MEĐUNARODNI NAUČNI SKUP „DANI ARČIBALDA RAJSA“
TEMATSKI ZBORNIK RADOVA MEĐUNARODNOG ZNAČAJA

INTERNATIONAL SCIENTIFIC CONFERENCE “ARCHIBALD REISS DAYS”
THEMATIC CONFERENCE PROCEEDINGS OF INTERNATIONAL SIGNIFICANCE

MEĐUNARODNI NAUČNI SKUP
INTERNATIONAL SCIENTIFIC CONFERENCE

„DANI ARČIBALDA RAJSA“

“ARCHIBALD REISS DAYS”

Beograd, 10-11. mart 2016.
Belgrade, 10-11 March 2016

TEMATSKI ZBORNIK RADOVA
MEĐUNARODNOG ZNAČAJA

THEMATIC CONFERENCE PROCEEDINGS
OF INTERNATIONAL SIGNIFICANCE

TOM I
VOLUME I

KRIMINALISTIČKO-POLICIJSKA AKADEMIJA
Beograd, 2016
ACADEMY OF CRIMINALISTIC AND POLICE STUDIES
Belgrade, 2016

Publisher
ACADEMY OF CRIMINALISTIC AND POLICE STUDIES
Belgrade, 196 Cara Dušana Street (Zemun)

Editor-in-Chief
DRAGANA KOLARIĆ, PhD
Academy of Criminalistic and Police Studies

Editors
ĐORĐE ĐORĐEVIĆ, PhD, Academy of Criminalistic and Police Studies
MILAN ŽARKOVIĆ, PhD, Academy of Criminalistic and Police Studies
DRAGAN RANĐELOVIĆ, PhD, Academy of Criminalistic and Police Studies
BOBAN MILOJKOVIĆ, PhD, Academy of Criminalistic and Police Studies
DANE SUBOŠIĆ, PhD, Academy of Criminalistic and Police Studies
SAŠA MIJALKOVIĆ, PhD, Academy of Criminalistic and Police Studies
OBRAD STEVANOVIĆ, PhD, Academy of Criminalistic and Police Studies
ZORAN ĐURĐEVIĆ, PhD, Academy of Criminalistic and Police Studies
TIJANA ŠURLAN, PhD, Academy of Criminalistic and Police Studies
NIKOLA MILAŠINOVIĆ, PhD, Academy of Criminalistic and Police Studies
DRAGOSLAVA MIĆOVIĆ, PhD, Academy of Criminalistic and Police Studies

Thematic Proceedings Reviewers
Full Professor OLIVIER RIBAUX, PhD
School of Criminal Justice, Faculty of Law, Criminal Justice and Public Administration,
University of Lausanne, Switzerland
Associate Professor GABOR KOVACS, PhD
Faculty of Law Enforcement, National University of Public Service, Hungary
Full Professor JOZEF METENKO, LLD
Academy of Police Force in Bratislava, Slovakia
Associate Professor SNEŽANA MOJSOSKA, PhD
Faculty of Security, University "St. Climent Ohridski", Macedonia
Associate Professor GEORGICĂ PANFIL, PhD
"Alexandru Ioan Cuza" Police Academy, Romania

Impression
200 copies

Print
PEKOGRAF, Belgrade

THE CONFERENCE AND THE PUBLISHING OF PROCEEDINGS
WERE SUPPORTED BY THE MINISTRY OF EDUCATION AND SCIENCE
OF THE REPUBLIC OF SERBIA

© 2016 Academy of Criminalistic and Police Studies, Belgrade

ISBN 978-86-7020-356-3
ISBN 978-86-7020-190-3

Izdavač
KRIMINALISTIČKO-POLICIJSKA AKADEMIJA
Beograd, Cara Dušana 196 (Zemun)

Glavni i odgovorni urednik
prof. dr DRAGANA KOLARIĆ
Kriminalističko-policijska akademija

Urednici
prof. dr ĐORĐE ĐORĐEVIĆ, Kriminalističko-policijska akademija
prof. dr MILAN ŽARKOVIĆ, Kriminalističko-policijska akademija
prof. dr DRAGAN RANĐELOVIĆ, Kriminalističko-policijska akademija
prof. dr BOBAN MILOJKOVIĆ, Kriminalističko-policijska akademija
prof. dr DANE SUBOŠIĆ, Kriminalističko-policijska akademija
prof. dr SAŠA MIJALKOVIĆ, Kriminalističko-policijska akademija
prof. dr OBRAD STEVANOVIĆ, Kriminalističko-policijska akademija
prof. dr ZORAN ĐURĐEVIĆ, Kriminalističko-policijska akademija
prof. dr TIJANA ŠURLAN, Kriminalističko-policijska akademija
doc. dr NIKOLA MILAŠINOVIĆ, Kriminalističko-policijska akademija
doc. dr DRAGOSLAVA MIĆOVIĆ, Kriminalističko-policijska akademija

Recenzenti Zbornika radova
prof. dr OLIVIJE RIBO
Univerzitet u Lozani, Švajcarska
prof. dr GABOR KOVAČ
Policijska akademija, Nacionalni univerzitet za javnu službu, Mađarska
prof. dr JOZEF METENKO
Policijska akademija, Bratislava, Slovačka
prof. dr SNEŽANA MOJSOSKA
Fakultet bezbednosti, Univerzitet "Sv. Kliment Ohridski", Makedonija
prof. dr George Panfil
Policijska akademija "Aleksandru Joan Kuza"

Tiraž
200 primeraka

Štampa
PEKOGRAF, Beograd

ODRŽAVANJE SKUPA I ŠTAMPANJE OVOG ZBORNIKA PODRŽALO JE
MINISTARSTVO PROSVETE, NAUKE I TEHNOLOŠKOG RAZVOJA
REPUBLIKE SRBIJE

© 2016 Kriminalističko-policijska akademija, Beograd

ISBN 978-86-7020-356-3
ISBN 978-86-7020-190-3

INTERNATIONAL SCIENTIFIC CONFERENCE
"ARCHIBALD REISS DAYS"

THE HONORARY COMMITTEE

Mladen Bajagić, PhD, Acting Dean of the Academy of Criminalistic and Police Studies, President
Dragana Kolarić, LLD, Acting Vice Dean of the Academy of Criminalistic and Police Studies
Tijana Šurlan, LLD, Acting Vice Dean of the Academy of Criminalistic and Police Studies
Sima Avramović, LLD, Dean of the Faculty of Law, Belgrade
Zoran Stojanović, LLD, Full Professor, Faculty of Law, Belgrade
Ivica Radović, PhD, Dean of the Faculty of Security, Belgrade
Major-General **Goran Zeković**, Spec., Head of the Military Academy, Belgrade
Ambassador **Ljiljana Nikšić**, PhD, Head of the Department for Migration Policy and Diaspora, Ministry of Foreign Affairs of the Republic of Serbia
Academician **Dragoljub Živojinović**, Serbian Academy of Sciences and Arts
Jovan Ćirić, PhD, Director of the Institute of Comparative Law, Belgrade
Branislav Đorđević, PhD, Director of the Institute of International Politics and Economics, Belgrade
Momčilo Pavlović, PhD, Director of the Institute for Contemporary History, Belgrade

International members

Zvonimir Jovanović, President of the Serbian-Swiss Friendship Association "Dr. Archibald Reiss"
Olivier Ribaux, PhD, Director of the School of Criminal Justice, University of Laussane, Switzerland
Marcelo Aebi, PhD, Deputy Director of the School of Criminal Justice, University of Laussane, Switzerland
Barry Lituchy, PhD, University of California, Berkeley, Director of the Jasenovac Research Institute, USA
Wang Shiquan, PhD, President of the National Police University of China
Vladimir Tretyakov, LLD, Chief of the Volgograd Academy of the Russian Internal Affairs Ministry
José García Molina, PhD, Director of the National Police Academy, Ávila, Spain
Major Knut Thoresen, Researcher of the „Simon Wiesenthal" Centre, Norway
Hélène Martini, PhD, Director of the France's National Police College and President of the Association of European Police Colleges
Norbert Leitner, PhD, Vice President of the Association of European Police Colleges and Director of SIAK, Vienna, Austria
Major-General **Valeriy Vyacheslavovich Sereda**, LLD, Rector of the Lviv State University of Internal Affairs, Ukraine
Major-general **Vladimir Bachila**, LLD, Head of the Academy of the Interior Ministry of the Republic of Belarus
Gheorghe Popa, PhD, Rector of the Police Academy "Alexandru Ioan Cuza", Bucharest, Romania
Simon Carp, PhD, Rector of the Academy "Stefan cel Mare", Ministry of Interior of the Republic of Moldova
Piotr Bogdalski, LLD, Commandant-Rector of the Police Academy, Szczytno, Poland
Lucia Kurilovská, PhD, Rector of the Academy of Police Force, Bratislava, Slovakia
Jozef Meteňko, PhD, Academy of Police Force, Bratislava, Slovakia
Milorad Kojić, PhD, Centre for the Investigation of War, War Crimes and the Search for Missing Persons, Republika of Srpska
Duško Pena, MA, Director of the Police College, Republic of Srpska
Mile Šikman, PhD, MoI of the Republic of Srpska
Count Philippe Piccapietra, Honourable President of the the Serbian-Swiss Friendship Association "Dr. Archibald Reiss", Switzerland
Nedžad Korajlić, PhD, Dean of the Faculty for Criminal Justice, Criminology and Security Studies, University of Sarajevo, Bosnia and Herzegovina
Zoltán Rajnai, PhD, Bánki Donát Faculty, Óbuda University, Hungary
Andrej Sotlar, PhD, Dean of the Faculty of Criminal Justice and Security, Ljubljana, University of Maribor, Slovenia
Ivan Toth, PhD, Dean of the University of Applied Sciences Velika Gorica, Croatia
Oliver Bačanović, PhD, Dean of the Faculty of Security, Skopje, Macedonia
Dragan Radonjić, LLD, Dean of the Faculty of Law, Podgorica, Montenegro
Milica Pajović, Dean of the Police Academy, Danilovgrad, Montenegro

THE PROGRAMME COMMITTEE

Đorđe Đorđević, PhD, Academy of Criminalistic and Police Studies, President
Milan Žarković, PhD, Academy of Criminalistic and Police Studies
Dragan Ranđelović, PhD, Academy of Criminalistic and Police Studies
Boban Milojković, PhD, Academy of Criminalistic and Police Studies
Dane Subošić, PhD, Academy of Criminalistic and Police Studies
Saša Mijalković, PhD, Academy of Criminalistic and Police Studies
Obrad Stevanović, PhD, Academy of Criminalistic and Police Studies
Zoran Đurđević, PhD, Academy of Criminalistic and Police Studies
Nikola Milašinović, PhD, Academy of Criminalistic and Police Studies
Dragoslava Mićović, PhD, Academy of Criminalistic and Police Studies

MEĐUNARODNI NAUČNI SKUP
„DANI ARČIBALDA RAJSA"

POČASNI ODBOR

prof. dr **Mladen Bajagić**, v. d. dekana Kriminalističko-policijske akademije, predsednik
prof. dr **Dragana Kolarić**, v. d. prodekana Kriminalističko-policijske akademije
prof. dr **Tijana Šurlan**, v. d. prodekana Kriminalističko-policijske akademije
prof. dr **Sima Avramović**, dekan Pravnog fakulteta, Beograd
prof. dr **Zoran Stojanović**, redovni profesor Pravnog fakulteta, Beograd
prof. dr **Ivica Radović**, dekan Fakulteta bezbednosti, Beograd
general-major spec. **Goran Zeković**, načelnik Vojne akademije, Beograd
ambasador dr **Ljiljana Nikšić**, načelnik Odeljenja za migracionu politiku, dijasporu, socijalne sporazume i kulturu sećanja, Ministarstvo spoljnih poslova
akademik **Dragoljub Živojinović**, Srpska akademija nauka i umetnosti
dr **Jovan Ćirić**, direktor Instituta za uporedno pravo, Beograd
prof. dr **Branislav Đorđević**, direktor Instituta za međunarodnu politiku i privredu, Beograd
dr **Momčilo Pavlović**, direktor Instituta za savremenu istoriju, Beograd

