has taken steps towards bringing justice to the region by investigation proceedings regarding persons who suspected of committing various crimes. 47 individuals were convicted for committing unlawful deprivation of liberty or abduction of a person in accordance with Article 146 of the Criminal Code.¹⁰³ 5 individuals were held liable for sex crimes in accordance with Articles 153 and 154 of the Criminal Code.¹⁰⁴ There are extremely few cases brought before courts in regard to torture — 27 instances as of 2016.¹⁰⁵ It seems that such processes are delayed and mainly unsuccessful. While lack of cooperation between Ukrainian authorities and another side of the conflict is a contributing factor, the lack of initiative from the Ukrainian side remains the key factor

⁹⁹ See for example developments in case no. 756/4855/17 in the Unified State Registry of Court Decisions.

¹⁰⁰ Prosecutor Hyunduz Mamedov, *Crimea: Four Years of Occupation* (Ukrainian Helsinki Human Rights Union, 2018), <https://helsinki.org.ua/articles/krym-chotyry-roky-okupatsiji/> (accessed Dec. 13, 2018).

¹⁰¹ Law of Ukraine 1632-VII as of August 12, 2014 (amended as of December 15, 2017), art. 1-5.

¹⁰² Decree of the Verkhovna Rada of Ukraine 462-VIII as of May 21, 2015.

¹⁰³ Andriy Hladun et al., *Unlawful Detention and Torture, Committed by the Ukrainian Side in the Conflict Zone in Eastern Ukraine* (USAID Publication 2017) 19-20.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

in the obstruction of justice. Hence, such investigations and proceedings are rather ineffective or sometimes even partial.

1.3. Ukraine and the International Criminal Court

Considering the general inefficiency of investigations, Ukraine is now experiencing a somewhat critical moment. Lustration is a political measure implemented through legal means. Nevertheless, it does not contribute to bringing those responsible for crimes to justice. The conflict zone is an area that has a high risk of occurrence of human rights violations, lack of justice, and even international crimes such as crimes against humanity and war crimes. Although peace is a fruitful goal of every state, it is practically impossible to reach it with regard to Euromaidan events and further developments as the country is currently in the state of war with Russia. There are many victims that are dissatisfied with the way judicial proceedings and investigations are conducted. While Ukraine introduces plenty of reforms, such as the judicial reform, these measures can be undermined by the fact that the justice was not reached in regard to certain aggravated and heinous acts. The situation is also sparked by corruption, which, according to an array of academics, closely follows human rights violations and is in the core of them.¹⁰⁶ Some say that such situation is so destabilizing, that all other transitional justice measures will be impractical and inefficient until some direct measures to bringing justice are implemented.¹⁰⁷ Former Yugoslavia is a vivid example. There, a combination of non-judicial measures for security and peace, such as the United Nations Transitional Administration for Eastern Slavonia, Baranja and Western Sirmium, was set up alongside with the International Tribunal for former Yugoslavia that had to bring the worst perpetrators to justice.¹⁰⁸ National courts were also involved into the process and dealt with middle and lower links of officials related to execution of unlawful orders.¹⁰⁹

¹⁰⁶ Isabela Robinson, *Truth Commissions and Anti-Corruption: Towards a Complementary Framework?* (International Journal of Transitional Justice 9(1) 2014) 33-50.

¹⁰⁷ Yuliya Zabyelina, *Lustration Beyond Decommunization: Responding to the Crimes of the Powerful in Post-Euromaidan Ukraine* (State Crime Journal, vol. 6, no. 1 2017) 68-69.

¹⁰⁸ Tomasz Lachowski, *Transitional Justice in Ongoing Conflicts and Post-War Reconstruction: Reintegrating Donbas into Ukraine* (46 Polish Pol. Sci. Y.B. 2017) 50-51.

¹⁰⁹ Ibid.

The International Criminal Court is the most realistic chance for Ukraine to achieve justice. Its jurisdiction *ratione materiae* extends to most heinous international crimes.¹¹⁰ ICC has proved its effectiveness in various African countries¹¹¹ and Ukraine's case would not only be invoking its power as an international judicial instrument but would also show its potential in other regions of the world and against citizens of the countries that oppose its jurisdiction, such as Russia. Scholars support the position that the International Criminal Court can serve a twofold function for Ukraine.¹¹² This thesis proposes a threefold one. First, ICC can be regarded as an instrument of international response to crimes committed in a conflict and post-conflict periods.¹¹³ Second, it will serve as “a mechanism of a comprehensive system of pursuing justice, disclosing truth and fostering reparations (...) which is to some extent “victims-oriented”.”¹¹⁴ The thesis also proposes the third function of the ICC as a political tool and also the instrument of transitional justice, aimed at promoting peace and stability in the aftermath of a conflict.

Ukraine is not a party to the Rome Statute. The causes have their roots in early 2001, when the Constitutional Court of Ukraine provided its opinion on the Rome Statute and hence the applicability of the ICC jurisdiction to Ukraine. The questions reviewed included the non-conformity of the Statute with the principle of officials' immunity, principle of complementarity, provisions on the surrender of nationals and enforcement of prison sentences.¹¹⁵ The Constitutional Court rightfully stated that immunity can be waived when international crimes are committed.¹¹⁶ The Court proceeded by stating that the surrender of nationals to the international court is a valid action and shall be differentiated from extradition that involves another state that imposes its jurisdiction on an individual who committed a crime.¹¹⁷ The progressive stance was taken in regard to enforcement of prison sentences — the Court elaborated

¹¹⁰ UNGA, *Rome Statute of the International Criminal Court*, 17 July 1998, 2187, U.N.T.S. 90, preamble.

¹¹¹ See cases *The Prosecutor v Thomas Lubanga Dyilo* or *The Prosecutor v. Ahmad Al Faqi Al Mahdi*

¹¹² Tomasz Lachowski, *International Criminal Court — the Central Figure of Transitional Justice: Tailoring Post-Violence Strategies, with Special Reference to Ukraine* (24 Pol. Q. Int'l Aff. 39 2015) 43.

¹¹³ Ibid.

¹¹⁴ Ibid.

¹¹⁵ Constitutional Court of Ukraine, Ruling no. 3-B/2001 as of January July 11, 2001, <http://zakon.rada.gov.ua/laws/show/v003v710-01> (accessed Dec. 13, 2018)

¹¹⁶ Ibid.

¹¹⁷ Ibid.

that convicted persons can serve their sentence in Ukraine in case Ukraine requests so from ICC.¹¹⁸ The Court, however, decided on the principle of complementarity in an unusual and illogical way. It stated that ICC is different from the ECHR because it can initiate investigations and proceedings *proprio motu* (on its own initiative)¹¹⁹. This argument has led to the decision that the Rome Statute cannot be ratified as it is in violation of Article 124 of the Constitution of Ukraine. The article states that justice in Ukraine is carried out exceptionally by the courts of general jurisdiction and the Constitutional Court of Ukraine.¹²⁰ The decision is illogical as the Court misunderstood the principle of complementarity enshrined in Article 17 of the Rome Statute. According to William Schabas who refers to *travaux préparatoires* (preparatory works) of the International Law Commission, Article 17 was drafted so that “State Parties would enjoy a level of confidence that their sovereign right to try crimes committed on their territory would not be encroached”.¹²¹ Professor Hnatovsky states that the ICC jurisdiction is invoked only if Ukraine does not fulfill its international obligations to prosecute international crimes.¹²² The thesis will not go further regarding the principle of complementarity as the principle in itself is not in violation of constitutional provisions on judiciary, as it was positively accepted in countries that have similar provisions in their constitutions.¹²³

Ukraine has taken steps towards ratification of the Rome Statute just recently. The 2016 amendment of the Constitution introduces the provision that Ukraine may now recognize the jurisdiction of ICC.¹²⁴ This would enable the ICC to have jurisdiction over international crimes committed on the territory of Ukraine. Still, ICC’s jurisdiction is subject to certain limitations. First, Ukraine cannot refer cases that occurred prior to the ratification. Second, if Ukraine invokes the crime of aggression committed by Russian citizens, such matters cannot concern the period prior to 2017.

¹¹⁸ Ibid.

¹¹⁹ Ibid.

¹²⁰ Constitution of Ukraine, the Law of Ukraine 254к/96-BP as of June 28, 1996 (amended as of September 30, 2016), art. 124.

¹²¹ William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2010) 336.

¹²² Mykola Hnatovsky, *Opinion on Conformity of the Constitution of Ukraine with the Rome Statute of the ICC* (2014) cited in Iryna Marchuk, *Ukraine and the International Criminal Court: Implications of the Ad Hoc Jurisdiction Acceptance and Beyond* (Vanderbilt Journal of Transnational Law 2016) 332.

¹²³ See for example Grundgesetz für die Bundesrepublik Deutschland / Basic Law for the Federal Republic of Germany (German Bundestag, 23 May 1949, last amended on 13 July 2017), art. 92.

¹²⁴ Law of Ukraine 1401-VIII as of June 2, 2016.

Therefore, effective resolution of cases related to Euromaidan, Crimea and war in Donbas, requires the Article 12(3) of the Rome Statute mechanism to be invoked. The mechanism allows for a state that is not a party to the Rome Statute to accept jurisdiction of ICC (even retroactively) by lodging a declaration.¹²⁵ As of now, Ukraine has filed two declarations with the registrar of ICC, on 17 April 2014 and on 8 September 2015.¹²⁶ The first one accepted the ICC jurisdiction over alleged crimes committed between November 21, 2013 and February 22, 2014 (Euromaidan events),¹²⁷ and the second one extended the acceptance to subsequent events related to Crimea and war in Donbas for an indefinite period of time.¹²⁸ After receiving the second declaration, the OTP reviews them collectively.¹²⁹ This means that during the preliminary examination of the situation in Ukraine, the OTP included alleged crimes starting from November 21, 2013 and onwards.

In the first declaration, Ukraine requests ICC to establish the identity of those guilty of committing crimes against humanity during the Euromaidan as well as to convict former President Yanukovich, Mr. Zakharchenko, Mr. Pshonka (ex-Prosecutor General of Ukraine), and other officials that ordered or executed unlawful orders. Iryna Marchuk, in her article points at certain flaws of the declaration. First, the electronic signature of Mr. Turchynov on it, who was *ex officio* Head of State, has been subject to discussion because Mr. Yanukovich was not removed from the post according to the procedure provided for by the Constitution of Ukraine.¹³⁰ According to Professor Marchuk, this effectively is not a debate as Mr. Yanukovich self-withdrew and there was no effective way to operate the country and the procedure of removal derives from a broader reading of the Constitution and is in itself legitimate.¹³¹ It is also the fact that the OTP has already accepted the declaration as valid. Second, providing an exhaustive list of individuals the OTP should investigate¹³² is not a

¹²⁵ Rome Statute, *supra* note 92, art. 12(3).

¹²⁶ International Criminal Court, *Preliminary Examination: Ukraine*, <https://www.icc-cpi.int/ukraine> (accessed Dec. 13, 2014).

¹²⁷ Declaration of the Verkhovna Rada of Ukraine 790-VII as of February 25, 2014.

¹²⁸ Declaration of the Verkhovna Rada of Ukraine 145-VIII as of February 4, 2015.

¹²⁹ The Office of the ICC Prosecutor, *Report on Preliminary Examination Activities* (2018) para. 62.

¹³⁰ Marchuk, *supra* note 103, 341-342.

¹³¹ *Ibid.*

¹³² *Id.*, 345.

common practice. While Professor Marchuk notes that the Verkhovna Rada exceeded its competence in this, it is unlikely that the OTP will be limited by the declaration.¹³³

Substantively, the declaration concerns crimes against humanity covered by Article 7 of the Rome Statute. Crimes against humanity at the time of initiating an investigation must constitute a widespread or systematic attack directed against any civilian population as a part of a state or organizational policy.¹³⁴ To meet the required threshold, the OTP had to prove the elements of alleged crimes under the lowest standards of proof — the reasonable basis standard. This means that only “a sensible or reasonable justification for a belief” has to be present, and the information does not have to be surely convincing.¹³⁵ Following the communications, visits and analysis of available evidence, the OTP did not reach a satisfactory conclusion. The investigation was not initiated on the basis of Article 53(1) of the Rome Statute. The OTP stated that there was no “widespread and/or systematic attack” element. Iryna Marchuk and Tomasz Lachowski argue that the OTP took the situation too scrupulously, for only one element had to be proved (either “widespread” or “systematic”) and there is no specified number of civilian casualties necessary to meet the threshold.¹³⁶ In any case, the OTP continues to gather information on the period and can potentially reach a satisfactory conclusion.¹³⁷ The thesis does not go into the matter in detail and rather focuses on a transitional justice aspect of such decision.

ICC took a rather conservative stance in this matter. The reasons could be different, including the risk of undermining the mandate. Ukrainian authorities are also to “blame” for the decision. Despite the fact that some information was indeed provided by the government of Ukraine, most reports on Euromaidan submitted to the OTP came from non-profits and international organizations. Professor Lachowski suggests recognizing the value of non-judicial tools.¹³⁸ If Ukraine was to establish a non-judicial body such as a truth and reconciliation commission aimed at researching and collecting information on Euromaidan events by interviewing victims and their families, this

¹³³ Marchuk, *supra* note 103, 345.

¹³⁴ International Criminal Court, *Elements of Crimes* (2011), art. 7.

¹³⁵ Marchuk, *supra* note 103, 347, citing Rome Statute, art. 53(1)(a)-(c).

¹³⁶ Marchuk, *supra* note 103, 341-342; Lachowski, *supra* note 97, 52.

¹³⁷ OTP 2018 Report, *supra* note 112, para. 96.

¹³⁸ Lachowski, *supra* note 97, 47.

could allow the OTP to adopt a wider approach to the matter. While wider approach would enable the OTP to open an official investigation, the fact that such approach bears certain risks should not be undermined. On one hand, the request for the ICC intervention into the Euromaidan issues is “a will to include an international, credible, independent body in forming the post-transition landscape”.¹³⁹ On the other hand, the overly broad approach in this case would not only establish a precedent for other countries when over 100 civil casualties amount to a widespread attack,¹⁴⁰ but would also allow for potential abuse of such decision by current government authorities. Ukraine is still a so-called “oligarchic democracy”.¹⁴¹ There is a potential risk that such intervention (or even the declaration) will be beneficial to the current government in the future, for instance, in the future elections. This concern resembles the events in the case of Uganda, where President Museveni asked for ICC’s intervention to investigate the LRA in 2003. After gaining international legitimacy, Museveni threatened to withdraw from the Rome Statute, showing by the maneuver that ICC was merely a political tool.¹⁴² Finally, considering the fact that the judicial reform was deemed “successful” by Ukrainian authorities, there is a risk that citizens will keep losing trust in reformed courts because they were so dysfunctional that the matter of social attention to the Euromaidan crimes required international intervention.

There certainly are risks ICC does not want to take by being a politically powerful tool. It is, hence, only fair that ICC requires further examination of the matter. There is a chance that Euromaidan crimes, due to their small gravity in comparison with other countries, will not meet the requirements necessary to be considered crimes against humanity. Nevertheless, if ICC establishes the required standard of proof, it would be beneficial for Ukraine to establish additional transitional justice measures, such as a separate agency, that would work in conjunction with ICC during investigation and trials. The unresolved question is — how will the potential decision

¹³⁹ *Id.*, 51.

¹⁴⁰ Declaration of the Verkhovna Rada of Ukraine 790-VII, *supra* note 126.

¹⁴¹ Klaus Bachmann & Igor Lyubashenko, *The Puzzle of Transitional Justice in Ukraine* (International Journal of Transitional Justice 11(2) 2017) 298.

¹⁴² Jaya Ramji-Nogales, *Designing Bespoke Transitional Justice: A Pluralist Process Approach* (Michigan Journal of International Law 32, 2010) 111.

be executed if alleged perpetrators are hiding in foreign jurisdictions, especially Russia?

The declaration concerns alleged crimes against humanity and war crimes committed in Crimea and Eastern Ukraine. There is no decision of the OTP on the matter and as of 2018, the OTP stated in its report that it “expects to finalize its analysis of subject matter jurisdiction (...) in the near future, with a view to assessing admissibility as appropriate”.¹⁴³ The positive aspect of the declaration is that it links senior officials of the Russian Federation apart from “DPR” and “LPR” leaders to alleged crimes against humanity and war crimes.¹⁴⁴ The OTP is positive on qualifying the Russian illegal annexation of Crimea de-facto occupation as well as considering the conflict in Eastern Ukraine both as non-international and international armed conflict.¹⁴⁵ It is necessary to stress here that ICC is one of the few strong tools Ukraine can use to convict perpetrators and bring justice and peace back to the region. As of now, there is limited coverage and understanding of the human rights situation in “DPR” and “LPR”. ICC’s investigation of the matter makes it highly possible that committed crimes against humanity and war crimes will be associated with specific individuals. It is the vision of numerous media outlets that Putin can potentially be found a perpetrator,¹⁴⁶ though such decision would raise questions as to how realistic its implementation is, considering the absence of separate ICC police force and Russia’s recent withdrawal from ICC following the preliminary report on the Ukraine’s declaration. In a hybrid of post-conflict and ongoing conflict situations in Ukraine, ICC could be a powerful tool of initializing transitional justice and reconciliation.

There are several shortcomings of such approach. A number of NGOs report that war crimes were allegedly committed by Ukrainian military forces as well.¹⁴⁷ If true, this could negatively impact society’s heavy reliance on dignity and honor of Ukrainian soldiers. On one hand, it will unquestionably affect post-conflict state of

¹⁴³ OTP 2018 Report, *supra* note 112, para. 98.

¹⁴⁴ Declaration of the Verkhovna Rada of Ukraine 145-VIII, *supra* note 111.

¹⁴⁵ OTP 2018 Report, *supra* note 112, para. 72-73.

¹⁴⁶ In this regard, Ukrainian and foreign media often cites petition to the Government of Canada that calls upon declaring Putin a war criminal and refer him to the International Criminal Tribunal in the Hague, see *Petition E-1757 (Russia)* (initiated by Roman Hruby, sponsored by MP James Bezan), <https://petitions.ourcommons.ca/en/Petition/Details?Petition=e-1757> (accessed Dec. 13, 2018).

¹⁴⁷ Hladun et al., *supra* note 90.

affairs and will obstruct achievement of peace. On the other hand, it seems the only allowable way to seek truth and justice considering the gravity of war crimes, importance of bringing perpetrators of war crimes to justice, and establishing the truth, sometimes painful and shocking. There can be no amnesty, at least for high-ranked perpetrators, allowed in this case whatsoever. Even though, as with previous declaration, there is as well the risk of losing trust into national courts, this may not be the case here, considering the objective inability of convicting perpetrators in “DPR” and “LPR”. Professor Lachowski believes that ICC’s involvement can be even beneficial for the domestic court system and prosecution in Ukraine because of the “necessity of cooperation between the Hague and Kyiv, also on the grounds of the “positive complementarity” postulate”.¹⁴⁸ He further elaborates by stating that there is a potential for “more efficient peace talks leading to the end of the conflict in Donbas”, since army leaders will be conscious of their possible accountability before ICC.¹⁴⁹ While Professor Lachowski asserts that other transitional justice mechanisms cannot be implemented in Ukraine, such as truth commissions due to the lack of non-judicial truth-telling tradition in the country,¹⁵⁰ this position should be criticized. Truth commissions or any other transitional justice mechanism “on the spot” can effectively become a valuable supplement to the operation of ICC in Ukraine.

There is little doubt that Ukraine’s situation with pro-Russia separatists and Russian intervention is somewhat similar to Georgia’s experience. South Ossetia, a region of Georgia, was destabilized by pro-Russian separatists since 1990s until Russian military intervention in 2008.¹⁵¹ Similar allegations were made then as to crimes against humanity and war crimes. The country attempted to seek justice on its own, but the attempts failed due to ineffective national investigations.¹⁵² Seven years had passed after the war before an investigation was opened by the ICC Prosecutor Fatou Bensouda.¹⁵³ While this is an attempt to go beyond purely “African” framework

¹⁴⁸ Lachowski, *supra* note 97, 52.

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.*

¹⁵¹ Nika Jeiranashvili, *The Georgian Experience: A Story of How the ICC is Failing Victims in its First Case Outside Africa* (International Justice Monitor 2018), <https://www.ijmonitor.org/2018/05/the-georgian-experience-a-story-of-how-the-icc-is-failing-victims-in-its-first-case-outside-africa/> (accessed Dec. 13, 2018).

¹⁵² *Ibid.*

¹⁵³ *Ibid.*

the Court previously worked with, it is also a red flag for Ukraine. Considering the delay in a similar case, there is a probability that another sensitive case such as the Ukrainian one will not be progressing anytime soon. There were reasons that justified the delay in the Georgian case, such as it being too complex at the time the conflict unfolded.¹⁵⁴ However, even after opening the investigation, it took the OTP two years to reach out to victims and authorities as the political situation has changed.¹⁵⁵ It took seven years to initiate an investigation, and so far, it seems the institution was not ready to work with the material and victims in a different country. Considering the upcoming elections in Ukraine, there is fear that the ICC framework will not succeed even if the OTP opens an investigation.

¹⁵⁴ Ibid.

¹⁵⁵ Ibid.

CHAPTER III

POST-CONFLICT JUSTICE IN UKRAINE AFTER THE EUROMAIDAN: LEGAL ANALYSIS

1.1. Introduction of the background

There was certainly a wave of transitional justice measures that were implemented in Ukraine in the 1990s, during the state-formation processes. It is difficult, however, to differentiate between those that can be considered regular processes for a state that has just gained its independence, and those that occur to fix the society, achieve justice and reconciliation after a specific period. In Ukraine it was the Communist regime for the past 72 years. Such measures were implemented with laws and decrees, sometimes passed in an extraordinary manner. They had to address issues that were pressing and vital — for instance, the country could not operate properly when it chose to follow free market guidelines but retained only state property “status quo”. Another issue to be addressed was the presence of the Communist Party of Ukraine in the Verkhovna Rada. Finally, the presence of individuals responsible for human rights violation through power enforcement and involvement in the Committee for State Security (KGB) in political life of the state was alarming.

As mentioned above, some measures introduced were related to property issues. Bernadette Atuahene writes that peculiarities of transitional justice often involve property-related questions. This is, in part, because “history is ripe with examples of states and private actors that have systematically and unjustly taken real property from one group and given it to another”.¹⁵⁶ Some property rights violations occurred under the Soviet Union — property was nationalized, hence state-owned. For Ukraine there were only three available options — either to retain the previous legal status of property, completely disregarding the private one; to create a whole new legal status of property; or to accommodate two systems of property ownership into a single integral system. Ukraine has decided to go with integration. A series of laws and decrees were introduced, such as the Law of Ukraine “On Privatization of State Property”, the Land Code of the Ukrainian Socialist Soviet Republic (later transformed

¹⁵⁶ Bernadette Atuahene, *Property and Transitional Justice* (58 UCLA L. Rev. Discourse 2010) 65-66.

into the Land Code of Ukraine), the Decree of the Verkhovna Rada “On Land Reform”, the Law of Ukraine “On Types of Ownership of Land” and others. They temporarily preserved the initial collective property to allow for the gradual transition to three forms of property (state property, communal property, and private property). At the same time, they have introduced ways to privatize what once was owned by the state. While such processes were initiated, they were slow, corrupt, and inefficient due to lack of supervision and poor legal procedure. The procedure introducing auctions and procurement was only developed later on and transformed into law in 2018 with the new Law of Ukraine “On Privatization of State and Communal Property”.¹⁵⁷

Another issue that was common for all post-Soviet states was the presence of the Communist party in its parliaments. In Ukraine, reaction against the Communist Party of Ukraine was rapid. The party was banned from political life temporarily first, to find a nexus between activities of the party and the 1991 Soviet coup d'état attempt.¹⁵⁸ Within the following days, the party was completely banned from any activity within Ukraine. This was due to the prohibition of political parties that act to undermine the national sovereignty of the country and to threaten national peace and security in accordance with Article 7 of the Constitution of Ukraine (Ukrainian Soviet Socialist Republic).¹⁵⁹ Despite this, the party was resurrected in 1993 from the similar cohort of members and participated in the elections years afterwards under the name of the “Socialist Party of Ukraine”. In 2001 the ruling of the Constitutional Court of Ukraine allowed for the full restoration of the Communist Party of Ukraine. It was found that the party was established in 1991 in accordance with the existing legislation. The ruling stated that the newly established Communist Party of Ukraine is not a successor to the Communist party initially prohibited.¹⁶⁰ The legal lacuna and short-sighted approach prolonged the existence of the party until 2014-2016 when the court of the first instance confirmed the prohibition of the party. The party was supporting the prohibited Communist regime, and arguably separatist activities in Crimea,

¹⁵⁷ Law of Ukraine “On Privatization of State and Communal Property” 2269-VIII as of January 18, 2018.

¹⁵⁸ Decree of the Presidium of the Verkhovna Rada of Ukraine “On a Temporary Suspension of Activity of the Communist Party of Ukraine” 1435-XII as of August 26, 1991.

¹⁵⁹ Decree of the Presidium of the Verkhovna Rada of Ukraine “On Prohibition of Activity of the Communist Party of Ukraine” 1468-XII as of August 30, 1991.

¹⁶⁰ Judgement of the Constitutional Court of Ukraine 20-пр/2001 as of December 27, 2001, paras. 7-8.

Donetsk and Luhansk regions as well as terrorist activities within those territories.¹⁶¹ This shows that reactionary transitional justice in Ukraine did not succeed as it succeeded in other countries. Namely, the significance of Communist symbols to the survival of the ideology was disregarded in Ukraine until decommunization laws were passed in 2015. Similar prohibitions occurred in Hungary (2000),¹⁶² Romania (1991),¹⁶³ and Czech Republic (in 1991 — Czechoslovakia at that time)¹⁶⁴.

Finally, it is necessary to address the presence of individuals with a background in the former USSR authorities, political parties, and on high-ranked positions in Ukraine. The cleansing did not occur during the 1990s and purge laws were not passed. One reactionary initiative worth mentioning occurred in 2005, when Levko Lukianenko, who was a Member of Parliament in the Verkhovna Rada, with the help of three other MPs introduced a draft law “On Lustration”. This draft law was declined by the committee because of numerous violations of the provisions of the Constitution of Ukraine and other laws.¹⁶⁵ It also had a vague definition of lustration — as “*the process aimed at establishing the truth of the testimony* of [certain categories of] Ukrainian citizens”.¹⁶⁶ The list included leaders of legislative, executive, judicial and other institutions.¹⁶⁷ Again, it took Ukraine more than twenty years after regaining its independence to adopt the law that restricts access of individuals involved in crimes of the Soviet regime to the political life of the country.

There are, of course, numerous aspects that prevented such processes in other countries. In many of them, such as Moldova, Estonia, and Poland, legislation on prohibition of Communist symbols was found unconstitutional or declined by a committee on the basis of freedom of speech.¹⁶⁸ Some countries did not commit to lustration at all, such as Russia, and it not only affected the roster of people in national authorities, many of whom were former KGB employees, but also influenced

¹⁶¹ Judgement of the District Administrative Court of Kyiv as of December 16, 2015 in the case 826/15408/15, <http://reyestr.court.gov.ua/Review/54392066> (accessed Nov. 17, 2018).

¹⁶² Criminal Code of Hungary (Act C of 2012, 2012), <https://www.refworld.org/docid/4c358dd2.html> (accessed Nov. 18, 2018), this provision was found unconstitutional in 2011, eleven years after being introduced.

¹⁶³ Law of Romania “On the National Security of Romania” No. 51 as of July 29, 1991, art. 3.

¹⁶⁴ Czechoslovak Criminal Code (1992) § 260.

¹⁶⁵ Report of the Central Scientific Experts Office on the Draft Law of Ukraine “On Lustration” as of March 28, 2005.

¹⁶⁶ Draft Law of Ukraine “On Lustration” 7028-2 as of March 2, 2005.

¹⁶⁷ Ibid.

¹⁶⁸ Volodymyr Yavorsky, Analysis of the Law on Prohibiting Communist Symbols (Kharkiv Human Rights Protection Group 2015), <http://khpg.org/en/index.php?id=1430564974> (accessed Nov. 19, 2018).

neighboring countries such as Georgia, Ukraine, Belarus, and Moldova. Latvia and other Baltic countries were able to identify a threat of Russian presence after the fall of the USSR — “Latvians perceived this Russian presence and demographic growth as a threat to the future survival of the Latvian nation and as a traumatic legacy of the Soviet annexation”.¹⁶⁹ At the same time, countries like Moldova, Georgia and even Ukraine did not contribute to resolution of separation conflicts and to breaking ties with Russia, which caused the emergence of unrecognized state-like entities (“quasi-states”) such as Transnistria, Abkhazia, Nagorno-Karabakh, and South Ossetia. They possess, according to subjective statements of their so-called “officials”, *de jure* necessary characteristics of a state under the Montevideo Convention¹⁷⁰ but are justly unrecognized due to the nature of their emergence.

Another issue still pressing for Ukraine despite the criminalization and recent legislative changes introducing harsher punishments is corruption. It waives positive effects of reforms as it provides individuals with the possibility to bribe officials and avoid liability, for instance, in cases of lustration). The problem of corruption in Ukrainian government existed since the 1990s and had devastating effects on the country. Despite this, the concept of a national anti-corruption agency was introduced just recently. The Commissioner for the Anti-Corruption Policies and the Bureau of Anti-Corruption Policies were created in 2010, both proved inefficient.¹⁷¹ Since 2012, Ukraine introduced reforms to its criminal legislation. Namely, the severity of punishment for corruption crimes was increased, new types of abuses of authority or office were introduced, and articles related to the discharge of punishment and from serving it, namely, Article 74 of the Criminal Code of Ukraine, were rewritten so as to exclude corruption crimes.¹⁷² The Law of Ukraine “On Prevention of Corruption” has numerous positive effects on the situation. It introduces a mandatory declaration filing

¹⁶⁹ World Directory of Minorities and Indigenous Peoples – Latvia: Russians (Minority Rights Group International 2008), <http://www.unhcr.org/refworld/docid/49749cf2c.html> (accessed Nov. 19, 2018).