Članovi iz inostranstva

Zvonimir Jovanović, predsednik Društva srpsko-švajcarskog prijateljstva „Dr Arčibald Rajs"
prof. dr **Olivier Ribaux**, direktor Fakulteta za kriminalistiku, Univerzitet u Lozani, Švajcarska
prof. dr **Marcelo Aebi**, zamenik direktora Instituta za kriminologiju, Lozana, Švajcarska
prof. dr **Barry Lituchy**, Univerzitet Berkli, direktor Institut za istraživanje zločina u Jasenovcu, SAD
prof. dr **Wang Shiquan**, predsednik Nacionalnog policijskog univerziteta Kine
prof. dr **Vladimir Tretjakov**, načelnik Volgogradske akademije Ministarstva unutrašnjih poslova Rusije
prof. dr José **García Molina**, direktor Nacionalne policijske akademije, Ávila, Španija
major **Knut Thoresen**, istraživač Centra „Simon Vizental", Norveška
Hélène Martini, predsednica Asocijacije evropskih policijskih koledža i direktorka Francuskog nacionalnog policijskog koledža
dr **Norbert Leitner**, potpredsednik Asocijacije evropskih policijskih koledža i direktor SIAK Policijske akademije, Beč, Austrija
general-major prof. dr **Valerij Vjačeslavovič Sereda**, rektor Državnog univerziteta unutrašnjih poslova, Lavov, Ukrajina
general-major doc. dr **Vladimir Bačila**, načelnik Akademije MUP R. Belorusije
prof. dr **Gheorghe Popa**, rektor Policijske akademije „Alexandru Ioan Cuza", Bukurešt, Rumunija
prof. dr **Simon Carp**, rektor Akademije "Stefan cel Mare", MUP R. Moldavije
prof. dr **Piotr Bogdalski**, komandant-rektor Policijske akademije, Ščitno, Poljska
doc. dr **Lucia Kurilovská**, rektor Policijske akademije, Bratislava, Slovačka
prof. dr **Jozef Meteňko**, Policijska akademija, Bratislava, Slovačka
dr **Milorad Kojić**, Republički centar za ratne zločine, Banja Luka, R. Srpska
mr **Duško Pena**, direktor Visoke škole unutrašnjih poslova, Republika Srpska
dr **Mile Šikman**, MUP Republike Srpske
grof **Philippe Piccapietra**, počasni predsednik Društva srpsko-švajcarskog prijateljstva „Dr Arčibald Rajs", Švajcarska
prof. dr **Nedžad Korajlić**, dekan Fakultet za kriminalistiku, kriminologiju i sigurnosne studije, Univerzitet u Sarajevu, BiH
prof. dr **Zoltan Rajnai**, Fakultet Banki Donat, Univerzitet Obuda, Mađarska
prof. dr **Andrej Sotlar**, dekan Fakulteta bezbednosnih studija, Ljubljana, Univerzitet u Mariboru, Slovenija
prof. mr. sc. **Ivan Toth**, dekan Veleučilišta Velika Gorica, Hrvatska
prof. dr **Oliver Bačanović**, dekan Fakulteta bezbednosti, Skoplje, Makedonija
prof. dr **Dragan Radonjić**, dekan Pravnog fakulteta, Podgorica, Crna Gora
Milica Pajović, direktorka Policijske akademije, Danilovgrad, Crna Gora

PROGRAMSKI ODBOR

prof. dr **Đorđe Đorđević**, Kriminalističko-policijska akademija, predsednik
prof. dr **Milan Žarković**, Kriminalističko-policijska akademija
prof. dr **Dragan Ranđelović**, Kriminalističko-policijska akademija
prof. dr **Boban Milojković**, Kriminalističko-policijska akademija
prof. dr **Dane Subošić**, Kriminalističko-policijska akademija
prof. dr **Saša Mijalković**, Kriminalističko-policijska akademija
prof. dr **Obrad Stevanović**, Kriminalističko-policijska akademija
prof. dr **Zoran Đurđević**, Kriminalističko-policijska akademija
doc. dr **Nikola Milašinović**, Kriminalističko-policijska akademija
doc. dr **Dragoslava Mićović**, Kriminalističko-policijska akademija

PREFACE

Dear readers,

In front of you is the Thematic Collection of Papers presented at the International Scientific Conference "Archibald Reiss Days", which was organized by the Academy of Criminalistic and Police Studies in Belgrade, in co-operation with the Ministry of Interior and the Ministry of Education, Science and Technological Development of the Republic of Serbia, National Police University of China, Lviv State University of Internal Affairs, Volgograd Academy of the Russian Internal Affairs Ministry, Faculty of Security in Skopje, Faculty of Criminal Justice and Security in Ljubljana, Police Academy "Alexandru Ioan Cuza" in Bucharest, Academy of Police Force in Bratislava and Police College in Banjaluka, and held at the Academy of Criminalistic and Police Studies, on 10 and 11 March 2016.

The International Scientific Conference "Archibald Reiss Days" is organized for the sixth time in a row, in memory of the founder and director of the first modern higher police school in Serbia, Rodolphe Archibald Reiss, PhD, after whom the Conference was named.

The Thematic Collection of Papers contains 165 papers written by eminent scholars in the field of law, security, criminalistics, police studies, forensics, informatics, as well as by members of national security system participating in education of the police, army and other security services from Belarus, Bosnia and Herzegovina, Bulgaria, China, Croatia, Greece, Hungary, Macedonia, Montenegro, Romania, Russian Federation, Serbia, Slovakia, Slovenia, Spain, Switzerland, Turkey, Ukraine and United Kingdom. Each paper has been double-blind peer reviewed by two reviewers, international experts competent for the field to which the paper is related, and the Thematic Conference Proceedings in whole has been reviewed by five competent international reviewers.

The papers published in the Thematic Collection of Papers contain the overview of contemporary trends in the development of police education system, development of the police and contemporary security, criminalistic and forensic concepts. Furthermore, they provide us with the analysis of the rule of law activities in crime suppression, situation and trends in the above-mentioned fields, as well as suggestions on how to systematically deal with these issues. The Collection of Papers represents a significant contribution to the existing fund of scientific and expert knowledge in the field of criminalistic, security, penal and legal theory and practice. Publication of this Collection contributes to improving of mutual cooperation between educational, scientific and expert institutions at national, regional and international level.

The Thematic Collection of Papers "Archibald Reiss Days", according to the Rules of procedure and way of evaluation and quantitative expression of scientific results of researchers, passed by the National Council for Scientific and Technological Development of the Republic of Serbia, as scientific publication, meets the criteria for obtaining the status of thematic collection of papers of international importance.

Finally, we wish to extend our gratitude to all the authors and participants in the Conference, as well as to all those who contributed to or supported the Conference and publishing of this Collection, especially to the Ministry of Interior and the Ministry of Education, Science and Technological Development of the Republic of Serbia.

Belgrade, June 2016 *The Programme Committee*

TABLE OF CONTENTS

Introductory Papers

Tadashi Nagai
REMEMBRANCE OF DR ARCHIBALD REISS – MESSAGE OF PEACE
BASED ON THE LESSONS LEARNED 2

Uros Suvakovic
DR ARCHIBALD REISS IN WORLD WAR I: ETHICS OF WORLD FORENSIC
SCIENTIST AND SERBIAN WARRIOR 4

Tijana Surlan
ARCHIBALD REISS`S CONTRIBUTION TO THE ENFORCEMENT
OF THE INTERNATIONAL HUMANITARIAN LAW 14

TOPIC IV

Strengthening the State's Institutions and Fight against Crime

Miodrag N. Simović, Vladimir M. Simović
CONCEPT, MEANING AND ACTIVITIES
OF INTERNATIONAL, HYBRID, AND NATIONAL CRIMINAL COURTS IN
PROSECUTING PERPETRATORS OF INTERNATIONAL CRIMINAL ACTS 25

Dragan Vasiljevic
LEGAL NATURE AND SIGNIFICANCE OF GUARANTEE ACT
AS PROVIDED FOR IN GENERAL ADMINISTRATIVE PROCEDURE BILL 44

Vladimir V. Veković
MAIN CHARACTERISTICS OF NEW LEGISLATION
ON CRIMINAL PROCEEDINGS AGAINST JUVENILES IN SERBIA 54

Duško Dimitrijević,
PROHIBITION OF TERRORISM IN INTERNATIONAL LEGAL PRACTICE 61

Slađana Jovanović
PROTECTION ORDERS IN SERBIA 79

Temelko Risteski, Vesna Sijic
POSIBILITIES AND PERSPECTIVES OF THE SPECIAL PUBLIC PROSECUTION
OF THE REPUBLIC OF MACEDONIA 89

Ivan Fedchuk, Sergei Dobriyan
COMBATING CRIMES COMMITTED WHILE UNDER
THE INFLUENCE OF ALCOHOL: THE REPUBLIC OF BELARUS 102

Ljubinko Mitrovic, Nikolina Grbic Pavlovic
SANCTIONS FOR MINORS IN MINOR OFFENCE LEGISLATION
OF THE REPUBLIC OF SRPSKA 111

Ivana Krstić-Mistridželović, Radomir Zekavica
SERBIA IN THE GREAT WAR THROUGH THE EYES OF ARCHIBALD REISS 119

Saša Marković
PROBLEMS IN COURT PRACTICE WITH DETERMINING CERTAIN
ELEMENTS OF THE OFFENSES UNDER THE ARTICLE 246 AND 246a
OF THE CRIMINAL CODE OF SERBIA 132

Zorica Mršević
TRANSGENDER PRISONERS 150

Božidar Otašević, Dragoslava Mićović
OPERATION MOJKOVAC A CENTURY LATER 160

Marina Dimitrijević
THE STATE'S CONTEMPORARY APPROACH
TO THE SUPPRESSION OF NON-COMPLIANCE WITH TAX LAWS 172

Sasho M. Stojanovski, Metodija Dojchinovski, Biljana M. Stefanova
THE ROLE OF INTERPOL DEALING WITH CRIME AND TERRORISM 179

Maja Nastić
PARLIAMENTARY OVERSIGHT OF SECURITY SYSTEM: The Case of Serbia 188

Darko Dimovski, Ivan Ilic
HATE SPEECH IN THE EUROPEAN COURT OF HUMAN RIGHTS CASE LAW 197

Jelena Slovic, Snezana Mojsoska
PREVENTION AS THE KEY MEASURE IN FINANCIAL FRAUDS 208

Kire Babanoski
NATIONAL STRATEGIES FOR IMPROVING ROAD TRAFFIC SAFETY VS.
REAL OPPORTUNITIES AND CHALLENGES IN REDUCING
ROAD TRAFFIC ACCIDENTS 218

Maja Miladinović, Miroslav Terzić, Stefan Miladinović
INTERNATIONAL COOPERATION IN THE PROTECTION OF WITNESSES IN
CRIMINAL PROCEEDINGS FOR THE CRIMINAL ACTS OF ORGANIZED CRIME ... 226

Predrag Terzić
THREATENING THE INSTITUTIONS OF LEGAL STATE IN SERBIA DURING
THE REIGN OF PRINCE/KING MILAN AND KING ALEKSANDAR OBRENOVIC 236

Dijana Jankovic
ALTERNATIVE SANCTIONS AND MEASURES IN THE SERBIAN LEGAL SYSTEM... 246

Vanda Božić
COMPARATIVE LEGISLATIVE ANALYSIS OF CRIMINAL LEGISLATION
OF THE REPUBLIC OF CROATIA AND THE REPUBLIC OF SERBIA
IN TERMS OF HUMAN TRAFFICKING AS THE MOST BRUTAL VIOLATION
OF FUNDAMENTAL HUMAN RIGHTS 261

Ante Orlović, Ivica Milković, Ante Gudelj
STRENGTHENING OF THE INSTITUTIONAL FRAMEWORK FOR COMBATING
ECONOMIC CRIME IN THE REPUBLIC OF CROATIA – ABOLITION AND
ESTABLISHMENT OF SPECIALIZED BODIES/ SERVICES 277

Zdravko Grujić, Ivan Milić
PRISON OVERCROWDING – MITIGATING THE CONSEQUENCES 286

Dragan Dakić
THE DISABLED AS A PROTECTED GROUP FOR THE PURPOSE OF GENOCIDE 296

Darian Rakitovan
EXTENDED CONFISCATION IN ROMANIAN CRIMINAL LAW 306

TOPIC I

Criminalistic and Criminal Justice Aspects of Claryfying and Proving of Criminal Offences

Marcelo F. Aebi, Christine Burkhardt, Julien Chopin, Mélanie M. Tiago
INTERNATIONAL COMPARISONS OF PRISON STATISTICS: KEY FACTS AND FIGURES OF THE SPACE 2014 REPORT AND TRENDS FROM 2005 TO 2014 319

Jozef Metenko, Martin Metenko
CRIMINALISTICS TACTIC AND CRIMINAL INVESTIGATION IN SLOVAKIA: METHODS AND TECHNIQUES 330