¹⁷⁰ Montevideo Convention on the Rights and Duties of States A-40 (December 26, 1933), art. 1, the Montevideo Convention outlines four qualifications that a state has to possess: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states. The Montevideo Convention is considered a restatement of customary international law that applies to all subjects of international law as a whole.

¹⁷¹ National Agency for Prevention of Corruption Research: Anti-Corruption Infrastructure in Ukraine in 2009-2011 (2012) 3, 7, 25.

¹⁷² Criminal Code of Ukraine, the Law of Ukraine 2341-III as of April 5, 2004 (amended as of November 10, 2018), art. 74.

for public servants, military officials, and other categories of individuals in office with high corruption risks, as well as reporting on acquisition of property with substantial monetary value.¹⁷³ The effect of such reforms is some reduction of the level of corruption — in 2017 Ukraine has received 30 points out of 100 in the Transparency International’s Corruption Perceptions Index, which is a better result than, for instance, in 2010, but still the lowest in Europe.¹⁷⁴

In the aftermath of the Euromaidan, Ukrainian authorities adopted post-conflict measures. Some to name are the 2014 lustration measures; decommunization measures of 2015 removing the Soviet legacy; democratization processes taking the form of numerous reforms such as reorganization of powers of government bodies, adoption of new procurement procedure, as well as judicial reform that introduced a new structure of the court system. After the conflict in Eastern Ukraine unfolded, Ukraine was forced to act in two ways —implement peacebuilding measures in the post-conflict situation and introduce measures aimed at resolving an ongoing conflict in Eastern Ukraine, Crimea and the Azov Sea. According to Tomasz Lachowski, “Ukraine became a unique example on the map of states implementing transitional justice, on the one hand, willing to enact backward-looking justice dealing with *ancient régime* structures (alongside the Soviet legacy), while on the other, being compelled to execute forward-looking justice, adjusted to the cases of ongoing conflicts and war-torn societies”.¹⁷⁵

Finally, four aspects of building new and improving existing transitional justice policies are relevant: 1) delayed transitional justice mechanisms are now dealing with processes that have worsened over time due to corruption and non-reaction of authorities; 2) post-conflict justice has to be implemented alongside processes aimed at dealing with an ongoing conflict, ready to escalate at any point of time; 3) the quality of law-making processes that could be improved; and 4) transitional justice mechanisms are often under implemented because of the effects of financial crisis in Ukraine and their strong reliance on foreign investment.

¹⁷³ Law of Ukraine “On Prevention of Corruption” 1700-VII as of October 14, 2014 (amended as of August 31, 2018), art. 3-17.

¹⁷⁴ Transparency International Ukraine: CPI 2017 Report, <https://ti-ukraine.org/research/indeks-koruptsiyi-cpi-2017/> (accessed Nov. 20, 2018).

¹⁷⁵ Tomasz Lachowski, *Transitional Justice in Ongoing Conflicts and Post-War Reconstruction: Reintegrating Donbas into Ukraine* (46 Polish Pol. Sci. Y.B. 2017) 37-38.

1.2. The legal analysis of lustration and its implementation in Ukraine

As was presented earlier, lustration in Ukraine was introduced with the Law of Ukraine “On Government Cleansing”. The law was developed and passed in 2014 as a reaction to the actions of the former government under Viktor Yanukovich presidency.¹⁷⁶ The purpose of the act is to introduce a vetting procedure for government officials who fall under one of the categories specified in Article 3 of the Law. The process of vetting is guided either by the law itself or can be initiated based on the court’s judgement. The key principles stipulated in this law are: a) rule of law and legality; b) openness, transparency, and publicity; c) presumption of innocence; d) individual responsibility and e) guarantee of the right to defense. Under the law persons that served in the government for at least one year during the period from February 25, 2010 to February 22, 2014 should be either fired from the current position or should remove themselves from the office. The categories are specified in Article 3 and include a wide range of persons in office at that time, namely the President of Ukraine, the Prime Minister of Ukraine and also other high-ranked government officials. The law was a reaction to the Euromaidan protests clashes. Therefore, it also includes persons that were in any way involved in dispersing protests in Kyiv and other regions of Ukraine. According to the procedure, the head of the agency is responsible for conducting checks on his or her employees and has an obligation to remove persons from the office if they fall under one of the categories.¹⁷⁷

The law at hand proved to be complicated to adopt from the very beginning. According to the law-making procedure in Ukraine, several committees of the Verkhovna Rada have to provide their expert reports on the draft law.¹⁷⁸ The Central Scientific Experts Office report was the first one to raise questions about the proposed legislation. Among things that were criticized was the language of the act as initially it had many grammatical errors and missed words. The report also criticized the

¹⁷⁶ Oleksandra Drik et al., *Report on Monitoring of Implementation of the Laws of Ukraine “On Government Cleansing” and “On the Restoration of Trust in the Judiciary of Ukraine”* (USAID Report 2017) 7-8.

¹⁷⁷ Law of Ukraine “On Government Cleansing” 1682-VII as of September 16, 2014 (amended as of August 31, 2018), art. 1-3.

¹⁷⁸ Law of Ukraine “Rules of the Verkhovna Rada of Ukraine” 1861-VI as of February 10, 2010 (amended as of November 4, 2018), art. 93.

introduction of mechanisms that proved to be ineffective earlier.¹⁷⁹ This argument was not elaborated on. Notwithstanding, the scrupulous analysis of the report leads to a conclusion that the criticism concerned the overlay of procedures of conviction already in place in the Criminal Code of Ukraine and the Law of Ukraine “On Prevention and of Corruption”, which formerly went under a different name that also included “combating corruption”. Finally, the report criticized the list of officials being “too broad”. The report also covered the issues such as presumption of guilt, and collective responsibility.¹⁸⁰

The basis of for the criticism was the reference to the PACE Resolution 1096 (1996) (hereinafter — Resolution 1096) as well as the “Guidelines to ensure that lustration laws and similar administrative measures comply with the requirements of a state based on the rule of law” (hereinafter — Guidelines).¹⁸¹ Specifically, the provision of point 3 of paragraph 4 of Article 3 of the proposed law was criticized — it extended lustration measures to those who participated in the Communist Party of any former Soviet Republic and to former KGB employees.¹⁸² Since according to the law the vetting procedure applies automatically, it raised concerns under the Guidelines. The sub-paragraph “i” of the Guidelines states that “no person shall be subject to lustration solely for association with, or activities for, any organization that was legal at the time of such association or activities (except as set out above in sub-paragraph h), or for personal opinions or beliefs”.¹⁸³ The only exclusion is the sub-paragraph “h” of the Guidelines — “where an organization has perpetrated serious human rights violations, a member, employee or agent shall be considered to have taken part in these violations if he was a senior official of the organization, unless he can show that he did not participate in planning, directing or executing such policies,

¹⁷⁹ Report of the Central Scientific Experts Office on the Draft Law of Ukraine “On Government Cleansing” as of August 14, 2014, 2.

¹⁸⁰ *Id.*, 3-4.

¹⁸¹ Parliamentary Assembly of the Council of Europe, *Measures to Dismantle the Heritage of Former Communist Totalitarian Systems* (Resolution 1096, Doc. 7568, report of the Committee on Legal Affairs and Human Rights adopted on 27 June 1996) also Adrian Severin, *Guidelines to Ensure that Lustration Laws and Similar Administrative Measures Comply with the Requirements of a State Based on the Rule of Law* (Doc. 7568 1996), http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=7506&lang=EN#_ftn1 (accessed Nov. 22, 2018).

¹⁸² Law of Ukraine “On Government Cleansing”, *supra* note 92, art. 3.

¹⁸³ Guidelines, *supra* note 96, para. “i”.

practices, or acts”¹⁸⁴. Conclusively, such criticism could be summed up to the position the whole procedure being flawed and likely to be sabotaged by persons subject to lustration.

The position of the report is also reflected in an interim report of the European Commission for Democracy Through Law (hereinafter — Venice Commission).¹⁸⁵ The Venice Commission criticized the legislative framework as a whole and the overlap between the Law of Ukraine “On Government Cleansing” and the Law of Ukraine “On the Restoration of Trust in the Judiciary of Ukraine” in particular. While the report praised the principles outlined in Article 1 of the law, the commission has stated that “the law does not live up to these principles and guidelines”.¹⁸⁶ It concluded that the occurrence of such law more than 25 years after the Communist regime fell is not justified and raises doubts as to the original purpose of the process. As regards the latter, the commission concluded that the period of lustration cannot be undetermined, and that lustration shall be a one-time action.¹⁸⁷ Other aspects of the report somewhat reflected the position of the Central Scientific Experts Office. Once the report was published and translated into Ukrainian, it caused a negative reaction among the Ukrainian society.¹⁸⁸

However, it is important to take into consideration the shortcomings stressed out in the interim report that could have influenced Commission's evaluation of the law although not directly relating to its contents. These include the absence of the explanatory note to the draft law, the inability of the Venice Commission to come to Kyiv and communicate with authorities that drafted the law and developed the lustration procedure, as well as the fact that the translation of the law in question provided to the Commission was unofficial.¹⁸⁹ Therefore, the Commission, having

¹⁸⁴ Guidelines, *supra* note 96, para. “h”.

¹⁸⁵ European Commission for Democracy Through Law (Venice Commission), *Interim Opinion on the Law on Government Cleansing (Lustration Law) of Ukraine* (Opinion no. 788/2014, adopted by the Venice Commission at its 101st Plenary Session, 12-13 December 2014), [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2014\)044-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)044-e) (accessed Nov. 22, 2018).

¹⁸⁶ *Id.*, 6.

¹⁸⁷ *Id.*, 7.

¹⁸⁸ See for example Maryna Parynova, *The Opinion of the Venice Commission on Lustration* (Obozrevatel.com, December 15, 2014), <https://www.obozrevatel.com/blogs/24967-visnovok-venetsianskoi-komisii-schodo-lyustratsii.htm> (accessed Nov. 25, 2018), also *The Law on Lustration Will Be Rewritten* (Segodnya.ua, December 16, 2014), <https://ukr.segodnya.ua/politics/zakon-o-lyustracii-perepishut-577770.html> (accessed Nov. 25, 2018).

¹⁸⁹ Interim Opinion, *supra* note 100, 3.

made appropriate considerations, issued an updated report. The final opinion on the law now included opinions based not only on the law itself, but also on proposed amendments that were under review of the Verkhovna Rada and its committees.¹⁹⁰ The Commission have concluded that despite the proposed changes, there are still drawbacks to the law: a) the purpose of lustration this broad may come into contradiction with the principle of proportionality; b) the procedure that applies to judges still has a twofold nature due to the Law of Ukraine “On the Restoration of Trust in the Judiciary of Ukraine” that introduces checks on judicial authorities; c) the procedure is battling both the regime, its prevention, and corruption which are not the same even in Ukrainian context; d) lustration term must be justified and constantly revised; e) the independent body apart from the Ministry of Justice has to monitor the procedure.¹⁹¹

Concluding from the reports it can be noted that Ukrainian lustration laws were overall criticized. While the domestic authorities and international bodies did not condemn but rather endorsed the procedure, it was a common opinion that the law-drafting technique needed improvements. Otherwise, due to its poor quality, the law was in conflict with other laws already covering the issues of background checks and liability for the involvement in certain organizations. The law itself was not balanced enough to satisfy the principle of proportionality. Finally, such discrepancies hindered the implementation of the law and caused the review of its constitutionality by the Constitutional Court of Ukraine disputing the law’s constitutionality, will be reviewed in detail later.

The very notion of lustration is important to the democratic society. Lustration – a form of vetting – describes the broad set of parliamentary laws that restrict members and collaborators of former repressive regimes from holding a range of public offices, state management positions, or other jobs with strong public influence, such as in the media or academia, after the collapse of the authoritarian regime.¹⁹² It allows for the

¹⁹⁰ European Commission for Democracy Through Law (Venice Commission), *Final Opinion on the Law on Government Cleansing (Lustration Law) of Ukraine* (Opinion no. 788/2014, adopted by the Venice Commission at its 103rd Plenary Session, 19-20 June 2015) 3, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2015\)012-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2015)012-e) (accessed Nov. 22, 2018).

¹⁹¹ *Id.*, 19-20.

¹⁹² Cynthia M. Horne, *Lustration: Temporal, Scope, and Implementation Considerations* (Transitional Justice and the Former Soviet Union: Reviewing the Past, Looking toward the Future, Cynthia M. Horne & Lavinia Stan eds., 2018) 177

dismissal of persons, who contributed to former regimes and conflicts. While etymologically lustration comes from Latin “lustrum” and “lustrare” that mean “review, survey, examination”,¹⁹³ in Ukraine lustration was not aimed at finding unrevealed information and publicize it, for instance, about the property that persons in office privately own. Lustration as a mechanism does not violate human rights as long as the procedure has clear guidelines. The removal from office based on previous activity can invoke an intervention in human rights. The European Court of Human Rights (hereinafter — ECHR) has rendered numerous decisions on the matter, some of which establish the fact of the rights violation, such as in cases related to lustration barring from private sector jobs that resulted in violation of the right to private life, while others confirm that limitation were justified.¹⁹⁴ Lustration as a measure introduced by the government that limits human rights has to pass a test introduced by the ECHR in its case law. First, it has to be prescribed by law, and the ECHR practice gives a definition of “law” much broader than simply statutory law, including the judicial practice, bylaws, and other legal norms into the notion. However, such law has to meet certain requirements as to its “quality” — those of clarity, foreseeability, and accessibility.¹⁹⁵ This thesis will not go in detail regarding each of the requirements. Second, a measure has to be necessary in a democratic society.¹⁹⁶ This characteristic is decided on a case-by-case basis, but deriving from the principles found in Resolution 1096, lustration is necessary in a democratic society.¹⁹⁷ Lustration is generally regarded as the measure of “the protection of national security and public safety, the prevention of disorder as well as well as the protection of the rights and freedoms of others”.¹⁹⁸ Third, the limitation of rights has to pursue a legitimate aim. This is also decided on a case-by-

citing Monika Nalepa, *Lustration* (Encyclopedia of Transitional Justice, Lavinia Stan and Nadya Nedelsky, eds. (New York: Cambridge University Press, 2013) 1:46.

¹⁹³ Roman David, *Lustration in Ukraine and Democracy Capable of Defending Itself* (Transitional Justice and the Former Soviet Union: Reviewing the Past, Looking toward the Future, Cynthia M. Horne & Lavinia Stan eds., 2018) 137.

¹⁹⁴ *Sõro v Estonia*, ECHR (Application no. 22588/08, Chamber Judgement of 3 September 2015) § 60-§ 62, <http://hudoc.echr.coe.int/eng?i=001-156518> (accessed Nov. 23, 2018).

¹⁹⁵ *Del Rio Prada v Spain*, ECHR (Application no. 42750/09, Grand Chamber Judgement of 21 October 2013) § 91-§ 93, <http://hudoc.echr.coe.int/eng?i=001-127697> (accessed Nov. 23, 2018).