Tatjana Velkova
PHENOMENOLOGICAL CHARACTERISTICS OF JUVENILE CRIMINALITY IN RELATION TO JUVENILE JUSTICE (JUSTICE FOR CHILDREN AND YOUTH) 347

Željko Nikač, Boban Simić
EXTRADITION AS A TYPE OF INTERNATIONAL CRIMINAL-LEGAL ASSISTANCE ACCORDING TO REGULATIONS OF THE REPUBLIC OF SERBIA 358

Georgică Panfil, Marius Andrița, Mihaela Marin
ROMANIAN EDUCATIONAL SYSTEM OF FORENSIC SCIENCE 373

Li Yongtao
TECHNIQUES FOR BETTER ANALYZING VIDEO SURVEILLANCE INFORMATION IN CRIMINAL INVESTIGATION 379

Ivan Joksic
CRIMINAL LEGAL PROTECTION OF COMPUTER DATA 385

Zoran Pavlović
THE RIGHT TO COUNSEL AND EUROPEAN LEGAL STANDARDS 394

Valentina Baić, Igor Areh, Dag Kolarević
PERSONALITY CORRELATES OF LIE DETECTION 404

Ivana Bjelovuk, Tanja Kesić
AFTEREFFECTS OF HIGH EXPLOSIVE EXPLOSION AND THEIR EVIDENCE POTENTIAL 414

Marija Lučić-Ćatić, Dina Bajraktarević Pajević, Muamer Kavazović, Nebojša Bojanić
HATE CRIME OR HATE SPEECH: JUDICIARY PRACTICE IN BOSNIA AND HERZEGOVINA 421

Katerina Krstevska
CRIMINAL ACTS AGAINST INTELLECTUAL PROPERTY ENCOMPASSED BY THE MACEDONIAN CRIMINAL CODE 433

Zivorad M. Milenovic
INSTITUTIONS OF PROSECUTOR' S OFFICE AS A FACTOR OF INCENTIVE FOR YOUNG PEOPLE TO COMMIT CRIMINAL OFFENCES 446

Darko Jokic, Mirela Jokic
APPLICATION OF THE NE BIS IN IDEM PRINCIPLE IN CRIMINAL PROCEDURES AND MINOR OFFENCE PROCEDURES DURING PROSECUTION OR TRIAL FOR THE SAME "OFFENCE" 459

Zeljko Nincic
FORMS OF ORGANIZING OF CRIMINAL ASSOCIATIONS 470

Dragana Čvorović, Veljko Turanjanin
REFORMED CRIMINAL PROCEDURAL LEGISLATION AND LEGITIMACY OF SERBIAN POLICE IN EUROPE (DOCTRINE, STATISTICS AND CONSISTENCY) 483

Slavko Milic
RESTRAINING ORDER FROM AN ACCESS TO A PROPERTY – DOMESTIC VIOLENCE 494

Sinisa Karanovic
IMPORTANT CHARACTERISTICS OF THE CRIME OF ILLICIT SEXUAL ACTS.....502

Kornél Girhiny
NEW TRENDS OF INVESTIGATIONS, THE DOMINANCE OF TECHNICAL EVIDENTIARY METHODS.....516

Ivana Bodrožić
THE CRIMINAL JUSTICE RESPONSE TO TERRORISM – THE EUROPEAN LEVEL...524

Tijana Perić Diligenski
THE INFLUENCE OF THE EUROPEAN UNION ON DESIGNING OF ANTI-CORRUPTION POLICY IN THE REPUBLIC OF SERBIA.....537

Dražan Bojić
NORMATIVE DEFINITION OF THE CRIMINAL OFFENCE OF HUMAN TRAFFICKING IN THE CRIMINAL LEGISLATION OF BOSNIA AND HERZEGOVINA.....545

INTRODUCTORY PAPERS

REMEMBRANCE OF DR ARCHIBALD REISS – MESSAGE OF PEACE BASED ON THE LESSONS LEARNED

As former Ambassador of Japan to the Republic of Serbia and the President of the Japanese-Serbian Society, it is my honour and pleasure to represent Japan at this Sixth International Conference "Archibald Reiss Days" in Belgrade. It is also my honour to be given the opportunity, thanks to kind suggestions and recommendations of H. E. Mr Nenad Glišić, Ambassador of Serbia to Japan, to join you in remembrance of Dr Archibald Reiss and his contribution to the investigation of the war crimes committed in the World War I. As a prominent forensic scientist and a man of tremendous professional and personal authority, reporting of Dr Reiss on atrocities in Serbia during the World War I contributed generally to the public perception of the role of civilians and the meaning of war crimes.

The suffering of civilians in war is also what my country and specifically people of Hiroshima and Nagasaki experienced in August 1945 following an atomic bombing. Last year marked the 70th anniversary of the atomic bombing of Hiroshima and Nagasaki. Both of these cities led a normal, although it was a wartime one, life with the warmth of family, the deep human bonds of community, traditional festivals heralding each season, as well as rural scenery such as rivers, fields and hills where children played around. They all disappeared instantly when a single atomic bomb struck Hiroshima at 8:15 a.m. on 6 August and in Nagasaki at 11:02 a.m. on 9 August 1945 and reduced these two cities to a ruin.

Let me quote some of the words by the mayors of both cities.

"Below the mushroom-shaped cloud, a charred mother and child embraced, countless corpses floated in rivers, and buildings burned to the ground. Tens of thousands were burned in those flames. Those who managed to survive, their lives grotesquely distorted, were left to suffer serious physical and emotional aftereffects compounded by discrimination and prejudice. Children stole in order to survive. The suffering still continues.

Meanwhile, in our world there still exists more than 15,000 nuclear weapons, and policymakers in the nuclear-armed states remain trapped in egocentric thinking, repeating by world and deed their nuclear intimidation. We know how many incidents and accidents that have taken us to the brink of nuclear war or nuclear explosions. Today, we are threatened by nuclear terrorism.

I would therefore like to use this occasion to repeat once again strongly the peace message from Hiroshima and Nagasaki – as long as nuclear weapons exist, anyone could become a victim of an atomic or hydrogen bomb at any time. If that happens, the damage will reach indiscriminately beyond national borders. Therefore, I call on everybody, all people of the world, to listen carefully to the words of A-bomb victims and to contemplate the nuclear problem as their own. The greatest power to realize a world without war and without nuclear weapons lies inside each of every one of us.

Renew your determination and let us work together with all our might for the abolition of nuclear weapons and the realization of lasting world peace."

It is my heart-felt wishes that these messages will reach the every corner of the world.

Before closing tis statement, I would like to reiterate that the Government of Japan has been taking an initiative of sponsoring a United Nations General Assembly resolution for the total elimination of nuclear weapons. Last year on 7 December, the resolution titled "United action with renewed determination towards the total elimination of nuclear weapons" was adopted. It was supported by as many as 166 countries, but 16 countries abstained and three countries voted against.

I would like to add that I am not an expert on criminology and police science, but I thought I should have something to present to this Conference and made an interview with Dr Yutaka Harada, Director of the Department of Criminology and Behavioural Sciences of the National Research Institute of Police Science of Japan. I will be leaving the summary of his study called "Utilizing the Latest Satellite Positioning Technology for Effective and Substantial Safety Promotion Activities Led by Local Residents" with the organizers to share should there be any interest.

Thank you.

Mr Tadashi Nagai

UDC: 341.322.5(497.11)"1914/1918"
34:929 Pajc P. A.
174:340.69

DR ARCHIBALD REISS IN WORLD WAR I: ETHICS OF WORLD FORENSIC SCIENTIST AND SERBIAN WARRIOR[1]

Uros Suvakovic, PhD[2]
University of Prishtina with contemporary Head-Office in Kosovska Mitrovica,
Faculty of Philosophy, Department for Sociology

Abstract: The work of Dr. Archibald Reiss during the World War I is analyzed in the paper, as the forensic scientist, who comes to Serbia with the task to verify allegations of war crimes committed by the Austro-Hungarian army in Serbia over civilians. Performing his work in accordance with the highest standards of the criminological ethics, additionally informing world community on the results of his work that was of immeasurable use for the Serbian side in WWI, this Swiss soars above the professionalism of the vocation and decides to become a volunteer in the Serbian army, wanting to confront in a military manner the crimes of his ethnic compatriots (and not only them) over the Serbian people. In this way, he excells the obligation of professional ethics and by his sublime acts reaches the highest moral virtues.

Keywords: Archibald Reiss, World War I, professional ethics, moral virtues.

Neutrality is not possible when facing crime
R. A. Reiss[3]

INTRODUCTION

We are not going to deal in this paper with facts regarding Rudolph Archibald Reiss D.Sc. (*Rudolph Archibald Reiss*, 1875-1929), since his contributions for both forensic science and police organization, as well as participation in the World War I are mainly well known. Enough time has passed and almost all the material regarding this Swiss of German origin translated to Serbian language to the greatest extent has become well known and available to everyone. In this paper, we will try to research something else. Firstly, we are interested in to what extent the fact that he was a German of half-Jewish origin influenced Archibald Reiss to accept the invitation sent by Serbian government to investigate atrocities perpetrated on Serbian civilians by his compatriots. Secondly, did he perform that job impartially, according to the ethical rules of the profession, regardless the fact that he was very much engaged in publishing his findings in various magazines throughout the world. Namely, simultaneously with the investigation of the crimes of the Austro-Hungarians, Bulgarians and Germans, he

1 Paper is the result of the work also on the project *ИИИ* 47023 "Kosovo and Metohija between National Identity and Euro-integrations", financed by the Ministry of education, science and technological development of the Republic of Serbia.
2 uros-s@eunet.rs
3 Archibald Reiss started his lecture in the Sorbonne with this sentence, on the topic "On behavior of Austro-Hungarians in Serbia, which they invaded", held in the beginning of 1916. See Rudolf Archibald Reiss, *What I have Seen and Experienced during Great Days* (Belgrade: Mladost turist, Itaka, 1997), 68.

accepted to be a war correspondent for newspapers published in Switzerland, France and the Netherlands: *Gazette de Lausanne* (Lausanne), *Le petit Parisien* (Paris) and *De Telegraaf* (Amsterdam). Regarding the attitudes of many contemporary intellectuals, such an act would disqualify him regarding the objectivity of the revealed forensic findings. Finally, the fact that Reiss was not only a neutral investigator but also that he expressed his attitude by joining the Serbian army as a volunteer, we shall consider his activities in the light of the famous Habermas's (*Jürgen Habermas*, 1929-) distinction between ethical and moral norms.

Attempting to resolve the first part of our research, we quote what Reiss himself wrote in this regard exactly one century ago: "Serbians were accusing the Austro-Hungarian invasion army for terrible crimes, but the public, especially in neutral countries, remained skeptical. I admit that even the wording of the Serbian accusations did not convince me. However, receiving the invitation from the Serbian government, I considered that it was my duty to respond to it. Is it not a duty of an honorable man to publish atrocities if they had been performed really methodically and to prove, if only individual cases are concerned, that the whole army cannot be responsible for the crimes of few villains, examples of which unfortunately existing in all nations"[4]. Therefore, at the beginning of the war Reiss himself had doubts whether it was possible that a European, civilized state made such crimes like those reported in the press in Switzerland. Besides, as a criminology specialist he had no prejudice, but considered that the truth should be revealed, starting from a presumption that crimes, even if committed, were performed individually and not planned, systematically, by command, so that the whole Austro-Hungarian army should not be deemed responsible for them. Therefore, Reiss started from the contemporary principle of criminal law, the principle of individual responsibility for a committed crime, even pointing out that perpetrators of such war crimes, which were individual, might be "found by perplexity in all nations"[5]. At the time when in Switzerland he was reading the reports from battlefields, he could not imagine that the issue was on organized and systematical, planned crimes perpetrated against the Serbian people. On the contrary, it seemed that he was willing to accept the thesis that crimes were perpetrated as exceptions.

However, a general attitude of Reiss regarding the World War I must be considered. He accused Austrians and Germans, with no doubts, for the outbreak of the war, evidencing their preparations for the war even before the Sarajevo assassination. This evidence of Reiss – written down in the book of his reminiscences "What I have Seen and Experienced in Great Days"[6] from 1928 – today has a special importance. Namely, a century after the outbreak of World War I, the revisionist historiography tries to transfer the blame for the breakout of this war to Serbia, reducing the obvious responsibility of Austro-Hungary and Germany.[7] This

4 Rudolphe Archibald Reiss, *How Austro-Hungarians fought in Serbia* (Odesa: Typography of South-Russian stock company, 1916), reprint published in the monograph Archibald Reiss, *Atrocities over Serbs in Great War* (Belgrade: Svet knjige, 2014), 37

5 Here we cannot resist to compare the comprehension of Reiss with comprehension of so-called Hague Tribunal (ICTY) that started from the just opposite presumption: establishing so-called "command responsibility" and "joint criminal attempt", for which the highest state (political) leaders of FRY, Serbia, Republic of Srpska and Republic of Srpska Krajina have been accused, as well as the highest command military-police staff. Analysis of accusations inevitably leads to conclusion on collective guilt of one people – Serbian – for crimes perpetrated in the area of the former Yugoslavia, which is also visible from the years of penalties to which Serbian leaders were convicted. "The tribunal has sentenced 60 Serbs to 925 years of imprisonment, not counting another four sentenced for life imprisonment. Ten Croats have been sentenced to 145 years of imprisonment, three Muslims to eight years and one Albanian to 13 years of imprisonment". *Politika* (Belgrade: Politika, 9.12.2012/).

6 How proud he was on his contribution to truth and Serbian struggle for freedom is shown by the affiliation of Reiss, the doctor of forensic science and the professor of the University in Lausanne, stating: "Brevetted captain of Serbian army".

7 The most famous example of such a false pretense of history is the monograph of the professor at the University of Cambridge Dr Christopher Clark *The Sleepwalkers: How Europe Went to War in 1914* (Smederevo: Heliks, 2014)

makes his biographical work current even today, while he simultaneously, even more than 80 years from his death, helps Serbia to be saved from false accusations by evidencing the truth. "Deeply disappointed with the results of the Balkan wars from 19112 and 1913, the Austrians living in Switzerland were not hiding the disappointment and were looking for the cure for this situation in just one winning war against Serbia, which they considered to be intolerable. Therefore, a few months before the Sarajevo assassination, the Austro-Hungarian consul in Lausanne, a wealthy hotel owner at the time, and an intelligence agent during the war who later died in the greatest misery, told me one evening: 'Listen, the situation with us in Austria is unbearable. The world is nervous, discontented, humiliated. Only a winning war can get us out of this condition'"[8].

When the war started, Switzerland was neutral, but crowded with foreign intelligence agents. Reiss was relieved from the military service, but as a forensic scientist, a "technical policeman" as he defined with his own terminology, he wanted to put his knowledge in the service of preservation of Swiss neutrality. He made himself available to the General Staff for counterintelligence jobs, conditioning that he should be in charge of Austrian and German agencies, since "he was for the allies with all his heart", which was accepted. He pointed out that several successful actions were performed in that field, but when these should be finalized, the Chief of General Staff in Bern, colonel Sprecher, "whose Austro and Germanophilia was known for the whole world"[9], would always stop them. Realizing that his work was ineffective, he resigned from this service, intending to offer his services to the allies. "It was all the same for me if they would use me to carry biers or in service of the French counterintelligence – with my poor health I could not hope to be received as a soldier in battle – just that I can cooperate, even to the smallest extent, on what I was considering then and still consider today as defense of rights and freedom"[10]. However, the negotiations regarding the Reiss' activity within the lines of the allies remained unfinished, but an invitation of Serbian Government soon followed, to come to Serbia as an independent investigator.

Therefore, a completely clear answer can be given to our first issue. Reiss was not such a Serbophile before the outbreak of World War I. He even could not believe that his ethnic compatriots were performing such crimes for which Serbia was accusing them. Therefore, the invitation from Serbian Government to investigate the crimes was a professional challenge for him, the opportunity to witness the truth. Although having doubts about the organization of the crimes, trying to observe them as individual excesses that exist in every army, he considered that as a criminology expert he was obliged to investigate the accusations. To establish the truth at the spot by using scientific methods. He considered that to be his obligation, bounded by the ethics of the profession. The truth as a virtue was above the ethnic affiliation for him. On the other hand, Reiss was obviously against war. Having had the knowledge about preparations of Austro-Hungary and Germany for war, even before the assassination of Franz Ferdinand, he had no doubts regarding the preferences between the encountered sides. Having had the dependable knowledge about who was preparing for war, and understanding the causes, he opted for the side that was defending "the right and the freedom"; actually, he did not want to support the politics that jeopardized those values under any circumstances.

Reiss had problems because of such an attitude, even in German cantons of neutral Switzerland. The newspapers *Neue Zürcher Zeitung* published in October 1915 an anonymous letter in which he was accused for betrayal of his origin, that he was a "hunter for medals", that the Government of the Kingdom of Serbia paid him for the job he was performing, etc. Reiss responded to all this in public that it was true that he was partly German and that he

8 Rudolphe Archibald Reiss. *What I have Seen and Experienced During Great Days*, 15
9 Ibidem, 17
10 Ibidem, 18

did not forget that his great grandfather was a Jew, "one of those persecuted by the Germans, the authors of anti-Semitism". He further pointed out that he accepted Switzerland as his motherland, the country to which he had come for healing and in which he was educated and socialized, accepting in that way, since he lived in the Roman canton Vaud (*Le Canton du Vaud*), the French spirit of freedom and democracy, expressing the admiration for France. Regarding the accusations that he had any benefits from his investigation at the request of the Serbian Government, Reiss responded: "The government of this country wanted to pay me for this job, or at least to reimburse the expenses. I have refused all that and have said that it would be infra dig to take a single cent. Moreover, since I was the correspondent of the newspapers *Petit Parisien*, the wealthiest newspapers in France, I requested my fee, intended for the French-Serbian orphanage, to be delivered to the Serbian representative in Paris"[11].

Regarding the other issue – if and in which extent Reiss observed the rules of the profession, especially the ethics of the profession, we find the answer in his official reports, reports of a war correspondent and biographical material that appeared later. "I swore to tell 'truth, nothing but the truth'. Now, ten years after the end of the war, I can state that I have not transgressed my oath"[12].

Reiss was originally invited to make an "inquiry" about crimes of Austro-Hungary over Serbs in the summer 1914; staying with the Serbian army during the whole war, he made a complete report on crimes of Austro-Hungarians, Germans and Bulgarians during the war, and his records were used as findings of expert about crimes of occupants in Serbia and their violation of the international war law at the peace conference in Paris. Reiss himself describes how he was working on collecting the data for his reports: "Therefore, I went and arranged my questionnaire with necessary caution. I was not satisfied with interrogation of hundreds of Austrian prisoners and hundreds of witnesses; I went to the venue, sometimes in the middle of grenades, in order to take care of everything that was possible to establish. I was opening crypts, examined corpses and wounded, visited bombarded towns, entered into houses and there performed a technical questionnaire according to the most scrupulous method; in short, I did everything in order to establish and verify the facts exhibited in this work"[13]. In his report for the *Gazette de Lausanne* that was published on 16 October 1914, he wrote: "I heard terrible details from the lips of Austrian prisoners, but I will not pass them today. I prefer, as the man who is used to look for material evidences for crimes, to go in the venue and conduct investigation myself"[14]. From Reiss' texts, it can be concluded that he was using all the methods and techniques known at that period in criminology, in order to establish the facts. Being the specialist for criminology of the world class surely helped him in performing this job. Regarding the methods of data collection, he was using: the method of interrogation (war prisoners, citizens, witnesses, soldiers, field marshals) – both techniques: questionnaire and interview, criminal expert opinion (ballistic expert opinion, exhumation, autopsy, investigation on the spot), taking photographs for criminalities (Reiss was the first in the world to introduce photograph into criminalities), analysis of document content (written document, photograph), observation and observation with participation – the type observer-participant[15]. He was trying to materially document each of his findings. Moreover, what is of a special importance – to inform the public about it immediately. Reiss was not waiting to submit an official report, but he, as the war correspondent of the already mentioned magazines, was informing the world about the atrocities as soon as he acquired the knowledge about

11 Dr Archibald Reiss, *War Reports from Serbia and from Salonika Front: Unpublished Texts in Serbian Language* (Belgrade: Geopolitika, 2014), 144-147
12 Rudolphe Archibald Reiss. *What I have Seen and Experienced*, 24
13 Archibald Reiss, *Atrocities over Serbs in Great War*, 37
14 Dr Archibald Reiss, *War Reports from Serbia and from Salonika Front*, 17
15 V. Vojin Milic, *Sociological Method* (Belgrade: Zavod za udžbenike, 2014), 440-441

them. In this way, by informing the world, he was trying to act preventively – if atrocities were revealed, maybe systematic commitment would stop. For example, in 1916 in his work "How Austro-Hungarians Were Fighting in Serbia" he reported on Austrian use of forbidden ammunition against Serbs. However, he informed the public about this even on 19 October 1914, as soon as he cognized this fact, also for the *Gazette de Lausanne*: "They use these bullets against enemy troops, while wounds made by these bullets are terrifying. If they hit arms or legs, amputation is unavoidable, and if the bullet hits head or body, death is inevitable… I will not describe how wounds look like, I will just say that they are terrifying. We have opened those bullets here and I am personally in possession of the one. It looks like an ordinary bullet from the outside, but when the bullet is opened, it is visible that its outside part is made of full lead. Then comes a cylinder filled with compressed black powder, mixed with small amount of aluminium. Closed bottom of this cylinder contains a small percussion cap with mercury fulminate, and behind, in a slider, there is a pointed striker. If a fired bullet hit on an obstacle, e.g. a bone, the striker hits the cap and it triggers explosion of the powder, therefore, explosive bullet is the issue with excellent characteristics, used before only for hunting pachyderms"[16]. Furthermore, he indicated the Austrian State factory where these bullets were produced, in which packing, which troops were supplied with them, with their photograph and graphical illustration of their structure. Therefore, Reiss was performing ballistic expert's report of this forbidden, inhumane ammunition, previously used only for hunting animals and recorded his findings. When writing about the Austro-Hungarian rush in Macva, he described the situation when civilians (stating their names) had hide in the house of Dragomir Marinkovic from Lipolist, which was one of a solid-built for that period. The ten of them. Austrian army passed in their reverse, fired through windows and shot even five hidden people, 10-60 years of age. Reiss performed a ballistic expert's report. "I have ascertained that the shots were fired into the house from without through closed windows. Therefore, the possibility of firing from the inside of the house is excluded"[17]. Reiss established by a criminal investigation on the spot that an Austrian punitive expedition had burnt alive a wounded man in Prnjavor[18]. In the same manner, by a criminal investigation on the spot, but also being present in person during one of the bombardments, he ascertained use of shrapnel when bombarding Belgrade. Since Belgrade was an open city and that there was no army in it, Reiss concluded: "Using shrapnel in destruction of Belgrade might mean that they sought to strike at the civil population of Belgrade. They had killed twenty five persons and wounded one hundred and twenty six. Out of this number, four persons had been killed by shrapnel, while thirty seven were wounded"[19]. Reiss also drew attention to violation of international laws and war conventions by Austrian bombardment of open (defenseless) cities, like Belgrade. Analyzing the targets of the Austrian bombardment of Belgrade, he indicated that "among these buildings there are also some that are, according to the war conventions and international conventions, almost sacred: the University, the National Museum, etc. Oddly even more: regarding the condition of these buildings of Science and Art, these were targeted with much more destructive rage than the others were. I have rarely seen in my life such sad scenes like destroyed lecture halls or the Physical Science cabinet. However, there are only 60 State buildings affected by bombardment, while there are 640 private houses and, this should be remembered, the majority of private houses is not in the proximity of State buildings. A conclusion may be driven that they deliberately sought to destroy the city as much as possible"[20].

Even at the beginning of the war, Reiss has published in the Swiss *Gazette de Lausanne* the

16 Dr Archibald Reiss, *War Reports*… 18-19
17 Ibidem, 35
18 Ibidem, 36
19 Ibidem, 22
20 Ibidem

excerpts from the Order for action towards Serbian citizens of the Command of the 9th Corps of Austro-Hungarian Army[21]. In his newspapers report, Reiss gives just excerpts from this instruction, in order to illustrate with what brutality Austro-Hungarian troops had to conquer Serbia[22]. During the war, this order has been misused in great number of situations that Reiss described for performing atrocities over Serbian citizens. The instructions about taking hostages when going through a village has been misused even at the entrance of the next village: they should dispose of the previously taken hostages. Reiss indicates that to release them was the simplest, but since every person, according to the same order, encountered outside a village should be considered to be "war band", they were simply – killed. "Therefore, for the defense from that dangerous 'guerilla' of 10 or of 75-80 years of age, as well as from 'women guerilla' of 60 years of age, they would simply shoot or hang them'[23]. Albanian guerilla also, fighting on the side of Austria against Serbs, was misusing a similar order, for organized killing of Serbian inhabitants in the territory of Kosovo and Metohija. Reiss reported on this, collecting material evidences for his reports[24].