¹⁹⁶ ECHR Convention, *supra* note 56, art. 8(2).

¹⁹⁷ Resolution 1096, *supra* note 97, para. 4.

¹⁹⁸ *Sõro v Estonia*, *supra* note 111, § 58.

case basis and must derive from the nature of provisions, their length, expediency, scale and other requirements.¹⁹⁹

While the Law of Ukraine “On Government Cleansing” received criticism on national and international levels, its provisions are strongly defended by, for instance, the Ministry of Justice. In the letter published in 2018 that reviews the annual report of the Supreme Council of Justice, the Ministry criticized the report about its view on the lustration procedure.²⁰⁰ Namely, they disagreed that provisions of the Law of Ukraine “On Government Cleansing” and the Law of Ukraine “On the Restoration of Trust in the Judiciary of Ukraine”.²⁰¹ Therefore, the first law reviews judges’ involvement in activities during the period specified in this law and establishes objective criteria for individual non-admissibility to hold the office.²⁰² The second law reviews judges’ activity as to whether they could be disciplined or prosecuted for crimes, and to determine their competence to carry out adjudication. Also, the Ministry of Justice criticized the approach of the Supreme Council of Justice regarding the implementation of the law. They have stated that they submitted 111 cases to remove specific judges based on the previous employment in the judiciary, and the Supreme Council of Justice refused to remove all but 8 judges referred to it by the Ministry. The refusal itself stated that “the procedure initiated exceeded the scope of the procedure prescribed within the Law of Ukraine “On Government Cleansing”. This refusal was criticized by the Ministry of Justice and later submitted to the Higher Administrative Court of Ukraine for review.²⁰³

Lustration generally represents what the dissatisfied society is willing to do — remove as many responsible persons as possible and conduct this over the period that is long enough to completely wipe out consequences of former regimes. The procedures can be harsh and radical as they are broad enough to lustrate too many persons which can cause interruptions in government operations. According to

¹⁹⁹ See for example Steven Greer, *The Exceptions to Article 8 and 11 of the European Convention on Human Rights* (Council of Europe Publishing 1997) 22-23 citing ECHR cases on Articles 8 and 11.

²⁰⁰ Ministry of Justice of Ukraine, Letter on Position of the Ministry of Justice of Ukraine Regarding Certain Provisions of the Annual Report of the Supreme Council of Justice for 2017 as of February 22, 2018, <https://lustration.minjust.gov.ua/article/read/210> (accessed Nov. 25, 2018).

²⁰¹ Ibid.

²⁰² Ibid.

²⁰³ Ibid.

estimations provided by Arseniy Yatsenyuk (the former Prime Minister of Ukraine), around one million officials are subject to lustration, taking into consideration all categories of officials introduced by the Law of Ukraine “On Government Cleansing”.²⁰⁴ This thesis adopts an alternative view on lustration laws in Ukraine — despite its broad scope and inefficiencies that are yet to be fixed by amendments, the radical law may be justified if historical and social contexts allow for it. The key factor is how this law is implemented.

Some scholars find positive aspects of lustration in Ukraine in its current state. Roman David suggests using the “law and society” method to justify the process that includes “an understanding of the context, motives, and interests in producing laws, their application and interpretation, and it also includes studies of the impact of law on shaping, transforming, and solidifying social relations”.²⁰⁵ He distinguishes the meaning of lustration in Ukraine from what lustration was in countries like the Czech Republic and Poland. He states that lustration in Ukraine shall be reviewed as the measure that has “the quasi-retributive nature”.²⁰⁶ Considering the pressing social need and some clear reflections of that in social actions (such as lustration campaign represented by political activists from Dnipro city as a guillotine; or caricatures and pictures of politicians being “pelted with tomatoes”), he concludes that lustration in Ukraine has acquired a dual meaning, being at the same time an instrumental and a symbolic process.²⁰⁷ While he is not denying that the Venice Commission report has highlighted deficiencies, he also stresses that the Commission as well as the ECHR principles on lustration are aimed at countries that did not have a particular situation Ukraine is facing.²⁰⁸ He refers to the principle usually employed by the ECHR called “democracy capable of defending itself”.²⁰⁹ This principle is a basic justification of necessity for lustration laws in a democratic society. The concept was developed by Karl Loewenstein in 1937, when during his observation of the situation in Europe he

²⁰⁴ *Yatsenyuk: Ukraine lustration will cover 1 million officials* (Kyiv Post, Interfax-Ukraine 2014), <https://www.kyivpost.com/article/content/ukraine-politics/yatsenyuk-ukraine-lustration-will-cover-1-mln-officials-law-enforcers-364963.html> (accessed Nov. 25, 2018).

²⁰⁵ David, *supra* note 110, 136.

²⁰⁶ *Id.*, 137.

²⁰⁷ *Id.*, 138.

²⁰⁸ *Id.*, 141.

²⁰⁹ *Id.*, 140-142.

concluded that the Weimar democracy did not have sufficient legal provisions that would grant it a “militant defense” which was needed at that time to protect it from groups that wanted to destroy it.²¹⁰

Simply put, the principle “democracy capable of defending itself” is aimed at protecting democratic values in extraordinary situations and against extreme views or any other threats. This is why in many countries political parties of extremist nature are prohibited. Lustration is not an exception. It brings measures that can be unacceptable in one country, but completely justified in others. Lustration of a rather radical kind can potentially be justified in Ukraine and not be in violation of Article 8 (alone or in conjunction with Article 14) of the ECHR Convention. Coupled with the external conflict that Ukraine is involved into, certain objections can be levied. The Communist Party of Ukraine that was prohibited has not received its representation in the Parliament of Ukraine, same with the Party of Regions that dissolved following Euromaidan (the political party that supported Yanukovich’s power usurpation). As organizations, these parties are not a threat anymore. However, the individuals that contributed to their operations are still present in various government bodies — and this is where lustration has the most power. Even considering that lustration was delayed for members of the Communist Party of the USSR, former KGB employees and other categories, it may still be relevant to lustrate them under the present situation.

This view is also supported by Roman David as he elaborates on the principle in question. He states that while Ukraine became a democracy in 2014, it still has “an unreformed state apparatus” that has caused reoccurrence of undemocratic practices in Ukraine and led to bursts of revolutions such as the Orange Revolution in 2004-2005 and the Euromaidan protests in 2013-2014.²¹¹ The major reason for this is Ukraine’s inadequacy in dealing with its Soviet past. It is also important to state that while the KGB secret service and the Communist Party do not exist now, their “remains” are still clearly visible and present. Since the support of Russia by the Communist Party members that remained in Ukrainian government is obvious and widely acknowledged,

²¹⁰ Id., 141, citing Karl Loewenstein, *Militant Democracy and Fundamental Rights I* (The American Political Science Review 31, 3, 1937) 417-432 and Karl Loewenstein, *Militant Democracy and Fundamental Rights II* (The American Political Science Review 31, 4, 1937), 638-658.

²¹¹ David, *supra* note 110, 142.

lustration can easily satisfy requirements for necessity and proportionality by removing them from their government positions.²¹² Therefore, it is fair to presume that the historical context of inability to carry out lustration in 1990s shall not be the obstruction for implementing it and avoiding reoccurrences of both internal and external threats in the future.

In 2014 and 2015 the Supreme Court of Ukraine and the group of 47 Members of Parliament, both of which have a legal capacity to initiate proceedings before the Constitutional Court, filed three and one submissions respectively. The Constitutional Court of Ukraine accepted their submissions and as of 2018 is still reviewing them.²¹³ They all relate to the alleged unconstitutionality of the Law of Ukraine “On Government Cleansing”. The submissions dispute constitutionality of provisions of Article 3 regarding the applicability of law to specified categories of officials, Article 5 regarding declarations that must be filed in accordance with the Law of Ukraine “On Grounds of Preventing and Combating Corruption”, and procedures in the closing and transitional provisions of the law regarding the procedure of dismissing officials based on their personal records. In their submissions the applicants challenge the provisions on temporal aspect of lustration, that lustration is not a one-time action in this case but a recurring procedure of checks; discriminatory nature of lustration, that prohibits certain individuals from taking positions in office; as well as the scope of subjects being too broad (namely point 11 of paragraph 1 of Article 2 reads as “other government officials and civil servants, except for elected positions, of government bodies and local governments”). All three submissions were merged into one constitutional proceeding as they relate to the same legal matter.²¹⁴

²¹² Id., 144.

²¹³ Constitutional Submission as of December 4, 2018 (Constitutional Court of Ukraine Official Website 2018), <http://www.ccu.gov.ua/novyna/konstytuciyni-podannya-za-stanom-na-4-grudnya-2018-roku> (accessed Dec. 4, 2018).

²¹⁴ Supreme Court of Ukraine, *Constitutional Submission Regarding Admissibility (Constitutionality) of Provisions of the Law of Ukraine “On Government Cleansing”* on the basis of the Decision of the Plenum of the Supreme Court of Ukraine no. 25 as of December 25, 2015, <http://www.ccu.gov.ua/sites/default/files/43.pdf> (accessed Dec. 4, 2018); Supreme Court of Ukraine, *Constitutional Submission Regarding Admissibility (Constitutionality) of Provisions of the Law of Ukraine “On Government Cleansing”* on the basis of the Decision of the Plenum of the Supreme Court of Ukraine no. 3 as of March 16, 2015, <http://www.ccu.gov.ua/sites/default/files/44.pdf> (accessed Dec. 4, 2018); Supreme Court of Ukraine, *Constitutional Submission Regarding Admissibility (Constitutionality) of Provisions of the Law of Ukraine “On Government Cleansing”* on the basis of the Decision of the Plenum of the Supreme Court of Ukraine no. 8 as of November 17, 2014, <http://www.ccu.gov.ua/sites/default/files/46.pdf> (accessed Dec. 4, 2018); 47 Members of the Verkhovna Rada, *Constitutional Submission Regarding Admissibility (Constitutionality) of Provisions of the Law of Ukraine “On Government Cleansing”* as of January 20, 2015, <http://www.ccu.gov.ua/sites/default/files/45.pdf> (accessed Dec. 4, 2018) (hereinafter — Constitutional Submissions).

Earlier in 2017 the Constitutional Court of Ukraine reviewed point 7 in paragraph 2 of Article 42 of the Law of Ukraine “On Higher Education” according to which one cannot be elected or appointed, including to a position of temporary performer of duties, to the post of head of a higher education institution if a person “has voted for dictatorial laws on January 16, 2014”.²¹⁵ The provision refers to the laws that limited the freedom of assembly.²¹⁶ However, the Constitutional Court has ruled that since there were numerous laws voted on January 16, 2014, the provision is unconstitutional. While some of the laws were later condemned, the very wording of the provision lacks legal certainty.²¹⁷ The Constitutional Court has also stressed that the principle of indemnification validly applies here — according to international principles and Article 80 of the Constitution of Ukraine, members of parliament are not liable for their expressions and decisions (votes) in the house.²¹⁸ Considering this ruling, the Ministry of Justice is concerned that a similar ruling on the Law of Ukraine “On Government Cleansing” will be rendered in the constitutional proceeding.²¹⁹

According to Professor Myroslava Bilak, the arguments within the three submissions can be divided into four categories: a) related to equal access to civil service jobs; b) correlation between limitations of rights and freedoms with international standards; c) liability of officials that are barred from taking certain positions and d) procedural guarantees of defense of persons that fall under the lustration procedure.²²⁰ It is also worth noting that submissions relate to the right to equal access to civil service jobs.²²¹ Despite the legitimacy of such argument, the proportionality and necessity of the interference with the mentioned right have to be considered. Professor Bilak advances the argument by stating that according to paragraph 4 of Article 5 of the Constitution of Ukraine, “no one shall usurp state

²¹⁵ Constitutional Court of Ukraine, Ruling no. 2-p/2017 as of December 20, 2017, <http://zakon.rada.gov.ua/laws/show/ru/v002p710-17> (accessed Dec. 4, 2018).

²¹⁶ Law of Ukraine 767-VII, *supra* note 77.

²¹⁷ Ruling no. 2-p/2017, *supra* note 135, paras. 2.3, 3.2.

²¹⁸ *Ibid.*, para. 3.

²¹⁹ Ministry of Justice of Ukraine, *Constitutional Court of Ukraine Prepares Grounds for Cancelling Lustration* (Letter as of January 29, 2018), <https://lustration.minjust.gov.ua/article/read/205> (accessed Dec. 4, 2018).

²²⁰ Myroslava Bilak, *The Law of Ukraine “On Government Cleansing” and the Determination of Its Disputable Provisions in the Context of Constitutional Submissions Currently Under Consideration of the Constitutional Court of Ukraine* (USAID Report on Contact AID – 121 – C – 11 – 00002) 8.

²²¹ Constitutional Submissions, *supra* note 134.

power”.²²² Prevention of this is exactly the purpose of the Law of Ukraine “On Government Cleansing”. In case of *Naidin v Romania*, the ECHR reiterated the principle of “democracy capable of defending itself”, supporting the necessity of lustration in a democratic society.²²³ The Court has also stated that the state is capable of regulating employment in civil service.²²⁴ The individuals are not limited in their ability to occupy other positions, for instance, in the private sector, despite differential treatment.²²⁵ As the ECHR noted, “a democratic State had a legitimate interest in requiring civil servants to show loyalty to the constitutional principles on which the State was founded”.²²⁶ Conclusively, Myroslava Bilak in her USAID report praises all the aspects of lustration legislation except for the following two: a) the length of lustration has to be clearly defined and justified, and based on objective characteristics such as the duration of taking office, professional skills, and individual peculiarities of former involvement with activities triggering lustration²²⁷ and b) the dual responsibility of judges under the Law of Ukraine “On Government Cleansing” and the Law of Ukraine “On the Restoration of Trust in the Judiciary of Ukraine”.²²⁸ It is interesting how subjects, authorized to file constitutional submissions, invoke a discrepancy of national legislation with international principles only in cases when such provisions are of adverse consequence for them. The problem is, the Constitutional Court of Ukraine has power to render such provisions unconstitutional. Considering the fact that judges of the Constitutional Court are themselves subject to lustration checks,²²⁹ this may be something they will lean towards. It is possible in case the court employs a general European approach to lustration and standards in Resolution 1096 and Guidelines verbatim and disregards the uniqueness of Ukraine’s situation. If the provisions at hand are rendered unconstitutional, this potentially can undermine the whole lustration process, which can be threatening to Ukraine’s state-building and democracy.

²²² Bilak, *supra* note 140, 14-15.

²²³ *Naidin v Romania*, *supra* note 115, § 47, 49.

²²⁴ *Ibid.*

²²⁵ *Ibid.*

²²⁶ *Ibid.*

²²⁷ Bilak, *supra* note 140, 22-24.

²²⁸ *Id.*, 30-32.

²²⁹ Law of Ukraine “On Government Cleansing”, *supra* note 93, art. 3.