Reports of Archibald Reiss are not just abstract, quantitative. Namely, his descriptions are also qualitative: except for the facts on committed crimes and the number of victims, he testifies also on cruelty of the committed crime. He writes about atrocities near Prnjavor, about 32 killed inhabitants from Ivan Selo and 109 shot, 11 killed and 5 hanged inhabitants of Prnjavor

21 The document is kept in the Military Archive, the Archive of the Kingdom of Serbia Army, the fund of the Headquarters staff, k-1, reg. no. 8/1. *In extenso* is published as enclosure in Rudolphe Archibald Reiss *Atrocities over Serbs in Great War*, 345-349

22 "The war is taking us into a country inhabited by a population inspired with fanatical hatred towards ourselves, into a country where assassination, as the catastrophe of Sarajevo has again shown, is condoned even in the upper classes… In dealing with a population of this kind all humanity and kindness of heart are out of place, they are even harmfull… I therefore give orders that, during the entire course of war an attitude of extreme severity, extreme harshness, and extreme distrust is to be observed towards everybody… To begin with, I will not tolerate those non-uniformed, but armed men of the enemy country, whether encountered singly or in groups, should be made prisoners. They are to be unconditionally executed. (The Austrians were well aware that Serbian soldiers of the Third Levy, like our *landsturm*, were never uniformed (remark A. Reiss).) Who shows compassion in such cases, will be severely punished… In any case, soldiers should immediately take a few hostages to protect themselves (priests, teachers, people of good standing, etc). In traversing a village, they are to be brought, if possible to a passage *en queue* and if a single shot is fired at the troops in that village, they should be summarily executed… Village inhabitants should be informed immediately to hand over all weapons and that search will be performed. Each house in which weapon is discovered will be destroyed. If householder is not found, the first inhabitants that appear will be taken and they will be requested to say who the householder is and where he has disappeared. If it is clear that they refuse on purpose to say, they will be hanged… Every inhabitant encountered in the open is to be considered the member of a band, which has concealed its weapons somewhere: we have no time to look for it. These people are to be executed if they appear even slightly suspicious", Rudolphe Archibald Reiss, *War Reports*… 30-33

23 Ibidem,34

24 "I have in my files the photographs of victims from this case. Police officers, by chained 'guerilla', show bullets, bombs and 'discovered' weapons. On this occasion, I will mention just one statement of the Austrian police officer, Dusan Todorovic, age 31, from Zagreb, infantry sergeant of the 25th Hungarian Regiment: 'Globocnik, Edler von Vojka was general-major in Mitrovica and had under his command an Albanian local battalion. This battalion had the task to clear the province from bandits, but as I have already said, just those Albanians were the greatest bandits. They were pillaging villages and killing Serbs in them, reporting later that the Serbs were 'guerilla'. For example, they were reaching to a Serbian house and asking for water from householder. The farmer goes for water accompanied by a soldier, who would leave his rifle. Then others would come, taking the rifle and accusing the farmer for possession of firearms. He would uselessly defend himself claiming that the rifle belonged to the soldier that went for water with him. He would be shot regularly and Albanians were reporting that they had found a 'guerilla' armed with a rifle and executed him. In order to kill Serbian civilians in such a manner, Austro-Hungarian military authorities alluded to the decision of the commander in chief from 28 February 1916 regarding the possession of weapon, ammunition and explosives, as well as to the decision of the same subject from 23 August 1916". Rudolphe Archibald Reiss *Atrocities over Serbs in Great War*, 286-287

in Lesnica. Referring to the evidence of a witness who described the manner of shooting, when 109 victims were aligned at the edge of a joint grave and soldiers that were shooting were opposite to them, Reiss concludes the following: "The whole group rolled down to the grave and other soldiers filled the grave with soil without waiting to see whether all were dead or only wounded. It is certain that many of them were not mortally wounded, some of them maybe were not wounded at all, but were pulled down to the grave by others. They were buried alive! Another group of prisoners was brought during this shooting with many women among them and when the others were shot, the executioners forced poor people to shout: 'Long live Francis Joseph!'"[25]. Reporting on the atrocity in Ivan Selo, where inhabitants were informed in advance by the duke Vuk that they should flight, but did not listen and therefore perished, Reiss cynically but truly determines that "Austro-Hungarian 'kulturtreger' left in this village only graves, burnt houses and raped women"[26].

Reiss accuses Austro-Hungary for another form of war crime, specific regarding the manner of commitment: using biological weapons. Namely, Serbian army had many sick from typhus, including those captured by Austro-Hungarians. Franc Joseph's government directed those captives to Bulgaria, where, of course, they spread this severe infective disease. Bulgaria has not entered into the war yet and Reiss indicates that sending of sick people was performed "with the political goal that is not hard to guess"[27].

His powers of observation, establishing facts and their proper qualifications have not betrayed him even later during the war. On 13 December 1916 he recorded the consequences of Bulgarian-German bombardment of Bitola. Bitola has been already proclaimed an "open city" and as such, it was under the protection of the international war law. "I occasionally come across a stretcher, carried by the two, where a bloody body of a woman or a child lays, accompanied by few sad relatives. These are the victims of disobedient Bulgarian-Germans to war contracts and laws… I found a great pool of blood in a cellar. A mother with three children found shelter there. One nurseling was on her breast and two little ones were happily hiding in her skirts. She settled them saying that they were safe in the cellar, until a 210 grenade came to extinguish the four innocent lives… The result of the day was: one Italian soldier dead, one Serbian soldier wounded, a dozen of women and children killed"[28]. Reiss writes again in 1917 about the new suffering of Bitola and victims among civilian inhabitants. He points out that there were no excuses for Bulgarian bombardment of this city, since there was no artillery in the city according to the Reiss' testimony. Artillery was placed at city perimeter, like before, which was well known to the aggressor. However, it did not stop the atrocities of the 17 August 1917 caused by Bulgarian bombardment: "Eight persons were burnt, twenty six were wounded by fire and twenty two killed by grenades. Only four soldiers were among the victims, burned when they tried to save children. Old mother of the Romanian professor Georgi and his little daughter were buried by ruins of their house. In this way, seven hundred houses were captured by fire"[29]. With these lines, Reiss was among the first researchers of conflicts in the world who indicated the change of war character, regarding the victims of war: belligerents did not care anymore for civilian victims and, as we can see from his descriptions, they directly and consciously caused them by bombardment of open cities, although it was completely opposite to the Hague Convention regarding the war laws and conventions in the land (Article 25 of the Regulation)[30]. He explicates this: "Austro-Hungary leads an 'integral war', i.e. it wants to exter-

25 Rudolphe Archibald Reiss, *What I have Seen and Experienced During Great Days*, 57
26 Ibidem
27 Rudolphe Archibald Reiss, *What I have Seen and Experienced During Great Days*, 69
28 Rudolphe Archibald Reiss, *Letters from Serbian-Macedonian Front*, 50
29 Ibidem, 100
30 Vesna Knezevic-Predic, Sasa Avram, Zeljko Lezaja (ed.), *Sources of Humanitarian Law* (Belgrade: Faculty of Political Sciences, Red Cross of Serbia, International Committee of Red Cross, 2007), 311

minate the complete Serbian people, not only their soldiers"[31]. The consequence was that in the World War I there were more civilian than military victims were for the first time in the history of modern conflicts; World War II only confirmed the tendency that lasts until nowadays.

Since Reiss was not only recording war atrocities but also informing the world public about them, he was constantly in a controversy regarding the truthfulness of declared statements. Therefore, he recorded in Thessaloniki on 27 November 1916: "Here is a document in front of me showing that we were right when speaking about outrageous Austro-Hungarian atrocities. In a pocket of a German officer, killed at Bitola front, we have found a document competent for itself, extremely compromising, as the most monstrous accusation against the authority of 'His virtuous catholic Majesty'. It is a postcard with the picture of hanging six peasants in Krusevac, in Serbia. Six unfortunate peasants, with hands tied at their backs, hang on six gallows. All around these shameless pillars German officers and soldiers, and especially Austrian, look at the scene that is usually performed in secret and in privacy and peace within a secret yard of prison. The expression of these spectators is what incriminates the most: their faces express content and joy! What to say about the idea of these hangers to put this in a postcard? Is it sadism or cruelty of an animal incapable to satisfy its bloodiness? In any case, such the acts dishonor their authors for good"[32].

According to everything that we stated, as well as many other documents that we have not used in this paper due to the limited space, there is no doubt that Reiss performed his engagement of independent investigator as conscientiously as possible, strictly observing the ethics and the rules of the criminalist science profession. He tried to criminally document every atrocity that he recorded in the official reports. He succeeded in most of the cases. He tried not only to document, but also to establish the causes that led to it. Surely, these causes disproved his starting presumption before he had left Switzerland for Serbia that atrocities were individual accidents. During his mission in Serbia, he was convinced that these were performed in an organized, systematic manner and on order of the highest command of the Imperial-Royal army. The term genocide did not exist in his period; however, according to his descriptions of performed atrocities and war, military documents ordering them, there is no doubt that Reiss would qualify them as such. Regarding his engagement as the war correspondent, Reiss considered that as his duty. He considered that the world should be informed about the truth at battlefield and he was sending his reports – adapted to journalist expression – to distinguished foreign magazines from his period. Exactly this act of Reiss explains him in the light of the engaged intellectual. He is not just an expert in the field of criminal science recording atrocity and making the report about it; he is at the same time the intellectual that considers that he must do everything in order to make available for public the truth he had established by scientific methods. Publishing the scientific truth, Reiss gave the essential respond to Austro-Hungarian war propaganda. The respond to which the whole propagandist machinery of Central Powers, although trying very hard, could not parry. By this, he showed in practice how an intellectual should behave and what the difference between an expert and an intellectual was.

Reiss was eager to point out that he suffered no political pressures during his investigations of atrocities in Serbia, but on the contrary, he was enabled to investigate and document them in the best possible manner. In case that, eventually, he was under such pressures, he would have abandoned the participation in such an attempt. His attitudes regarding the need of police depolitization clearly evidence this, presented in his work *Contribution for Police*

31 Rudolphe Archibald Reiss, *What I have Seen and Experienced…*, 43
32 Rudolphe Archibald Reiss, "Austro-Bulgarian-German Violations of War Laws and Rules: Letters of One Practician-Criminal Scientist from Serbian Macedonian Front" in Rudolphe Archibald Reiss *Atrocities over Serbs in Great War*, 256

Organization[33], in which he literally says that "Politics has nothing to do in the police", but also his later acts when he abandoned the state position in Serbia because of appointment to an important position in the police of a man who, according to his opinion, had no professional, criminal competences, but with party support.

The third issue that we consider here is connected with Reiss' solidarity with Serbian army and people and his act of joining the Serbian army as a volunteer. That act is certainly understandable and explainable considering the fact that Reiss was sharing the good and the evil with Serbian soldier – peasant, that he crossed all the fronts, survived Albanian Golgotha, Kajmakcalan and Salonika front[34] and entered into liberated Belgrade with Serbian army on 1 November 1918.

We have already established that Reiss acted with great cautiousness and complete objectivity in performing his professional expertise, using the highest knowledge and methods known for the criminal science in that period. With that, he fulfilled obligation of the professional ethics: to public the truth to the world, to show his solidarity with victim, to fight for the right for freedom of one small nation to which aggression of great power was performed. Here we come to the important distinction between ethical and moral norms, mush later established by Jürgen Habermass[35]. Each ethical value is special in itself, while moral norm owes its status to verified universal meaning[36]. Ethical values characterize one community, reflect what represents a common good for that community, its identifiable characteristic. In that sense, e.g. a common good for criminal science profession is that community members give truthful and objective findings, based on the highest achievements of the profession, since in that way they provide credibility for them and their findings. However, moral norms are the norms of higher level and have universal meaning. Moral values are connected with the idea of justice. For example, it is just that every man and every people should be free; that all men are treated equally, etc. Courageously telling the truth about the war in Serbia 1914-1918, joining the Serbian army as volunteer, expressing solidarity with its struggle that he has already established by scientific methods that it was just since it represented the struggle for freedom and it respected, unlike Austro-Hungarians, norms of war law that were very important to Reiss, he actually was fighting for the idea of justice. He outgrew the ethical codex of his profession by this and raised himself to the example of the intellectual with the best moral virtues. This gave him the right to stay in Serbia even after the end of the World War I, to follow events in it and, in his political testament "Listen, Serbs!", to warn it to moral stumbles of its "intelligence" and political class[37].

33 Rudolphe Archibald Reiss. *Contribution for Police Reorganization* (Belgrade: Geca Kon, 1920), 14

34 "When someone says that he is 'Salonika warrior', his value in the eyes of almost all old warriors is greater than that he has a distinguished position in peace", Rudolphe Archibald Reiss, *What I have Seen and Experienced*, 12

35 Jürgen Habermas. "On the pragmatic, the ethical, and the moral employments of practical reason", in J. Habermas (ed.), *Justification and Application: Remarks on Discourse Ethics* (Cambridge (MA): MIT Press, 1993), 1-17

36 Jürgen Habermas. *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*. (Cambridge (MA): MIT Press, 1996), 259

37 See: Rudolphe Archibald Reiss. *Listen, Serbs!* (Gornji Milanovac: Dečije novine; Belgrade: Historical Museum of Serbia, Association of warriors from liberation wars 1912-1920 and descendants, 1997); Uros Suvakovic. 2012. "Topical Quality Of Archibald Reiss`s Work `Ecoutez, les Serbes!` At Present Day". In Goran Milosevic (ed.) *Archibald Reiss Days I*. (Belgrade: Academy of Criminalistic and Police Studies, 2012), 167-178

REFERENCES

1. Clark, Christopher. 2014. *Mesečari: kako je Evropa krenula u rat 1914.* [*Sleepwalkers: How Europe Went to War in 1914*]. Smederovo: Heliks
2. Knezevic-Predic, Vesna, Sasa Avram, Zeljko Lezaja (ed.) 2007. *Извори хуманторног права.* [*Sources of Humanitarian Law*] Belgrade: Faculty of Political Sciences, Red Cross of Serbia, International Committee of Red Cross
3. Milic Vojin. 2014. *Социолошки метод.* [*Sociological Method*] Belgrade: Zavod za udzbenike
4. Reiss, Rudolphe Archibald. 1916. *Како су Аустро-Мађари ратовали у Србији.* [*How Austro-Hungarian Fought in Serbia*] Odesa: Typography of South-Russian stock company
5. Reiss, Rudolphe ARchibald. 1920. *Прилог за реорганизацију полиције*. [Contribution for Police Reorganization]. Belgrade: Geca Kon
6. Reiss, Rudolphe ARchibald. 1997. *Шта сам видео и проживео у великим данима.* [*What I have Seen and Experienced During Great Days*]. Belgrade: Mladost turist, Itaka
7. Reiss, Rudolphe ARchibald. 1997. *Чујте, Срби!* [*Listen, Serbs!*]. Gornji Milanovac: Decije novine; Belgrade: Historical Museum of Serbia, Association of liberation wars 1912-1920 and descendants
8. Reiss, Rudolphe ARchibald. 2014. *Злочини над Србима у Великом рату*. [*Atrocities over Serbs in Great War*]. Belgrade: Svet knjige
9. Reiss, Rudolphe ARchibald. 2014. *Ратни извештаји из Србије и са Солунског фронта: необјављени текстови на српском језику*. [*War Reports from Serbia and from Salonika Front: Unpublished Texts in Serbian Language*]. Belgrade: Geopolitika
10. Suvakovic, Uros. 2012. ."Topical Quality Of Archibald Reiss`s Work `Ecoutez, les Serbes!`At Present Day". In Goran Milosevic (ed.) *Archibald Reiss Days I*. Belgrade: Academy of Criminalistic and Police Studies
11. Habermas, Jürgen.1993. "On the pragmatic, the ethical, and the moral employments of practical reason", in J. Habermas (ed.), *Justification and Application: Remarks on Discourse Ethics*. Cambridge (MA): MIT Press
12. Habermas, Jürgen. 1996. *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*. Cambridge (MA): MIT Press

INTERNET SOURCES

13. „Хиљаду година затвора за Србе у Хагу". ["Thousand Years of Imprisonment for Serbs in Hague"] *Политика*. 9.12.2012. Available at: http://www.politika.rs/scc/clanak/242549/%D0%A5%D0%B8%D1%99%D0%B0%D0%B4%D1%83-%D0%B3%D0%BE%D0%B4%D0%B8%D0%BD%D0%B0-%D0%B7%D0%B0%D1%82%D0%B2%D0%BE%D1%80%D0%B0-%D0%B7%D0%B0-%D0%A1%D1%80%D0%B1%D0%B5-%D1%83-%D0%A5%D0%B0%D0%B3%D1%83 [approached on 10.02.2016]

UDC: 341.322.5(497.11)"1914/1918"
341.33
34:929 Pajc P. A.

ARCHIBALD REISS`S CONTRIBUTION TO THE ENFORCEMENT OF THE INTERNATIONAL HUMANITARIAN LAW[1]

Tijana Surlan, PhD[2]
Academy of Criminalistic and Police Studies, Belgrade

Abstract: The aim of this paper is primarily to describe Reiss`s investigation efforts of war crimes during the First World War. Although focus on war crimes did not occur for the first time in Reiss`s work, it was for sure the first professional, forensic and criminalistics investigation of war crimes, rather than an quasi-legal or political report on what happened during the war. Reiss`s reports were not set of arbitrarily collected facts, but rather systemically gathered evidence, composed in accordance with the International Public Law, i.e. its part International Law of Armed Conflicts (International Humanitarian Law). As such it presents one of the important steps in the further development of International Humanitarian Law and International Criminal Law.

Key words: Report, criminalistics investigation of war crimes, International Humanitarian Law, International Criminal Law

INTRODUCTION

During previous five "Archibald Reiss Days" Conferences in Belgrade we were writing and listening about Archibald Reiss and his accomplishments a lot.[3] As his work was multidi-

1 This paper is the result of the research project: "Crime in Serbia and instruments of state response", which is financed and carried out by the Academy of Criminalistic and Police Studies, Belgrade - the cycle of scientific projects 2015-2019.
2 tijana.surlan@kpa.edu.rs
3 Sreten Jugović, Darko Simović, Dragutin Avramović, Actuality of Reiss`s Principles of Modern Police, International Scientific Conference "Archibald Reiss Days", Thematic Conference Proceedings of International Significance, 2011, Volume I, pp. 69-76; Ivana Krstić-Mistridželović, Archibald Reiss and the First Police School in Belgrade, International Scientific Conference "Archibald Reiss Days", Thematic Conference Proceedings of International Significance, 2011, Volume I, pp. 165-172; Svetlana Ristović, Establishing police education in Serbia and Contribution of Archibald Reiss, International Scientific Conference "Archibald Reiss Days", Thematic Conference Proceedings of International Significance, 2011, Volume I, pp.173-180; Uroš V. Šuvaković, Topical Quality of Archibald Reiss`s Work "ECOUTEZ, LES SERBES!" at Present Day, International Scientific Conference "Archibald Reiss Days", Thematic Conference Proceedings of International Significance, 2012, Volume I, pp.167-178; Sreten Jugovic, Darko Simovic, Dragutin Avramovic, Police Organisation in the Work of Archibald Reiss, International Scientific Conference "Archibald Reiss Days", Thematic Conference Proceedings of International Significance, 2012, Volume I, pp.229-240; Zoran Jevtovic, Zoran Aracki, Archibald Reiss Propaganda – Communication Influence on Conflict Paradigm Construction, International Scientific Conference "Archibald Reiss Days", Thematic Conference Proceedings of International Significance, 2013, Volume III, pp.249-256; Ljubiša Mitrović, The Strategy of Social Development and the Moral Unity of a People as the Bases of Security - On the Relevance of Reiss's Ideas on Justice, Concord and Patriotism of the Serbian Nation - , International Scientific Conference "Archibald Reiss Days", Thematic Conference Proceedings of International Significance, 2013, Volume III, pp. 219; Ivana Krstic-Mistridzelovic, Miroslav Radojicic, Report of the Inter-Allied Commission on Crimes Committed by the Bulgarians

mensional, such were the papers dedicated to him. Still, there are plenty of opportunities and needs to analyze his work and decide on the place that he deserves in the realm of science. Yet again, for the paper that follows it should be cleared at the very beginning, that Reiss himself as a scientist was neither dedicated nor working in the field of the International Humanitarian Law. He found himself in a position to investigate massive war crimes, placing his work in the framework of the International Humanitarian Law. My research is directed more towards the overview of the impact that his international crimes investigation has made in terms of the enforcement of the International Humanitarian Law.

For the introductory purpose I would like to offer yet another clarification. Term International Humanitarian Law paired with the name of Dr Reiss may sound dissonant – and that could be stated with the proper reason. At the time when Dr Reiss lived and worked, term International Humanitarian Law did not exist. It was coined after the Second World War and in the narrow sense it marks normative framework of the four Geneva Conventions from 1949 and two Additional Protocols from 1977. In broader sense though, the term International Humanitarian Law in modern International Law is used extensively, with the aim to cover all norms regulating armed conflicts and with the aim to apply them and interpret primarily in accordance with the principle of humanity. In the title of this paper, thus, modern term is paired with the name of the classical investigator; contemporary approach to the normative framework with classical investigation methods. That, of course, is not due to ignorance or incorrectness – quite the contrary. Reiss was the first criminal investigator to apply pure criminalistics methods on the battlefield crimes. What is intriguing is finding out what kind of impact, if any, Reiss`s work has made for the enforcement of the Law on Armed Conflicts and to the contemporary International Humanitarian Law and International Criminal Law.

The period of the First World War, when Reiss did his work, is marked with the first ever organized action against war crimes perpetrators and against impunity of sovereigns and high state officials.[4] The First World War was ended producing peace treaties with clauses obliging states to establish international criminal courts that would prosecute war crimes. Although the outcome of the war crimes prosecution attempts was poor, the overall outcome for the international criminal justice values these first efforts.[5]

What is important for this overview and Reiss`s role is the fact that normative framework for the war crimes prosecution was exactly the same at the end of the First World War as it was at the end of the Second World War. Both these periods are periods of forging of the international criminal justice.

Reiss was a pioneer in the overall scope of disciplines that he was working on – among them photography, criminalistics, police organization, police education, etc. The same can be claimed for the enforcement of the International Humanitarian Law.

in occupied Serbia (1915-1918), International Scientific Conference "Archibald Reiss Days", Thematic Conference Proceedings of International Significance, 2015, Volume II, pp. 341-348

4 Tijana Surlan, Odgovornost kajzera Vilhelma II za Prvi svetski rat – medjunarodnopravni aspect, Zivojinovic D. (ur.), Srbi i Prvi svetski rat 1914- 1918, Zbornik radova sa medjunarodnog naucnog skupa odrzanog 13-15.juna 2014, Srpska akademija nauka i umetnosti (SANU), Beograd, 2015, pp.667-684.

5 Tijana Surlan, Zlocini u Prvom svetskom ratu – medjunarodnopravni aspect, u: Prvi svjetski rat – uzroci i posljedice, Akademija nauka i umjetnosti Republike Srpske (ANURS), Naucni skupovi XXIX, Odeljenje drustvenih nauka, Knjiga 32, Banja Luka, 2014, pp. 363-382.

WAR CRIMES INVESTIGATION MAIN FACTS ABOUT DR REISS

When the First World War started Rodolph Archibald Reiss was a professor with the reputation of a influential criminologist. He studied chemistry at the Swiss University of Lausanne, as did many German students in the late XIX century. From the very beginning of his studies, he was especially interested in photography,. This attraction to photography was the foundation for the development of his forensic career later on.[6]

After acquiring a PhD in chemistry, Reiss went to Paris to well-known Alphonse Bertillon to get special training. [7] Bertillon developed the application of anthropometric method of criminalistic registration and identification of identity of a criminal based on personal description. Bertillon`s new ideas and new approach, made a huge influence on Reiss, being crucial for his further orientation towards scientific policing. In the years to come Reiss himself wrote his first book *Court Photography* (La photographie judiciaire) published in Paris in 1903, and Manuel du portrait parlé in 1905, both inspired by Bertillon's ideas, and both of them developing new methodological concept.

Reiss was appointed Associate Professor of Criminalistics at the University of Lausanne (1906), where he held inauguration lecture entitled *Scientific Methods in Judiciary and Police Investigations* (*Les méthodes scientifiques dans les enquêtes judiciaires et policières*). During the period of his teaching career Reiss developed many techniques used by the forensic community to investigate all types of crimes. He advanced the use of photography to document crime scenes and forensic evidence.