As of now, the opposition against lustration laws in Ukraine is still radical. First, after the Venice Commission report, four amendments were proposed in the form of draft laws. They introduce necessary changes such as limiting lustration to those who were over 18 years old at the time when lustration began, introducing the principle of proportionality into the law and some others.²³⁰ However, the draft laws in question have never been voted on and turned into laws.²³¹ At the same time, Ukraine attempted to establish an independent institution that would deal with monitoring and controlling the lustration process. This was in line with recommendations of the Venice Commission that the lustration process cannot be decentralized due to the high risk of occurrence of corruptive practices. Currently, the head of an agency is responsible for conducting checks and dismissing persons subject to lustration. The draft law no. 2040 as of February 5, 2015 introduced the National Lustration Committee appointed by the President of Ukraine. It was, however, deferred for the following reasons: a) the President of Ukraine cannot have duties that are not prescribed by the Constitution of Ukraine; b) the President of Ukraine has no power of allocating the budget for such agency and c) the National Lustration Committee is not an agency prescribed by the Constitution of Ukraine.²³² Clearly, the attempt did not succeed because the procedure itself was flawed. The agency dealing with lustration cannot be appointed by the head of state — this violates the principle of checks and balances. It is the recommendation of the thesis that the centralized body dealing with lustration has to be elected for a reasonable term following the procedure involving various bodies from all branches of government and taking place under civil control. As of now, the Law of Ukraine “On Government Cleansing” still has deficiencies as the amendments proposed by the Venice Commission have not been implemented.

Second, the radical opposition to lustration can be seen from the empirical data on lustration. The registry maintained by the Department of Lustration in the Ministry of Justice shows that there are currently 98 484 individuals applying or that are

²³⁰ Final Opinion, *supra* note 107, 12.

²³¹ Draft laws tagged “On Government Cleansing” including recommendations from the Venice Commission have not been voted for as of late 2018, Official Website of the Verkhovna Rada (Draft Laws Section), http://w1.c1.rada.gov.ua/pls/zweb2/webproc2_5_1_J?ses=10009&num_s=2&num=&date1=&date2=&name_zp=%EF%F0%EE+%EE%F7%E8%F9%E5%ED%ED%FF+%E2%EB%E0%E4%E8&out_type=&id= (accessed Dec. 4, 2018).

²³² Report of the Committee of the Verkhovna Rada of Ukraine on the Draft Law of Ukraine “On Making Amendments to the Law of Ukraine “On Government Cleansing” and Other Legislative Acts” no. 2040 as of January 27, 2016.

appointed to positions and 314 398 individuals in office that are undergoing lustration checks as of December 2018.²³³ However, according to the unified registry of the Ministry of Justice there are 927 individuals that underwent the lustration procedure.²³⁴ The registry of persons subject to lustration maintained by the Civil Lustration Committee, a non-governmental body that provides civil overseeing of lustration process,²³⁵ consists of 2 686 high-ranked officials that have not been lustrated yet. It can be seen that the process is slow and fairly inefficient.²³⁶ The reasons are clear — it is not that the procedure prescribed by the law is in itself inefficient but rather that there is an opposition in a form of misuse and abuse of law that allows such individuals to avoid checks and dismissal. “Deutsche Welle” has recently published an article where main schemes of avoidance are listed, referring to journalist investigations of civil initiatives “Skhema” and “Slidstvo.info”.²³⁷ First, individuals could dispute the dismissal in court.²³⁸ There currently are more than a thousand pending cases of such nature.²³⁹ Most of them are now temporarily suspended until the Constitutional Court of Ukraine rules on lustration laws constitutionality.²⁴⁰ Yet, some dismissals were disputed based on simple technicalities, such as the title of the position being slightly different from the one in the law.²⁴¹ Second, persons who participated in the defense of Ukraine as a part of the Anti-Terrorist Operation, are exempted from lustration.²⁴² This legal fact is confirmed by the “participant in military operations” status granted after participating in ATO.²⁴³ Many officials have abused this exemption — as an example, “Deutsche Welle” refers to one of the most notable cases, when 26

²³³ Ministry of Justice of Ukraine, *Consolidated List of Persons Currently Undergoing Background Checks* (Government Cleansing in Ukraine Website 2018), <https://lustration.minjust.gov.ua/main/checking> (accessed Dec. 5, 2018).

²³⁴ Ministry of Justice of Ukraine, *Unified State Registry of Persons to Whom the Provisions of the Law of Ukraine “On Government Cleansing” Were Applied* (Government Cleansing in Ukraine Website 2018), <https://lustration.minjust.gov.ua/register> (accessed Dec. 5, 2018).

²³⁵ Civil Lustration Committee, *What is the Civil Lustration Committee?* (LKU 2018), <https://lku.org.ua/about> (accessed Dec. 5, 2018).

²³⁶ Civil Lustration Committee, *Registry of Persons to Whom Lustration Applies* (LKU 2018), <https://registry.lku.org.ua/dashboard> (accessed Dec. 5, 2018).

²³⁷ Azad Safarov, *Short-of-Lustration Officials or Top 10 Ways to Avoid Lustration* (DW.com 2018), <https://www.dw.com/uk/недолюстровані-чиновники-або-топ-способи-уникнути-люстрації/a-44947553> (accessed Dec. 5, 2018).

²³⁸ *Ibid.*, also the Unified State Registry of Court Decisions currently has information on pending court decisions related to dismissals.

²³⁹ *Ibid.*

²⁴⁰ *Ibid.*

²⁴¹ *Ibid.*

²⁴² Law of Ukraine “On Government Cleansing”, *supra* note 93, art. 1.

²⁴³ Law of Ukraine “On the Status of Veterans of War, Guarantees of Their Social Protection” 3551-XII as of October 22, 1993 (amended as of July 25, 2018) art. 5-6.

prosecutors from the Donetsk region received the “participant in military operations” status to get exempted from lustration.²⁴⁴ Third, the President of Ukraine has powers to waive lustration procedure from officials whose performance of duties is critical for the national defense of Ukraine.²⁴⁵ While this applies only to the higher officials in military, some individuals involved in internal affairs have also been granted the waiver.²⁴⁶ Finally, considering the fact that the head of the agency is responsible for checks and initiation of lustration procedure, the Civil Lustration Committee reports that many heads “cover” for their employees and withhold the fact that such employees are subject to lustration, or transfer them to positions that are not subject to lustration.²⁴⁷

By looking at the abovementioned examples of avoiding the procedure and abusing law, one can come to a conclusion that deficiencies in lustration laws are unrelated to their implementation. The alleged violations of rights and freedoms, and departures from European standards on lustration are not the only case. It is the implementation and technicalities that officials invoke when opposing the law. Some of the provisions that were added to increase the roster of those who are exempted from lustration, perhaps initially designed to achieve a good goal, ended up being abused and opened up ways for corruptive schemes. While there is little doubt that officials would oppose such legislation as it forces them to leave their jobs, it is also expected its legitimate aim of refreshing the government apparatus will be achieved. Despite this, as of now, the procedural violations during the implementation of such laws interfere with reaching the set objective and make it uncertain whether it will be fully attained at all.

1.3. Constitutional rulings regarding lustration laws in Poland and Matyjek v. Poland (ECHR) as examples for further developments in Ukraine

Poland has a worthwhile to examine experience with lustration. The country underwent a different type of this process, the one Roman David calls

²⁴⁴ Safarov, *supra* note 159.

²⁴⁵ Law of Ukraine “On Government Cleansing”, *supra* note 93, art. 1.

²⁴⁶ Safarov, *supra* note 159.

²⁴⁷ USAID Report 2017, *supra* note 92, 57-67.

“reconciliatory”.²⁴⁸ First attempts to initiate lustration, though unsuccessful, took place in 1992-1993 with MPs’ resolution in the lower house of Poland’s parliament — Sejm. Yet, it was not until 1997 that the new law emerged. It introduced a truly “reconciliatory” procedure — current officials and candidates into office that were born prior to 1972 had to submit an affidavit revealing their former activities and/or employment with secret service that operated during Communist times. In case they revealed their cooperation truthfully, no sanctions were imposed, except for civil condemnation. In case information declared was false or incomplete, such persons were prohibited from taking public office for ten years. The categories that fell under the law were the president, members of parliament, judges, prosecutors and other high-ranked officials. The lustration court was appointed as a body to hear cases that disputed dismissals.²⁴⁹

In 2006 amendments were proposed, introducing the Institute of National Remembrance as the key actor in lustration, overseeing lustration declarations through its Vetting Office, and opening the secret materials and documents that contain information about former activities of officials.²⁵⁰ In 2007 the law was further amended, extending its scope to cover persons such as journalists, scientists, scholars, tax advisers and auditors, heads of the listed firms, and school directors.²⁵¹ Some of the provisions were brought before the Constitutional Tribunal of Poland and struck down as unconstitutional in 2007.²⁵² It differs from Ukraine’s approach as it was invoked earlier, therefore, there were no objections to the temporal aspect (to the first lustration law). The law in Poland also does not authorize automatic dismissals —only those persons could be dismissed who provided false arguments.²⁵³ Research of the Institute of National Remembrance (Instytut Pamięci Narodowej — IPN) serves in this regard as a clarification of the validity of facts in declarations.²⁵⁴ Although, since 2007 there

²⁴⁸ Roman David, *Lustration and Transitional Justice Personnel Systems in the Czech Republic, Hungary, and Poland* (University of Pennsylvania Press 2011) 10.

²⁴⁹ Lustration Act of 1997 (Poland) no. 70 as of April 11, 1997.

²⁵⁰ Hannah Suchocka, *Report “Lustration: Experience of Poland”* (Conference on Past and Present-Day Lustration: Similarities, Differences, Applicable Standards, Venice Commission & The Institute of International Relations Prague 2015) 7.

²⁵¹ *Ibid.*

²⁵² Constitutional Tribunal of Poland, Ruling K 2/07 as of May 11, 2007, <http://trybunal.gov.pl/postepowanie-i-orzeczenia/wyroki/art/5101-lustracja/> (accessed Dec. 7, 2018).

²⁵³ Suchocka, *supra* note 171, 7.

²⁵⁴ *Ibid.*

are almost no sources that cover recent developments in lustration, most of them arguing that after 2007 the role of the IPN became “unclear”, the IPN still submits catalogs with disclosed secret materials, renders decisions on lustrated individuals and represents the IPN in district courts when dismissals are disputed by officials.

The Polish experience can serve as a valid example for Ukraine in terms of the 2007 ruling of its Constitutional Tribunal (CT). In this ruling the CT reviewed the following arguments: a) collective liability; b) presumption of guilt; c) the scope of individuals subject to lustration being too broad; d) personal data issue regarding published catalogs and e) general incompatibility with international standards, Resolution 1096 in particular.²⁵⁵ Such arguments are somewhat similar to what Ukraine’s Constitutional Court is reviewing in consolidated submissions from the Supreme Court of Ukraine and the group of 47 Members of the Verkhovna Rada. First, the CT had to avoid objections against possible impartiality by removing two judges from the panel that were believed to be associated with the Communist secret service.²⁵⁶ Considering the fact that the Constitutional Court judges in Ukraine are subject to lustration, similar procedure is desirable. This point is supported by Myroslava Bilak in her report.²⁵⁷ Second, the ruling rendered provisions regarding persons holding non-public positions unconstitutional.²⁵⁸ This has no implications for Ukraine as the Ukrainian law does not require subjects holding non-public positions to undergo checks or be dismissed. Third, the CT stated that lustration has to apply only to persons that were actually involved in certain activities that violated human rights or contributed to violations by ordering such activities.²⁵⁹ Such activities must be explicitly defined.

While Marek Safjan states that there are different types of “collaborators” of the regime, including those that later willfully quit and became dissidents,²⁶⁰ Roman David disagrees by stating that such persons still contributed to the regime in a certain way and cannot be changed, even if years passed — David brings Leonid Kuchma as

²⁵⁵ Ruling K 2/07, *supra* note 173.

²⁵⁶ Suchocka, *supra* note 171, 8.

²⁵⁷ Bilak, *supra* note 140, 41.

²⁵⁸ Ruling K 2/07, *supra* note 173.

²⁵⁹ *Ibid.*

²⁶⁰ Marek Safjan, *Transitional Justice: The Polish Example, the Case of Lustration* (Vol.1 EJLS No. 2 2007) 8-9.

an example, Leonid Kuchma was a Communist Party member in 1990s and in 2014 was participating in Minsk negotiations with Russia regarding the conflict in Eastern Ukraine.²⁶¹ This is a debatable topic but is still a valid argument that can be used to undermine the current lustration law — it is not up to the European standards of lustration if lustration applies to a person for a mere fact of participating in a certain organization.

The case of *Matyjek v Poland* before the ECHR is another example for Ukraine to consider. In this case the applicant argued that current legislation in Poland did not award him the right to a fair trial when his declaration was disputed in court.²⁶² The ECHR has concluded that the classified nature of documents required for him to prepare his defense position “placed an unrealistic burden on the applicant in practice and did not respect the principle of equality of arms”, leading to the violation the right to a fair trial within the meaning of Article 6 of the European Convention on Human Rights.²⁶³ This case’s admissibility decision has also established that lustration cases are subject to the right to a fair trial within the meaning of Article 6 and amount to “criminal charges” based on Engel criteria framework developed by the court.²⁶⁴

As mentioned earlier, Ukraine does not have a similar procedure, and the documents of the Communist regime are now in public access since 2015. Yet, this case is still objectively significant for Ukraine for as of now it is listed as the respondent state in 72 cases regarding lustration registered before the ECHR, five of which have already been communicated to the government to send its arguments and answers.²⁶⁵ In case they are accepted, the ECHR will utilize its former practice and will potentially treat lustration disputes in the context of the right to a fair trial. The context of the right to a fair trial has not been brought in the context of lustration in Ukraine yet. One of the reasons for this is the temporary suspension of the judgements due to delays in the proceedings before the Constitutional Court. However, there is a possibility that such delay can be found by the ECHR unreasonable because some of the cases have been

²⁶¹ David, *supra* note 110, 147.

²⁶² *Matyjek v Poland*, ECHR (Application no. 38184/03, Chamber Judgement of 24 September 2007) § 44-§ 46, <http://hudoc.echr.coe.int/eng?i=001-80219> (accessed Dec. 7, 2018).

²⁶³ *Id.*, § 63.

²⁶⁴ *Id.*, § 53.

²⁶⁵ *Bogutskyy v Ukraine*, ECHR (Application no. 22699/16 and 4 others, Communicated Case of 14 March 2018), <http://hudoc.echr.coe.int/eng?i=001-182201> (accessed Dec. 7, 2018).

pending before Ukrainian court for more than two years. In addition, as the Higher Administrative Court stated in 2015 in its codification of judicial practice regarding lustration cases, such practice is still in the process of formation.²⁶⁶ In conclusion, there is a risk that procedural irregularities and technicalities prescribed by lustration laws and laws regulating judicial procedure will be disputed and examined by the ECHR, which will entail legal consequences for Ukraine.