Reiss gained the reputation of a respected professor as a very young scholar, much due to his new ideas, originality, new approaches to the sciences and ambition.[7] Publishing of the book *Thefts and Homicides* (Vols et homicides) in 1911, has brought him even greater reputation among world experts.[8] Within this book he presented techniques used by the scientific police at the time to investigate, collect, and analyze evidence related to burglaries and homicides. His last work in the field of criminalistics/crime investigation, *Contribution to the Reorganization of the Police* (Contribution à la réorganisation de la Police), he wrote in French in March 1914.[9]

As a promoter of modern criminalistics, Reiss was known as a lecturer in Austria, the Netherlands, Belgium, Brazil and Russia, as well as a criminalist expert in courts in Switzerland, France, Italy and Romania.[10] Governments of many countries were sending their experts to the scientific and professional training courses organized by Reiss, guided by the idea of modernization of technical police and its staff.

Among the experts from all around the world Dusan Alimpic also studied in Reiss`s school in 1910. He was a criminalist and police officer from Serbia, the founder and the Head of the Anthropometric Police Department of the Ministry of Internal Affairs. Dusan Alimpic established personal relations with Dr Reiss, and soon their relation developed into

6 Academy of Criminalistic and Police Studies – 90 Years of Higher Police Education in Serbia, 2012, pp.7-9.
7 Zdenko Levental, Rodolph Archibald Reiss: criminaliste et moraliste de la Grand Guerre, L`Age d`Homme, 1992, p.21; Jacques Mathyer, Rodolph Archibald Reiss: pionier de la criminalistigue, Lauusanne, 2000.
8 As the first volume of *Handbook for Scientific Policing* Reiss held as his goal to publish Volume II. Faux (Volume II. Contrefaits), Volume III. Identification (Volume III. Identification), and Volume IV. Organisation de la Police Criminelle Moderne (Volume IV. Organization of Modern Criminal Police). Unfortunately he didn`t manage to accomplish this goal.
9 It was translated into Serbian in 1920 and in 1928 into Chinese language.
10 Zdenko Levental, Rodolph Archibald Reiss: criminaliste et moraliste de la Grand Guerre, L`Age d`Homme, 1992, p.28.

friendship. Minister of Interior Stojan Protic was thoroughly informed on that, and especially on Reiss, his qualities, qualifications, science that he was developing, and also, as very important to him, about sympathies that Reiss was showing for Serbian nation.[11] Reiss also had close relation with Serbian Consul in Geneva, Nikola Petrovic and by that friendship he was acquainted with Serbian people.[12]

All these facts considering, Dr Reiss, formed a very specific professional relationship with the Serbian MOI. At the very beginning of the First World War, Minister of Interior Stojan Protic realised that Dr Reiss was capable of carrying out battlefield war crimes investigation, on atrocities committed against Serbs, at the very beginning of the First World War. Thus, in September 1914 Reiss was officially invited by the Royal Serbian Government as a neutral investigator to investigate war crimes.

It is very important to underline, for the purpose of the overall history of the International Law on Armed Conflicts i.e. International Humanitarian Law and International Criminal Law, that conducting criminal investigations of war crimes, especially battlefield war crimes investigations was quite unknown at that period. Thus Reiss`s accomplishment is even more significant, both for himself as a professional and for the enforcement of the International Humanitarian Law. For the purpose of clarification of his biography it would be correct to add this accomplishment as another pioneer project that he successfully launched.

WAR CRIMES INVESTIGATION

At the very beginning of the First World War, which started in the territory of Serbia in 1914, mass war crimes were committed by Austro-Hungarian and German Armies. Serbian Government reacted to war crimes immediately in terms of the International Public Law. Government did not opt for reprisals or *tu quouqe* approach, but rather for the legalistic approach - to conduct an impartial and professional investigation, by an eminent professional, from neutral country. It should be noted that sense and state of mind of Serbian Government was that war crimes were not usual and expected accompanist of the war; and as such, that they were to be investigated and sentenced.

One can say – war is a nasty job; it is expected, and in a way even usual way of conducting the war. Yet again, at the time of the First World War, war was not an enterprise governed by the pure will of the belligerents. Quite contrary – it was under the significant normative framework of the law on war, developed in the corpus of customary international law and codified at the end of the 19th century and at the very beginning of the 20th century, during two Hague Conferences in 1899 and 1907.[13] One may say again – International Law is weak; it is non-applicable; law as a phenomenon has no power to stop war or prevent war crimes. However – one is for sure – law can punish. And at this point Reiss`s work emerges, as well as his role in the enforcement of the International Humanitarian Law.

Reiss accepted the invitation of the Royal Serbian Government to act as a neutral criminal investigator and to investigate war crimes that occurred on the mass scale. He spent three months in Serbia investigating war crimes - during September, October and November of 1914. From the overall picture of mass war crimes that occurred at the beginning of the War,

11 Academy of Criminalistic and Police Studies – 90 Years of Higher Police Education in Serbia, 2012, pp.7-9.
12 Bastian Matteo Scianna, Reporting Atrocities: Archibald Reiss in Serbia, 1914-1918, The Journal of Slavic Military Studies, Volume 25, Issue 4, 2012, pp.596-617.
13 Тийана Шурлан, Место Гаагских конференций (1899 и 1907 гг.) в развитии международного права и международных отношений, у: Смолина М.Б., Залеский К.А. (ред.), Накануне Великой войны: Россия и мир – Сборник докладов и статей, Москва 2014, стр. 119-141.

Reiss`s Report covers only a small number of crimes committed by the Austrians and Germans. Since Serbia was occupied Reiss did not have a free approach to the territories under Austro-Hungarian occupation. Thus, his Report covers only the crimes committed in the first few months of the War. The damage done by the enemies was much more considerable than the Report documents. Nevertheless, his Report is a precious evidence, not just for Serbian Nation, but for the mankind, for its contribution to the enforcement of the International Humanitarian Law and the very foundation of the International Criminal Law.[14]

At this point it seems necessary to offer yet another clarification. As much as Reiss`s work was praised in previous lines of this paper as the first Report in terms of International Humanitarian Law enforcement, it should be clarified that his Report is not the first ever report on occurrences of a war. Another Report has been mentioned throughout the literature – Report of the International Commission to Inquire into the Causes and Conduct of the Balkan Wars, which was organized by the Carnegie Endowment for International Peace.[15] It is interesting to add that this Report was published in February 1914, just few months before the assassination of the Grand Duke Franz Ferdinand and the break of the First World War. It could be concluded that Serbian Government, who had the experience with a commission investigating occurrences of a war, simply repeated that formula for the war crimes of the First World War. Thoughtful exploration of the Carnegie Endowment Report reveals that such a statement would be countering the truth. Mentioned Report presents description of what happened during the Balkan Wars, from the origins of the war, through the relation of belligerent states, economic impact of the war, to the publication of some official document of governments of all states involved in the War. There was no investigation of war crimes, whatsoever, but general statements of war cruelties. There is one chapter dedicated to the normative framework, stating in general that law on war existed, but far beyond terms of the legal elaboration.[16] It is even stated in the very Report that it does not pretend to the title of legal analysis, yet again stating that every single legal norm was breached.[17] There is, as well, mentioning of the use of forbidden bullets, but in the descriptive manner, not analytical.[18] One argument more *pro* conclusion that this Report cannot be compared with Reiss`s Report, and that it does not poses legal importance as Reiss`s Report, rests on the very composition of the Commission members. Members of the Commission were professors and politicians from various states, since it was an international commission, but it was not an expert structured, professional commission, capable to encounter enforcement of law.

Reiss`s work, on the other side, was governed by the high standards of the criminalistics investigation, applying scientific, forensic methods. He also used advantages of photography. Some of photos were published in printed version of Report, presenting difference of wounds gained by ordinary and explosive bullets.[19] Reiss`s investigation was not ungoverned. On the contrary, he led his investigations in terms of the existing normative framework, following *ratio* and *telos* of the International Law of Armed Conflicts. Normative framework of the International Public Law governing means and methods of warfare existed at the time of the First World War. There was *corpus* of customary norms of the classical International Public Law prescribing the law in war and, even more important, a number of conventions adopted at the Hague Conferences in 1899 and 1907. Reiss was clearly aware of them and he conducted

14 Bastian Matteo Scianna, Reporting Atrocities: Archibald Reiss in Serbia, 1914-1918, The Journal of Slavic Military Studies, Volume 25, Issue 4, 2012, pp.596-617.
15 Ibid.
16 The Carnegie Endowment for International Peace, – Report of the International Commission to Inquire into the Causes and Conduct of the Balkan Wars, Washington, 1914, Chapter V, pp.208-234.
17 "This Report is not legal study", ibid, p.209
18 Ibid, pp.223-225.
19 Rodolph Archibald Reiss, Report upon atrocities committed by the Austro-Hungarian Army during the First Invasion of Serbia, London, 1916, pp.14-15.

his investigation following their systematic and normative structure. Yet again, specificity of battlefield crimes, huge number of victims, huge number of perpetrators – of different ranks, importance, variety of *actus reus* accomplishing the crimes, posed before Reiss task that easily could be threatening. We still, at the present time, do have some severe issues in the field of the International Criminal Law Procedure and in general methods that are applicable in terms of massive international crimes.[20] It is constructed according to national criminal law procedures, and yet it is highly different, with completely different *mens rea* and *actus rea*. Thus it is even more important to underline Dr Reiss`s work and accomplishment in adjusting traditional investigation methods to specific crimes.

In the period January - March 1915 Reiss analyzed his findings and evidence and documents he was supplied by the Serbian Government. Based on firm evidence he formed his "REPORT" upon the atrocities committed by the Austro-Hungarian army during the first invasion of Serbia" and submitted it in April 1915 to the Serbian Government. The report has 192 pages. The Report was also published. The first publication, in the form of a book, was edited in 1916, in London.[21]

The Report is divided in 6 chapters: 1. Explosive bullets and dum-dum bullets; 2. Bombardment of open towns and the destruction of buildings; 3. Massacres of Serbian prisoners and wounded; 4. Massacre of civilians; 5. Pillage and destruction of house property; 6. Review of the causes of the massacres.

As he himself stated in the letter to the Prime Minister of the Serbian Government, the main means of his enquiry were interrogation of prisoners of war, hundreds of eye-witnesses of atrocities, wounded; interrogation of cartridges forbidden by the laws and regulations of war. All his material is particularly valuable since everything was collected on the spot. For example, he himself witnessed bombardment of Belgrade, for duration of "36 days and nights consecutively".[22]Important statement was that Belgrade was open town. Yet again, Austrian army was bombing indiscriminately private houses, public buildings and factories.[23] He specified, that buildings of the University, Serbian National Museum, State Lottery Building, railway station, the Old Royal Palace, Military Academy, General State Hospital etc. were under bombardment. After thoroughly countered bombarded objects, Reiss cited Article 27 of the 1907 IV Hague Convention, forbidding the bombardment of civilian objects and accompanied these statements with photographs.[24] Bombardment of Belgrade caused numerous civilian cassualities; he stated numbers, precising the way how the death occurred.[25] Similar approach of investigation and presentation of facts, he presented for towns Sabac and Loznica. In other chapters of the Report he offered facts on soldiers *hors de combat* and civilians, not once citing names of persons, describing harm they suffered – also accompanying his statements with photos. In majority of cases he added his personal observations about wounds and inquiry that he undertook. One part of the report on massacres on civilians was about the killed, citing the number of killed, their names, age and cause of death.

During his investigation Reiss obviously tried to remain highly professional. His work was not intended to gather evidence to accuse the Austrians or Germans, but to find out what really happened. There is one illustration for this statement. Use of weapons was regulated by the norms of International Law on Armed Conflicts. Norms were forbidding the use of certain types of bullets, known as dum-dum bullets, or bullets that have power to explode in human

20 Tijana Surlan, Diversification of the International Criminal Judiciary, Athens Journal of Law, Volume 1, Issue 3, July 2015, pp. 165-175.
21 Rodolph Archibald Reiss, Report upon atrocities committed by the Austro-Hungarian Army during the First Invasion of Serbia, London, 1916.
22 Ibid., p.17.
23 Ibid.
24 Ibid., 19.
25 Ibid.,20.

body. Reiss found out that this kind of bullets were used by the Austrian Army, but more as an exception. When interrogating Austrian soldiers – prisoners of war – he learned that soldiers did not have any knowledge on that kind of weapon before December 1915 or after the defeat on the Jadar and Cer.[26]

The last part of his Report was dedicated to prisoners of war captured by the Serbian Army. The overall tone is affirmative, in manner that PoW were treated correctly, lacking mostly the food. On the other side, testimonies with different content were published as well. For example, Diary of a Prisoner in World War First or An Historian in Peace and War: The Diaries of Harold Temperley show that prisons in Serbia have not been immune to unjust or degrading treatment of PoW.[27]

During the period of the first investigation that Reiss undertook in the autumn of 1914, when he investigated atrocities committed by Austro-Hungarian and German soldiers, he remained in the scope of neutrality and the highest standards of professionalism. Later on, Reiss became closer to Serbian people, army and more sensitive to their suffering. He decided to join the Serbian Army which diminished his neutral position when he started his next war crime – atrocity investigation, committed by the Bulgarian Army.