1.4. The legal analysis of decommunization and its implementation in Ukraine

It was noted earlier that some measures were taken in Ukraine to address the remnants of communism. In this context, decommunization as the process takes place. The very notion of decommunization derives from the scholarly works of 1990s, where the transition from the Communist regime to democracy in Europe was associated with measures that dealt with the past. Decommunization is a political rather than legal term. Some countries dealt with the repercussions of communism by taking steps that did not include prohibition of the Communist party or the Communist ideology, such as Germany. According to Yoder, decommunization is a “political cleansing”, a process that deals with getting rid of Communist state establishments, culture, and psychology.²⁶⁷ This is quite a broad definition. The dispute here is over whether to consider decommunization through a wide approach methodology or treat it as a narrow concept. The former would include measures to the extent of including property laws, lustration, and prosecution of individuals that contributed to widespread human rights violations during the Communist regime, into decommunization. This approach deserves attention as it treats such measures as single state policy or a fairly wide and systematic transitional justice measure. It also allows for considering a wide array of different measures that occurred in Central and Eastern European and Baltic countries and compare them in their conjunction. For instance, such approach would be preferable in comparing Russia’s attempts of decommunization to a more effective

²⁶⁶ Decision of the Plenum of the Higher Administrative Court of Ukraine no. 16 as of September 18, 2015, http://www.vasu.gov.ua/plenum/post_plenum/postanova_plenumu_16_2015/ (accessed Dec. 4, 2018).

²⁶⁷ Jennifer A. Yoder, *From East Germans to Germans?: The New PostCommunist Elites* (Durham, NC, and London: Duke University Press 1999) 90.

package of consolidated acts that occurred in Estonia, Latvia, and Lithuania. In this regard, Russia has contributed to decommunization in a limited manner. It merely renamed several cities, while disregarding others.²⁶⁸ The country has banned the Communist Party of the Soviet Union, though allowed further operation of the Communist Party of Russia.²⁶⁹ Russia has established a small number of monuments in memory of those who suffered from atrocities of Stalin. The controversial monument “The Wall of Grief” was established in 2017 by the government. Ironically, this government openly supports similar political repressions as committed during the Communist regime.²⁷⁰

Considering the fact that decommunization in Ukraine and beyond usually refers to a specific roster of laws adopted as a package in 2015, a narrow approach would be preferable. These laws relate, in particular, to establishing legal grounds for treating opposition to communism as “honorable”, making archives of secret service and other Soviet Union bodies open to the public, and banning Communist symbols or other representation of Communist ideology. This would allow for comparing Ukraine’s experience of decommunization to the success of Baltic countries and struggles of some others, such as Hungary or Poland. Therefore, for the purposes of this research, decommunization will be defined as the procedure aimed at changing the attitude of citizens regarding the Communist regime and condemnation of its atrocities and human rights violations. This definition is also supported by explanatory notes to the draft laws on decommunization in Ukraine, and by their preambles that state a similar goal of such legislation. For instance, the explanatory note to the draft law “On the Condemnation of the Communist and National Socialist (Nazi) Regimes, and Prohibition of Propaganda of Their Symbols” states that acts committed under the Communist regime possessed necessary characteristics of crimes against humanity, genocide, war crimes, and were justified by the regime through the theory of class

²⁶⁸ Vitaliy Shevchenko, *Goodbye, Lenin: Ukraine Moves to Ban Communist Symbols* (BBC Monitoring 2015), <https://www.bbc.com/news/world-europe-32267075> (accessed Dec. 11, 2018).

²⁶⁹ *Ibid.*

²⁷⁰ RFE/RL’s Russian Service, *Amid Controversy, Putin Unveils Monument to Victims of Political Repression* (RadioFreeEurope/RadioLiberty 2017), <https://www.rferl.org/a/russia-stalin-putin-soviet-repression-remembrance-day-moscow/28823208.html> (accessed Dec. 11, 2018).

conflict and the principle of dictatorship of proletariat.²⁷¹ Accordingly, its preamble states that the purpose of the law is to “condemn the Communist and National Socialist (Nazi) totalitarian regimes, define legal grounds for prohibiting propaganda of their symbols and establish the procedure for liquidating symbols of the Communist totalitarian regime”.²⁷²

Some background on the actual laws should be provided. Decommunization attempts existed prior to the Euromaidan and events of 2014. In the 1990s, classes on Communist ideology, the history of the Communist Party were removed from school programs.²⁷³ In 1991 the monument to the Great October Socialist Revolution on Independence Square in Kyiv was torn down based the decision of the Kyiv City Council.²⁷⁴ In 2009 the former President Viktor Yushchenko rendered a decree on condemnation of the Holodomor (the man-made famine in Soviet Ukraine) and measures related to commemorations.²⁷⁵ Based on the decree, many monuments dedicated to officials who contributed to the Holodomor were removed, however, the process was halted during the Yanukovych presidency. It can be concluded that these measures did not have systematic character and cannot be referred to as “decommunization” in the sense of widespread state policy. In any case, they did not reach their expected goal. In 2015 decommunization laws were passed under the accelerated procedure, also called “decommunization package”. Four laws implemented in total: a) the Law of Ukraine “On the Condemnation of the Communist and National Socialist (Nazi) Regimes, and Prohibition of Propaganda of Their Symbols”; b) the Law of Ukraine “On the Legal Status and Honoring the Memory of Fighters for Ukraine’s Independence in the Twentieth Century”; c) the Law of Ukraine “On Perpetuation of the Victory Over Nazism in the Second World War of 1939-

²⁷¹ Explanatory Note as of April 3, 2015 to the draft law “On the Condemnation of the Communist and National Socialist (Nazi) Regimes, and Prohibition of Propaganda of Their Symbols” no. 2558 as of April 6, 2015, 1-2, http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=54670.

²⁷² Law of Ukraine “On the Condemnation of the Communist and National Socialist (Nazi) Regimes, and Prohibition of Propaganda of Their Symbols” 317-VIII as of April 9, 2015 (amended as of May 5, 2018) preamble.

²⁷³ Alla Kyrydon, *Report: Decommunization in Ukraine: Nature and Substantive Characteristics of the Process* (Round Table “Decommunization Processes in the lower-Danube Euroregion: Measures, Experience, Results” 2017).

²⁷⁴ Pavlo Solodko, *The History of Lenin’s Monument in Kyiv* (Historical Truth (Istorychna Pravda) 2013), <http://www.istpravda.com.ua/articles/2013/12/9/140323/> (accessed Dec. 11, 2018).

²⁷⁵ Decree of the President of Ukraine no. 432/2009.

1945”; and d) “On Access to the Archives of Repressive Agencies of the Communist Totalitarian Regime of 1917-1991”.

The first law was based on the principles established in international documents, for instance, Resolution 1096. It recognized Communist and Nazi regimes as criminal regimes. The law also created new crime based on the Communist or Nazi regimes propaganda and use of their symbols. The Communist symbols are defined in point 4 of paragraph 1 of Article 1 of the law. They include any depiction of state flags, crests or other symbols of former Soviet republics, anthems, symbol of a five-pointed star and a “hammer and sickle” symbol, monuments dedicated to higher officials of the Soviet Union, as well as any city, street and other names that derive from names of higher officials of the Soviet Union or events related to activities of the Communist Party. The Nazi symbols are defined in the following point 5 of paragraph 1 of Article 1 of the law. They include symbols of the National Socialist Party of Germany, state flag and crest of Nazi Germany, name of the National Socialist Party of Germany and any related imagery, signs or depictions. There are certain exceptions to such prohibition, such as using the symbols on official documents rendered prior to 1991; in museum exhibitions, in libraries, in works of art created before the law was enacted; in scientific research, on state and jubilee awards, gravestones and others. The law makes amendments to other laws, including the Criminal Code of Ukraine, adding Article 436-1 that makes it a crime to produce, distribute or publicly use prohibited symbols with the sanction of up to 5 years of deprivation of liberty in a non-qualified provision, and the Law of Ukraine “On Political Parties” that prohibits parties that utilize prohibited symbols. While the law clearly condemns both regimes, it puts an especial emphasis on the Communist regime. This fact is supported by a wider range of symbols that are prohibited and prohibition of political parties that use Communist symbols, clearly aiming at the Communist Party of Ukraine).²⁷⁶ While Nazi regime and its symbols are prohibited, the opposition against the law is particularly strong with regard to its decommunization provisions (to be reviewed in detail later). This can be historically justified as there was no Nazi regime present since the end of the World War II. The political ideology of Nazism was condemned strongly by the international

²⁷⁶ Law of Ukraine 317-VIII, *supra* note 193.

community and by the Soviet Union. As of now, prohibition of the Nazi regime serves a preventative role.

The second law, as stated by the Ukrainian Institute of National Remembrance (hereinafter — UINR), “honors the fighters for Ukraine’s freedom, repays the moral debt”.²⁷⁷ The law officially recognizes Ukrainian liberation movements, their fight for independence and interruption of this fight by years of Soviet rule is, and defines the state policy regarding the commemoration of the fighters. The law itself has a declaratory nature, though it can still be analyzed in light of the three other laws. It introduces an ideological justification for the prohibition of Communist symbols as well as opening of archives.²⁷⁸ It can be argued that such law would be better implemented were it a declaratory document such as an official letter or any other type of document that does not have a purely legal nature. This position is supported by the necessity to implement laws and the principle of legal certainty that this law does not satisfy. On the other hand, the law contains provisions of an imperative nature that Ukraine can benefit from, i.e. by recognizing the Ukrainian Republic of 1918 the first instance of restoration of Ukraine’s independence. There is also a risk of the law in question bringing division amongst Ukrainian citizens as it, among other things, endorses heroic acts of Organization of Ukrainian Nationalists (OUN) and the Ukrainian Insurgency Army (UPA).

The third law is of reconciliatory nature. It also aims at departing from the Soviet perception on the Second World War. Since this law came into force, Ukraine shall only use the term “Second World War of 1939-1945” instead of the Soviet approach that recognized the outcome of war as “great victory” and used the term “Great Patriotic War of 1941-1945”. The position on war as the series of events where many peoples suffered and the approach with remembrance and commemoration elements are introduced. The law has certain norms of declaratory nature, too. For instance, paragraph 1 of Article 1 of the law states that “respectful attitude to the victory over Nazism in the Second World War of 1939-1945, the war veterans, the participants in the Ukrainian liberation movement, and victims of Nazism is *a sacred duty* of the

²⁷⁷ Law of Ukraine “On the Legal Status and Honoring the Memory of Fighters for Ukraine’s Independence in the Twentieth Century” 314-VIII as of April 9, 2015, preamble.

²⁷⁸ Ibid.

state and citizens of Ukraine” (italics added).²⁷⁹ There is surely no legal definition of what “sacred duty” is. Due to this, there objectively is neither an obligation nor a particular duty imposed by such provision. Historically, such duty meant acting or not acting with disrespect towards war events and participants of the Second World War. The functional method also applies to interpreting this provision in conjunction with other articles of the law in question. Therefore, it logically follows that such duty is expressed in, for instance, preventing desecration of monuments of the Second World War, their damaging or destruction.²⁸⁰

The fourth law is somewhat similar to what other countries have enacted, for instance, Poland. As it was stated by the media, that law is more practical in its implementation.²⁸¹ The law allows for opening archives that contain information that used to be classified. Some key aspects include: a) designation of obligation to digitize and provide an online access to the archive documents; b) creation of independent consolidated archive of all repressive Communist agencies; c) European principles of access and sharing information from archives are introduced.²⁸² The key principle invoked is that such information shall be publicly available as it relates to certain facts in the past that make it “socially necessary information”, along with information about the environment, disasters etc.²⁸³ While the law is significant in terms of bringing reconciliation and conscious knowledge of the past, it also raises issues regarding personal data contained in such archives. The sensitive information does not enjoy automatic protection. There is only a procedure in Article 9 of the law. It allows for victims of repressive authorities to limit access to archived information for a period of not more than 25 years. In case the information is already made publicly available, such persons cannot request the limitation of access.²⁸⁴

²⁷⁹ Law of Ukraine “On Perpetuation of the Victory Over Nazism in the Second World War of 1939-1945” 315-VIII as of April 9, 2015, art. 1(1)..

²⁸⁰ Id., art. 4(7).

²⁸¹ Vladyslav Berkovskyi, *A Very Open Archive* (Chasopys “Krytyka” 2015), <https://krytyka.com/ua/solutions/opinions/duzhe-vidkrytyy-arkhiv> (accessed Dec. 11, 2018).

²⁸² Ukrainian Institute of National Remembrance, *Decommunization* (Official Website of the UINR 2015), <http://www.memory.gov.ua/page/dekomunizatsiya-0> (accessed Dec. 11, 2018).

²⁸³ Law of Ukraine “On Access to the Archives of Repressive Agencies of the Communist Totalitarian Regime of 1917-1991” 316-VIII as of April 9, 2015.

²⁸⁴ Id., art. 9.

The UINR is the body that monitors and executes certain aspect of decommunization, such as working with archives' accessibility to the public.²⁸⁵ The head of the UINR Volodymyr Viatrovyh is a co-author of the “decommunization package”. He stated that the necessity of such laws is imminent.²⁸⁶ He elaborates by contending that the prior absence of such laws has contributed to Yanukovych’s usurpation of power.²⁸⁷ It can be agreed upon that one of the reasons for the regime of Viktor Yanukovych to be established and last was the inability and/or unwillingness to implement transitional justice mechanisms that would distant Ukraine from its past, connected the state to Russia through the ideological bond. Mr. Viatrovyh also believes that many individuals who supported Communist values have also contributed to the establishment of the so-called “DPR” and “LPR” formations in Eastern Ukraine.²⁸⁸ Therefore, such laws are the matter not only of social policy, but also of the defense policy.²⁸⁹ Their implementation received a twofold reaction. Decommunization laws were being effectively implemented only at the very beginning. The prohibition of symbols burst in the first two years, when the Communist Party of Ukraine was banned for using them. Such laws have received a portion of support, but also an even larger criticism nationwide, and internationally. Foreign and Ukraininan scholars prepared an open letter along with other Ukrainian and Canadian scholars, requesting President Poroshenko to abstain from signing the laws. In the criticism they have largely relied on violation of the freedom of speech, and division of Ukraine as a probable effect of the laws.²⁹⁰ In 2015 the Venice Commission has also criticized these laws (this will be discussed in detail later). They are also currently under review in the Constitutional Court of Ukraine. According to Oxana Shevel, decommunization laws were opposed by the Opposition Bloc and Communist party

²⁸⁵ Decree of the Cabinet of Ministers of Ukraine “On the Ukrainian Institute of National Remembrance” no. 684 as of November 12, 2014, para. 3.

²⁸⁶ Volodymyr Viatrovyh, *Decommunization and Academic Discussion* (Chasopys “Krytyka” 2015), <https://krytyka.com/ua/solutions/opinions/dekomunizatsiya-i-akademichna-dyskusiya> (accessed Dec. 11, 2018).

²⁸⁷ Ibid.

²⁸⁸ Ibid.

²⁸⁹ Ibid.

²⁹⁰ David R. Marples et al., *Open Letter from Scholars and Experts on Ukraine Re. the So-Called "Anti-Communist Law"* (Chasopys “Krytyka” 2015), <https://krytyka.com/en/articles/open-letter-scholars-and-experts-ukraine-re-so-called-anti-Communist-law> (accessed Dec. 11, 2018).

leaders.²⁹¹ They stated that the laws at hand would cause large domestic divisions in Ukraine “by alienating the south and east from the rest of the nation, and that this would have potentially explosive consequences at a time of territorial conflict with Russia and economic crisis”.²⁹² Critics have also stated that the laws would prevent public debate and historical study as they ban expression of any “wrong” opinion about the Communist period, Communist leaders as well as Ukrainian liberation movements.²⁹³

However, despite the fact that that decommunization was met with an opposition in Ukraine,²⁹⁴ the measures regarding renaming toponymic objects was fairly effective. According to the annual report by the UINR 51 493 toponymic objects were renamed as of December 2016, including major cities of Dnipropetrovsk, changed to Dnipro, and Kirovohrad, renamed to Kropyvnytskyi. Also 2 389 monuments related to the Communist regime were removed.²⁹⁵ The Unified State Registry of Court Decisions indicates that currently there are only 7 cases where the court convicted persons of producing, distributing or publicly using prohibited symbols. Only one verdict convicted a person and punished for 6 years of deprivation of liberty on the basis that there was a breach not only of Article 436-1 of the Criminal Code but also of the prohibition of the desecration of the Ukrainian national flag.²⁹⁶ Others were either released on probation or the punishment was reduced below the level of sanction in Article 436-1 (they pleaded guilty and assisted the investigation).²⁹⁷

Oxana Shevel brings an interesting observation: while decommunization is actively and heatedly discussed in the media and at local council meetings, the protest has never risen to any significant actions and mainly remained a rhetoric, except for the pending case before the Constitutional Court of Ukraine.²⁹⁸ At the same time, she

²⁹¹ Oxana Shevel, *Decommunization in Post-Euromaidan Ukraine: Law and Practice* (PONARS Eurasia Policy Memo No. January 2016) 2.

²⁹² *Ibid.*

²⁹³ *Ibid.*

²⁹⁴ Yuriy Kotlyar, *Decommunization of Ukraine in the Context of Generation Change* (Danubius 35/2017, issue 3 2017) 102.

²⁹⁵ Ukrainian Institute of National Remembrance, *Annual Report on Decommunization* as of December, 2016, <http://www.memory.gov.ua/news/ponad-50-tisyach-vulits-zminili-nazvi-vprodovzh-2016-roku> (accessed Dec. 11, 2018).

²⁹⁶ Verdict of Dvorichanskyi Regional Court of Kharkivska oblast 618/473/15-к as of August 26, 2015, <http://reyestr.court.gov.ua/Review/49093648> (accessed Dec. 11, 2018).

²⁹⁷ See for example the verdict of Prymorskyi Regional Court of Odesa 522/8678/18 as of May 30, 2018, <http://reyestr.court.gov.ua/Review/74417778> (accessed Dec. 11, 2018).

²⁹⁸ Shevel, *supra* note 212, 2-3.

concludes that there is no widespread support for decommunization in the society.²⁹⁹ Insignificance of the opposition is partially explained by the shift in public opinion that occurred since the times of Yanukovych presidency. People are now more supportive of cutting ties with the Communist era and more receptive to European values, EU and NATO memberships.³⁰⁰ The second factor is the shift of political geography. There are far less toponymic objects now in areas controlled by Ukraine because of the illegal annexation and war in Eastern Ukraine.³⁰¹ The last factor that Oxana Shevel observes is the nature of opposition. It is usually a non-ideological opposition, which means that people criticize laws not on the basis of prohibition of ideology, but on the basis of financial costs of decommunization.³⁰² This renders decommunization a non-priority measure for citizens in Ukraine as they believe that financing war, making substantial reforms, including fighting corruption, must be a priority.³⁰³

On May 30, 2017 a group of 46 Members of the Verkhovna Rada of Ukraine filed a submission before the Constitutional Court of Ukraine. They only dispute the Law of Ukraine “On the Condemnation of the Communist and National Socialist (Nazi) Regimes, and Prohibition of Propaganda of Their Symbols”. The submission aims to prove that decommunization violates basic rights enshrined in the Constitution of Ukraine as well as principles of international conventions.³⁰⁴ It concerns the freedom of expression, freedom of association, prohibition of censorship, as well as the rule of law in general.³⁰⁵ The applicants state that because a definition of “Communist symbols” has a non-exhaustive wording, such as “flags, symbols, images *or other attributes* reproducing the combination of a sickle and a hammer, a sickle, a hammer and a five-pointed star, a plough, a hammer and a five-pointed star” (*italics added*).³⁰⁶ The submission states it violates the principle of legal certainty and individuals cannot

²⁹⁹ Ibid.

³⁰⁰ Ibid.

³⁰¹ Ibid.

³⁰² Ibid.

³⁰³ Ibid.

³⁰⁴ 46 Members of the Verkhovna Rada, *Constitutional Submission Regarding Admissibility (Constitutionality) of Provisions of the Law of Ukraine “On the Condemnation of the Communist and National Socialist (Nazi) Regimes, and Prohibition of Propaganda of Their Symbols”* as of May 30, 2017, http://www.ccu.gov.ua/sites/default/files/3_1919.pdf (accessed Dec. 11, 2018).

³⁰⁵ Ibid.

³⁰⁶ Ibid.

clearly understand and foresee how their conducts will correlate with the law.³⁰⁷ The submission also relates to the prohibition of parties that promote the Communist regime and/or use of Communist symbols. Notably, the MPs who filed the submission are mostly represented by the Opposition Bloc members, formerly Party of Regions. Similarly, to the constitutional submission on lustration, the cohort of persons from the opposition that supported the previous government invoked international standards for transitional justice measures in this case, too. Despite this, considering the overall nature of the past actions of the members of the Opposition Bloc, it is highly unlikely that the reason for filing a submission is to protect vital human rights.

The joint interim opinion of the Venice Commission and OSCE/ODIHR is worth mentioning in this context. The opinion mostly criticizes the law, while praising only several of its provisions. The opinion “recognize[s] the right of Ukraine to ban or even criminalize the use of certain symbols of and propaganda for totalitarian regimes”, for similar legislation was enacted in Europe.³⁰⁸ The opinion also invokes requirements of the ECHR and other human rights instruments to criticize the law, just like in case with the law on lustration. Key problems with the law at hand include: a) its non-adherence to the three-fold test of legality, legitimacy and necessity in a democratic society; b) its very broad scope of application; and c) disproportionality of sanctions to the legitimate aim pursued.³⁰⁹ The opinion states that “Ukrainian authorities [should] follow a “multiperspective” approach to Ukraine’s history, that allows a shared vision of its past in order to promote social cohesion, peace and democracy”.³¹⁰

It is to the vision of this thesis to provide an alternative view on the law as well as to contribute to a discussion by providing certain arguments that might contradict the mentioned Venice Commission and OSCE/ODIHR opinion. It is clear that the law constitutes a limitation or interference with the freedom of expression (Article 10 ECHR), freedom of association (Article 11 ECHR), and electoral rights (Article 3

³⁰⁷ Ibid.

³⁰⁸ European Commission for Democracy Through Law (Venice Commission) and OSCE/ODIHR, *Interim Opinion on the Law of Ukraine “On the Condemnation of the Communist and National Socialist (Nazi) Regimes and Prohibition of Propaganda of Their Symbols* (Opinion no. 823/2015 (FOE-UKR/280/2015), adopted by the Venice Commission at its 105th Plenary Session, 18-19 December 2015), 4, [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2015\)041-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2015)041-e) (accessed Dec. 11, 2018).

³⁰⁹ Ibid.

³¹⁰ Ibid.

Protocol 1 ECHR) as stated in the opinion.³¹¹ The protection afforded by the freedom of expression extends not only to protection of ideas and information expressed, but also to the form in which they are conveyed.³¹² The margin of appreciation (a principle allowing for certain deviations in interpreting the ECHR Convention) is very narrow with regard to the freedom of speech.³¹³ Any limitation has to be convincingly justified.³¹⁴ Similar principles apply the freedom of association and electoral rights.

Hence, the first test is the legality test or whether the measure that interferes with the rights is prescribed by law. Law has to be accessible and foreseeable.³¹⁵ The law in question is accessible as it was duly published. The opinion is concerned with overly broad definitions of “symbols” that might not be understood and therefore, be foreseeable. However, when legal definitions are used, especially for the first time, there often are “grey areas”.³¹⁶ This doubt cannot in itself make a provision incompatible with European standards enshrined in the ECHR Convention if such provision becomes clear in the large majority of cases.³¹⁷ The symbols are defined and there is little doubt in the society what a five-point star is, or a hammer and a sickle are. Unfortunately, the judicial practice on this issue is still insignificant in Ukraine.

The second test is a test of legitimacy that establishes whether the means employed are proportionate to the legitimate aim pursued. The opinion of the Venice Commission and OSCE/ODIHR refers to the *Vajnai v Hungary* judgement, where the ECHR condemned a blanket prohibition of symbols as a form of expression.³¹⁸ Yet, the Government’s argument that such prohibition was proportionate to the aim prevention of disorder and the protection of the rights of others was accepted.³¹⁹ This is also the case for Ukraine, especially considering the fragility of the current situation and the war conflict in Eastern Ukraine the outcome of which is still uncertain. The

³¹¹ Id., 11-15.

³¹² *Oberschlick v Austria*, ECHR (Application no. 11662/85, Judgement of 23 May 1991) § 57, <http://hudoc.echr.coe.int/eng?i=001-57716> (accessed Dec. 11, 2018).

³¹³ Joint Interim Opinion, *supra* note 227, 13-15 (citing ECHR practice).

³¹⁴ Ibid.

³¹⁵ ECHR, *Guide on Article 7 of the European Convention on Human Rights* (CoE 2018), 11.

³¹⁶ *Kokkinakis v Greece*, ECHR (Application no. 14307/88, Chamber Judgement of 25 May 1993) § 40, <http://hudoc.echr.coe.int/eng?i=001-57827> (accessed Dec. 11, 2018).

³¹⁷ Ibid.

³¹⁸ *Vajnai v Hungary*, ECHR (Application no. 33629/06, Judgement of 8 October 2008) § 51, <http://hudoc.echr.coe.int/eng?i=001-87404> (accessed Dec. 11, 2018).

³¹⁹ Id., § 34.

time period that has passed in *Vajnai v Hungary* since the end of a dictatorship was not taken into account by the ECHR.

The third test is a test of necessity in a democratic society. To evaluate this, the ECHR uses a “pressing social need” criteria. The ECHR reiterated that States may justify limitations but only “hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court”.³²⁰ Here, the ECHR and the opinion go in sync by referring to the narrow margin of appreciation and high level of protection afforded to political speech. They also refer to the principle established in *Handyside v the UK*, later reiterated in other cases such as *Oberschlick v Austria* — the freedom of expression shall apply not only to favorable and inoffensive information but also to that which offends, shocks or disturbs due to its necessity in a democratic society based on pluralism, tolerance, and broad-mindedness.³²¹ This is where the Ukrainian decommunization law has a risk of falling short. The opinion criticizes the law for its necessity and urges to a political debate in accordance with international standards. However, the opinion disregards the fact that such practice is based on the practice of states that became stable democracies. In *Vajnai v Hungary* the ECHR stated that “(...) almost two decades have elapsed since Hungary’s transition to pluralism and the country has proved to be a stable democracy (...) Hungary has become a Member State of the European Union, after its full integration into the value system of the Council of Europe and the Convention. Moreover, there is no evidence to suggest that there is a real and present danger of any political movement or party restoring the Communist dictatorship. The Government have not shown the existence of such a threat prior to the enactment of the ban in question.”³²² Ukraine has not yet become a stable democracy and can still invoke the principle of “democracy capable of defending itself” to justify transitional justice measures such as decommunization. Considering the overall political, economic, and social instability in Ukraine, there is still present and imminent danger of a political movement or party gaining and usurping power. The risk is even higher as regards to an ideology that was once widely supported, such as communism. While some

³²⁰ *Id.*, § 43.

³²¹ *Oberschlick v Austria*, *supra* note 231, § 57.

³²² *Vajnai v Hungary*, *supra* note 237, § 32.

decommunization measures did not succeed (such as in Moldova), Lithuania and Latvia have successfully implemented decommunization laws prohibiting Communist parties as well as Communist symbols.

It should be stressed, that drawbacks to the decommunization mechanism introduced in Ukraine do exist. The law falls short when it comes to proportionality of measures. It introduces criminal liability and at the same time prohibits using symbols in works of art created after the law comes into effect and research materials except for when they do not result in propaganda of regimes of criminal nature. It remains uncertain as to how such materials will be evaluated. This also means that such symbols are not allowed in the media which is usually regarded as an area of higher protection of the freedom of expression according to European standards. Some journalists regard these laws as draconic because they use terms that are value judgments, such as “desecration of the memory of fighters for Ukraine’s independence in the XX century”, “denigration of the dignity of the Ukrainian people”.³²³ The law introduces criminal liability for acts that are not violent in their nature — this also causes concerns for the international community.³²⁴ Despite decommunization covering a wide range of social aspects with four laws, the one that prohibits Communist and Nazi symbols does not provide a direct nexus between the act of using Communist and/or Nazi symbols and propaganda of such regimes. Also, the temporal aspect of implementation plays a role. While Lithuania banned the Communist party in 1991,³²⁵ Ukraine’s attempt failed with the Constitutional Court rendering such decision unconstitutional, as demonstrated earlier. Finally, social division is an aspect that should be considered. The country is in the state of war partially because social unrest caused by the proposed reforms started to grow in the regions that were always flooded with the supporters of Russia. The number of toponymic symbols in Eastern and Southern Ukraine is much larger than in any other region.³²⁶ There is, thus, a high risk of such laws being criticized

³²³ Halya Coynash, “Decommunization” Laws: Deeply Divisive and Destined for Strasbourg (Chasopys “Krytyka” 2015), <https://krytyka.com/en/solutions/opinions/decommunization-laws-deeply-divisive-and-destined-strasbourg> (accessed Dec. 11, 2018).

³²⁴ Joint Interim Opinion, *supra* note 227, 15 (citing ECHR practice in *Murat Vural v Turkey*).

³²⁵ Deseret News, *Latvia, Lithuania Ban Communist Party* (1991), <https://www.deseretnews.com/article/179359/LATVIA-LITHUANIA-BAN-COMMUNIST-PARTY.html> (accessed Dec. 11, 2018).

³²⁶ *Annual Report on Decommunization*, *supra* note 215.

purely for their contribution to the division in the society. Some justification can be provided, stating that the necessity of such laws is imminent now and getting rid of the past should be the primary goal of the country. It is a vital step Ukraine has to take to ensure that internal and external conflicts are dealt with effectively.

1.5. International approach to Communist and Nazi regimes, experiences of Moldova and Lithuania

It was never a dispute that the Nazi regime must be condemned. This is partially a consequence of the Nuremberg Tribunal that established the totalitarian nature of such regime and all the crimes related to its presence. The very nature of Nazi regime is flawed as it is based on an ideology that suppresses masses and introduces concepts that are dangerous to humanity in general. On the contrary, there is still some debate as to whether the Communist regime is in itself a totalitarian one. It is clear that in the historical context communism as an ideology was largely exploited, not only in Europe but beyond — for instance, in Indonesia or currently in countries like People’s Republic of China and North Korea. In the United States, where the freedom of expression has a very broad scope and meaning, the Communist ideology is not considered a threat to the public order.³²⁷ However, it is worth mentioning that the United States did not have a historical experience of the Communist ideology taking over and regime being established. Therefore, another context should be taken when evaluating the Communist regime. Despite the lack of the courts’ judgements on the totalitarian nature of Communist regime, various legal instruments were invoked to establish this fact.

In particular, the Resolution 1096 establishes that the former Communist systems were totalitarian and often involved human rights violations — therefore, their heritage shall be dismantled, for instance, through means of lustration or decommunization.³²⁸ Another example is Resolution 1481 (2006), which states that the totalitarian Communist regimes were “characterised by massive violations of human

³²⁷ *Stromberg v. California*, SCOTUS, 283 U.S. 359 (1931).

³²⁸ Resolution 1096, *supra* note 97.

rights”.³²⁹ Despite this provision, the resolution also recognizes the fact that some European Communist parties contributed to achieving democracy.³³⁰ There are some other notable examples, such as resolution of the European Parliament as of 2 April 2009 on European conscience and totalitarianism. In general, the condemnation of the Communist regime is as strong as the Nazi one (in spite it not being unequivocal).

Foreign experience closely related to what Ukraine is experiencing at the moment was in Moldova in 2012. The Communist party was initially banned in 1991 but the ban was later lifted. The country introduced a brief decommunization law no. 192 in 2012. The law was aimed at prohibition of a “hammer and sickle” symbol as well as prohibition of propaganda of the Communist regime.³³¹ Instead of criminal liability, the law imposed an administrative fine up to around 200 euros for natural persons and up to around 750 euros for legal entities.³³² The law also amended the laws on political parties by prohibiting the use of symbols of the Communist regime as well as propaganda of such regime by political parties.³³³ It did not, however, require the renaming of toponymic objects or covered the issue of any other ideology. The latter can be explained by a separate law being in place to regulate the prohibition of extremist activities related to Nazi regime and symbols.³³⁴

The positive aspect of the law was that the exhaustive character of the list that included only one defined symbol of the Communist regime, namely, a “hammer and sickle” symbol. This would allow citizens to clearly distinguish symbols and their representation. Another aspect worth mentioning is the more lenient sanction for the acts committed. Considering the criticism of the joint opinion mentioned above, replacing criminal liability with administrative fine would be a proportionate measure with regard to the legitimate aim pursued. The major drawback of the law in Moldova was its limited scope of application. It did not apply to all symbols of the regime and therefore, its effectiveness could be disputed. The law also specifies any definitions

³²⁹ Parliamentary Assembly of the Council of Europe, *Need for International Condemnation of Crimes of Totalitarian Communist Regimes* (Resolution 1481, Doc. 10765, report of the Political Affairs Committee adopted on 25 January 2006).

³³⁰ *Ibid.*

³³¹ Law of Moldova no. 192 as of July 12, 2012, art. 1.

³³² *Id.*, art. 2.

³³³ *Id.*, art. 3.

³³⁴ Law of Moldova no. 54 as of February 21, 2003.

and merely introduced amendments to existing laws on political parties, freedom of expression, and administrative punishments. Perhaps the main difference from the Ukrainian law is the absence of exceptions to obligation under the law. Therefore, any use of Communist symbols is violating its provisions, regardless of whether their usage is for research purposes or in works of art.

Such discrepancies resulted in legal action before the Constitutional Court of Moldova in 2013. The Constitutional Court of Moldova applied European standards in reviewing the law. It ruled that there was an interference with several human rights. The interference was prescribed by law as it contained a specific and exhaustive list of prohibited symbols to be prohibited. Nonetheless, the court stated the definition of “totalitarian ideology” was unclear and insufficient. The interference was also proportionate to the legitimate aim pursued, namely, prevention of disorder, protection of civil order, rights and freedoms of others. However, the court stated that there was no necessity in such interference. An interesting argument was that a “hammer and sickle” symbol was used by the Communist Party since 1994, therefore associating it with a totalitarian regime that existed more than 20 years ago is not justified. Furthermore, in 2015 the law prohibiting Nazi symbols and regime was also rendered unconstitutional, based on similar principles.³³⁵

There is a note of disagreement with this decision. The decision applied European standards strictly, without considering the margin of appreciation a state has. In addition, the historical context was not taken into account. This does not mean that in that case the court had to go beyond its scope of review or violate international standards. Nevertheless, such standards are rather flexible when it comes to a state-specific context. Such dissent is also supported by the separate opinion of judge Tenase of the Constitutional Court of Moldova. He states that the problem of the Communist symbols cannot be reviewed *in abstractio* and the social and historical context play a great role.³³⁶ For more than 22 years Moldova was unsuccessful in battling the Communist past. Hence, the Communist Party of Moldova, regardless of it being a

³³⁵ Constitutional Court of Moldova, Ruling no. 12 as of June 4, 2016; Constitutional Court of Moldova, Ruling no. 28 as of November 23, 2015.

³³⁶ Ibid.

party that emerged in independent Moldova, is still a successor of the principles of the Soviet Communist party.³³⁷

The position outlined above is worth mentioning in the context of Ukraine as well. While international organizations such as the Venice Commission and OSCE/ODIHR are guided by principles that place human rights above any state policy, they lack understanding of the context in which such decommunization measures are proposed. The Council of Europe in its resolutions stressed that some Communist parties contributed to building democracy in Europe.³³⁸ Yet, not all of them did so. In post-Soviet countries the struggle is imminent — one can see that Communist parties were not only destabilizing the political atmosphere but also contributed to preserving the ties with Russia. In Ukraine the political unwillingness of former governments to deal with the Communist past contributed to bursts of revolutions in 2004-2005 and 2013-2014 and the consequent war. The Communist parties in post-Soviet countries have not contributed to democracy in a positive way. On the contrary, they have imposed radical views that resulted in social division. Ukraine is not a stable democracy yet. Therefore, if the Constitutional Court of Ukraine is to review the decommunization law, the aforementioned aspects of Ukraine's past should be considered.

Lithuania is another bright example. Despite it being a Member of the European Union and generally regarded as a stable democracy,³³⁹ the country had implemented bans on distribution and demonstration of Soviet and Nazi symbols (in 2008) and propaganda of such regimes (in 2010).³⁴⁰ There is also an administrative fine imposed for distribution and demonstration of symbols, while propaganda of totalitarian regimes is criminalized by the Lithuanian Penal Code.³⁴¹ These provisions have been appealed to only twice before Lithuanian judicial authorities, but the cases are yet to

³³⁷ Ibid.

³³⁸ Resolution 1481, *supra* note 249.

³³⁹ See Sustainable Governance Indicators, *Lithuania: Quality of Democracy* (2018) and Freedom House, *Lithuania: Country Profile* (2018).

³⁴⁰ European Commission for Democracy Through Law (Venice Commission) and OSCE/ODIHR, *Joint amicus curiae brief of Law no. 192 of 12 July 2012 for the Constitutional Court of Moldova* (Opinion no. 697/2012, adopted by the Venice Commission at its 94th Plenary Session, 8-9 March 2013), 10-11, <https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD%282013%29004-e> (accessed Dec. 11, 2018).

³⁴¹ Ibid.

be decided on.³⁴² The specificity of propaganda is worth mentioning: in the context of Lithuanian legislation it means “public endorsement of international crimes, crimes committed by the Soviet Union or Nazi Germany to Lithuanian Republic or its residents, its denial or gross minimization”.³⁴³ There is a wide coverage on the imposition of the law. For instance, there were cases when cars depicting Communist symbols were denied entering the country.³⁴⁴ Lithuania also requested the removal of apparel depicting Communist symbols from stores such as Walmart, that sells t-shirts with “СССР” sign (“USSR”) and a “hammer and sickle” symbol.³⁴⁵

Lithuania should be a great example for Ukraine in implementing decommunization for two reasons. First, the administrative fine is a penalty more proportionate than a criminal liability for bearing Communist and Nazi symbols. Second, the country has defined propaganda of the regimes explicitly limiting it to endorsement of international crimes, their denial or gross minimization. This would allow for satisfying the principle of legal certainty and conforming to the prerequisites of a “quality law” according to the ECHR standards. It is also worth mentioning that by specifically limiting scope of “propaganda” to crimes committed by the regimes, the law introduces not only a legal definition of propaganda, but also possibilities to strike down individuals and legal entities, even the Communist party. if they do not perform ordinary and permitted tasks on the political arena.

³⁴² Ibid.

³⁴³ Ibid.

³⁴⁴ Ibid.

³⁴⁵ Megan Specia, *Walmart Pulls Soviet-Themed Shirts After Lithuania Objects* (New York Times 2018), <https://www.nytimes.com/2018/09/19/world/europe/walmart-soviet-shirts-lithuania.html> (accessed Dec. 11, 2018).

CONCLUSION

The concept of transitional justice is very broad. It can be perceived as a set of legal measures that bring retribution and response to past wrongdoings. However, understanding transitional justice, or post-conflict justice, requires a wider approach as to include peacekeeping missions, truth commissions and other non-judicial mechanisms, as well as social initiatives. Transitional justice is not purely about justice — it is also about bringing peace and reconciliation. While this might be a complex task to achieve, such approach increases state's chances to successfully transition from the former regime. Scholars have developed a framework of general objectives of transitional justice, as well as its ground principles. Suggested objectives try to reconcile conflicting aspects of transitional period, as well as different stakeholders such as society as a whole, victims, alleged perpetrators, and officials. The key goal that can be assessed is establishing the rule of law. It would allow for stable peace and continuous development, returning trust in state authorities and judiciary through legitimizing their actions. There is also a recognized need for international assistance as sometimes acts of the past are so grave that a state is unable to deal with them on its own. Transitional justice is also country-specific. Some countries may have a smoother transition from the former regime or conflict, while others struggle due to corruption, delayed justice, and international influence. Measures applicable in one country may not be effective in another at all.

Some similarities can definitely be noted, nevertheless. Many countries in the Central and Eastern Europe, and Baltics that transitioned from the Communist regime that existed for more than seventy years used similar tools, such as lustration, decommunization and resort to international judiciary. Ukraine, along with other post-Soviet countries, struggled with oligarchy and delayed justice. This has resulted in bursts of revolutions and Yanukovich's power usurpation. Ukraine is also at war with Russia and insurgents, its territory is occupied, and economy devastated.

If in 2001 it was not pressing to accept the jurisdiction of the International Criminal Court, now it is imminently necessary. Ukraine has lodged two declarations concerning its current state. Such commitment should not be purely of political nature

and shall be supplemented with other instruments. Ukraine has to, despite the struggles it faces, create a framework that would allow for supplying the ICC Prosecutor with as much data as possible as well as inform victims about the procedure and help their voices to be heard. Domestic courts and prosecution shall continue their investigation and review of crimes committed during and after the Euromaidan. Even if such trials do not succeed, there are chances their cooperation with ICC will have positive results. Ukraine has to prioritize the work towards ratification of the Rome Statute, albeit ICC might prove ineffective by delaying investigations as in the Georgia case. This will not only threaten ICC's reputation as an international court but will also lead to "justice delayed is justice denied" result.

When Ukraine invoked transitional justice measures, some of them were already delayed, such as decommunization). They were also criticized both nationally and internationally for the flaws in their implementation. The main reason for the criticism is that while there is no doubt Ukraine experiences a difficult situation, there were other countries more effective in implementing identical measures, such as Latvia. Despite this, when assessing Ukraine's progress, sufficient regards must be given to the fact that it is not a stable democracy yet. Hence, in order for transitional justice measures to be effective, many international standards should be applied to the situation in Ukraine with a wide margin of appreciation.

Lustration in Ukraine was ineffective because provisions of the relevant law contained significant flaws, such as overlapping with other legislation that introduced background checks, lack of justification for the length of lustration, and failure to take objective characteristics into account. These deficiencies are coupled with poor implementation and the abuse of law caused by the decentralized nature of the process, that allows for local corrupt officials to avoid lustration. All of the above proves that a radical lustration is vital for Ukraine. It would reflect the principle "democracy capable of defending itself". As of now Ukraine has reached a critical point of change. Therefore, strict application of international principles to lustration in Ukraine without necessary contextual deviations, creates a risk that the process will be ineffective in reaching its objectives. It is also worth noting that state officials who abuse the lustration law are the ones challenging its conformity to international and national

human rights standards before the Constitutional Court of Ukraine. By looking at Poland as an example, one can conclude that lustration is a radical tool which can be effective as long as judicial fairness and certainty are present to prevent the abuse of law.

Decommunization is another example of transitional justice measures Ukraine has resorted to. In the past, Ukraine has already attempted to implement decommunization measures, but the process did not have a systematic character and was delayed due to objective reasons. A widespread decommunization began in Ukraine only recently following the introduction of appropriate legislation. The main decommunization law introduced criminal liability, subject to limited exceptions, for the use of Communist and/or Nazi symbols and propaganda of these regimes. It was also heavily opposed to as interfering with the freedom of expression, freedom of association and electoral rights that without the necessity in a democratic society. The raised concerns are reasonable and should be addressed in order to balance the pressing need for decommunization with international standards. Amendments to be made include replacing criminal sanctions with administrative ones, increasing level of protection afforded to the free speech of media, providing an exhaustive list of prohibited symbols and justifying the nexus between using the symbols and propaganda of the regimes. In this regard, Lithuania should serve as an example of successful implementation of decommunization laws. Apart from introducing new legislation, it applied other supporting measures to deal with its Communist past. They include successful prohibition of the Communist Party in the 1990s and ongoing work on building stable democracy and securing trust in legitimacy of institutions. Lithuania has also succeeded because, contrary to that of Ukraine, its population was oriented on breaking any possible ties to the Soviet Union and Russia.

Although, there is still a long path towards peace and justice in Ukraine, the country seems to have chosen a one-way path towards them. By defining clear objectives and their simultaneous achievement, Ukraine has a chance of returning stability, reconciliation and legitimacy of state authorities. Successful implementation of introduced legislation is still possible provided its flaws are identified and eliminated in a timely manner. Political measures, promotion of democratic values, public

participation and social initiatives will be of a great help, especially when they are employed alongside quality law-making, effective judiciary and international tools of justice. The process can be obstructed by Russia's unpredictable actions, but profound reforms and introduction of truth-seeking and truth-telling institutions give Ukraine a chance to battle Russia's perpetrators on the international arena.

Transitional justice is not an easy process, especially for the victims as it can be painful and discomfoting to learn the truth about Euromaidan events, Russian intervention as well as the Communist past through recently opened archives. Nevertheless, this is undoubtedly the only viable way to tackle corruption and the past of the Communist and Yanukovych's regimes, corruption, as well as to handle reintegration of occupied regions. Transitional justice can serve as a crucial pivoting point in justice and peace building activities, and also contribute to the development and implementation of measures necessary in post-conflict and ongoing-conflict societies.

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