During the war, the East part of Serbian territory was occupied by Bulgaria. The first information about severe atrocities in the territory occupied by the Bulgarians, the Serbian Government was supplied by the Royal Netherlands Government, whose Embassy in Sofia represented interests of Serbia. The Serbian Government, at that time situated in the island of Corfu (Greece), tried to get informed about the situation in the occupied country, but since the Bulgarians refused to provide any information, they asked the Allies and the International Committee of the Red Cross to force Bulgaria to respect the Hague Conventions and customs of war. At the same time, eager to learn more on Bulgarian atrocities, Serbian Government asked Dr Reiss once again to conduct investigation on war crimes and violations of laws and customs of war, especially Hague conventions.

Dr Reiss accepted the new task and started visiting places where crimes were committed. On his findings he thoroughly informed Serbian Government through two reports.[28] At that time Reiss was, as already mentioned in the text, deeply involved with Serbian Army, Government and people, which was especially manifested through texts that he was publishing in newspapers in Switzerland, France and the Netherlands.[29]

Two reports on atrocities committed by Bulgarian soldiers Dr Reiss delivered on January 1919 to the Serbian Government. He made the list of 99 Bulgarian soldiers and clerks responsible for those crimes.[30] Methods of the investigation were similar as for the previous Report. On the other hand, the task was more complex since majority of the territory where crimes occurred was under Bulgarian occupation. These Reports were nevertheless an important starting point for the Inter-Allied Commission, that was established shortly after the war, with the task to organize documents for the forthcoming peace-treaties conferences.[31] It is worth mention-

26 Ibid, p.13.
27 Josef Sramek, Diary of a Prisoner in World War First, Prague, 2010; T.G.Otte (ed.), An Historian in Peace and War: The Diaries of Harold Temperley, Ashgate, 2014.
28 Miloje Prsic, Sladjana Bojkovic (pr.), O zlocinima Austrougara-Bugara-Nemaca u Srbiji 1914-1918, Beograd, 1997.
29 He was a war correspondent for the three prominent European newspapers, *Gazette de Lausanne*, *Le petit Parisien* in Paris and Amsterdam`s *De Telegraf.* Some of the newspapers reports less known were published two years ago again in Belgrade: Zivko Markovic, Milan Starcevic (ed.)Dr Arcibald Rajs, Ratni izvestaji iz Srbije i sa Solunskog fronta, Geopolitika, Beograd, 2014.
30 Ivana Krstic Mistridzelovic, Rajsova anketa o zlocinima Bugara u okupiranoj Srbiji (1915-1918), u: Prvi svjetski rat – uzroci i posljedice, Akademija nauka i umjetnosti Republike Srpske (ANURS), Naucni skupovi XXIX, Odeljenje drustvenih nauka, Knjiga 32, Banja Luka, 2014pp.437-464.
31 Inter-Allied Commission was consisting out of Lj. Stojanović, President, P. Gavrilovic, Authorized

ing that, besides Reiss, facts on Bulgarian atrocities were collected by American writer William Drayton, Swiss doctor Viktor Kun, American journalist John Reed and Swiss journalist, writer and nurse Catherine Sturzenegger.[32]

The Report that was produced by the Inter-Allied Commission could be compared to the Report of the International Commission on Balkan Wars, by the composition of members. On the other hand, this Report was also divided into parts following the logic of the Hague Conventions: on prisoners and wounded soldiers, killing civilians, bombing hospitals, torture, rape, forced labor, demolition of buildings, taxes, robbery and as such it was obviously structured in the manner that Reiss primarily applied in his Report on the atrocities of Austro Hungarian Army. From the point of main topic of this paper, and that is to analyze how the process of the enforcement of the International Humanitarian Law was developing, the Report by the Inter-Allied Commission should be also marked as positive step in furtherance of the enforcement policy.

Reiss was appointed a member of the Serbian Delegation at the Paris Peace Conference by the Serbian Government. Such decision clearly marks, besides appreciation for his deeds, firm awareness of the legal framework for the compensation and especially devotion to the criminal procedure for the perpetrators of war crimes.

The Paris Peace Conference did not provide further progress in terms of continuing with the court procedures before an international criminal court. There were some criminal procedures for Austro Hungarians, Bulgarians and Turkish perpetrators of atrocities before national courts. From the point of strict positivism and justice such an outcome could be marked as disappointing, especially when we take into account that all peace treaties signed at the end of the First World War contained clauses on establishing international criminal/military courts. But, from the point of the overall picture of the history of International Humanitarian Law and International Criminal Law all efforts to investigate crimes are existentially important and should be valued as such. There is always a first step and for sure Reiss`s reports do consist it. From the point of contemporary International Public Law period of the First World War confirmed that International Law, International Humanitarian Law and International Criminal Law existing at that time were applicable and that no government of belligerent state denied it.

CONCLUSION

What happened later, during 20th century, was mostly the display of inertia, tardiness and unwillingness to a develop strong and functional system of applicable International Law. In the period of the Second World War there were no organized criminal investigations of war crimes in the way Reiss did it, although it was decided at the very beginning of the War that war criminals will be prosecuted once the War is over. Progress that was made in that period summarizes in the Nuremberg and Tokyo trials, if we consider only international criminal/military courts. Courts established at the territory of Germany, by Allies, were also important for the further application and enforcement of the International Law.

When, at the end of the 20th century, *ad hoc* Tribunal for the former Yugoslavia started its work main objection was that there was no methodology for the investigation of war crimes, also that norms of International Humanitarian Law were not applicable in criminal

Minister, S. Jovanovic, professor at Belgrade University, Bonnasieux, the French delegate and Lt. Col. Men, the British delegate

32 Mark Lewis, The Birth of New Justice: The Internalisation of of Crime and Punishement (1919-1950), Oxford University Press, 2014, pp.65-68; Ivana Krstic Mistridzelovic, Rajsova anketa o zlocinima Bugara u okupiranoj Srbiji (1915-1918), u: Prvi svjetski rat – uzroci i posljedice, Akademija nauka i umjetnosti Republike Srpske (ANURS), Naucni skupovi XXIX, Odeljenje drustvenih nauka, Knjiga 32, Banja Luka, 2014, pp.437-464.

procedure. Jurisprudence of the *ad hoc* Tribunal shows that criminalistics investigation of international crimes and ordinary crimes are completely different and almost opposed. Investigator of international crimes has to deal with hundreds of perpetrators, hundreds of victims and mostly with no prompt approach to the crime scene. In majority of cases investigators couldn`t reach at all crimes scene, there were no forensic evidences, solid proofs. Majority of cases were built only on witness testimonies collected many years after crimes occurred, many times fake and false.

Important example of inertia of the international criminal justice presents lack of criminal investigation on certain atrocities committed at the territory of Kosovo and Metohija during the civil war at the end of the 20th century. In 2011 Council of Europe adopted Report submitted by Dick Marty on tremendous crimes concerning organ removal and organ trafficking. Methods of perpetrating these crimes were kidnaping of Serbs at the territory of Kosovo, transferring them to the territory of Albania and finalizing crime with removal of organs and after that killing. Such a tremendous crime was for the first times investigated more than 10 years after it was committed. Little evidences left after 10 years.

What are these examples showing, what is the message? The most important message is that we have forgotten what we knew 100 years ago. Hundred years ago Serbian Government arranged investigation of war crimes, immediately after they were perpetrated and it was professionally led by neutral investigator according to normative framework of International Humanitarian Law. Through these contemporary examples we can conclude that, even that international criminal judiciary is much more developed than ever before, we have all forgotten or abandoned classical criminalistics investigation during the war, at the battlefield, in the manner that it was pioneered by Dr Reiss.

REFERENCES

1. Jevtovic Z., Aracki Z., Archibald Reiss Propaganda – Communication Influence on Conflict Paradigm Construction, International Scientific Conference "Archibald Reiss Days", Thematic Conference Proceedings of International Significance, 2013, Volume III, pp.249-256.
2. Jugović S., Simović D., Avramović D., Actuality of Reiss`s Principles of Modern Police, International Scientific Conference "Archibald Reiss Days", Thematic Conference Proceedings of International Significance, 2011, Volume I, pp. 69-76.
3. Jugović S., Simović D., Avramović D., Police Organisation in the Work of Archibald Reiss, International Scientific Conference "Archibald Reiss Days", Thematic Conference Proceedings of International Significance, 2012, Volume I, pp.229-240.
4. Krstić-Mistridželović I., Archibald Reiss and the First Police School in Belgrade, International Scientific Conference "Archibald Reiss Days", Thematic Conference Proceedings of International Significance, 2011, Volume I, pp. 165-172.
5. Krstic Mistridzelovic I., Rajsova anketa o zlocinima Bugara u okupiranoj Srbiji (1915-1918), u: Prvi svjetski rat – uzroci i posljedice, Akademija nauka i umjetnosti Republike Srpske (ANURS), Naucni skupovi XXIX, Odeljenje drustvenih nauka, Knjiga 32, Banja Luka, 2014pp.437-464.
6. Krstic-Mistridzelovic I., Radojicic M., Report of the Inter-Allied Commission on Crimes Committed by the Bulgarians in occupied Serbia (1915-1918), International Scientific Conference "Archibald Reiss Days", Thematic Conference Proceedings of International Significance, 2015, Volume II, pp. 341-348

7. Levental Z., Rodolph Archibald Reiss: criminaliste et moraliste de la Grand Guerre, L`Age d`Homme, 1992.

8. Lewis M., The Birth of New Justice: The Internalisation of of Crime and Punishement (1919-1950), Oxford University Press, 2014.

9. Markovic Z., Starcevic M. (ed.), Dr Arcibald Rajs, Ratni izvestaji iz Srbije i sa Solunskog fronta, Geopolitika, Beograd, 2014.

10. Mathyer J., Rodolph Archibald Reiss: pionier de la criminalistigue, Lauusanne, 2000.

11. Mitrović Lj., The Strategy of Social Development and the Moral Unity of a People as the Bases of Security - On the Relevance of Reiss's Ideas on Justice, Concord and Patriotism of the Serbian Nation - , International Scientific Conference "Archibald Reiss Days", Thematic Conference Proceedings of International Significance, 2013, Volume III, pp. 219.

12. Prsic M., Bojkovic S. (pr.), O zlocinima Austrougara-Bugara-Nemaca u Srbiji 1914-1918, Beograd, 1997

13. Otte T.G. (ed.), An Historian in Peace and War: The Diaries of Harold Temperley, Ashgate, 2014.

14. Reiss A., Report upon atrocities committed by the Austro-Hungarian Army during the First Invasion of Serbia, London, 1916.

15. Ristović S., Establishing police education in Serbia and Contribution of Archibald Reiss, International Scientific Conference "Archibald Reiss Days", Thematic Conference Proceedings of International Significance, 2011, Volume I, pp.173-180.

16. Scianna B. M., Reporting Atrocities: Archibald Reiss in Serbia, 1914-1918, The Journal of Slavic Military Studies, Volume 25, Issue 4, 2012, pp.596-617.

17. Sramek J., Diary of a Prisoner in World War First, Prague, 2010.

18. Surlan T., Odgovornost kajzera Vilhelma II za Prvi svetski rat – medjunarodnopravni aspect, Zivojinovic D. (ur.), Srbi i Prvi svetski rat 1914- 1918, Zbornik radova sa medjunarodnog naucnog skupa odrzanog 13-15.juna 2014, Srpska akademija nauka i umetnosti (SANU), Beograd, 2015, pp.667-684.

19. Surlan T., Zlocini u Prvom svetskom ratu – medjunarodnopravni aspect, u: Prvi svjetski rat – uzroci i posljedice, Akademija nauka i umjetnosti Republike Srpske (ANURS), Naucni skupovi XXIX, Odeljenje drustvenih nauka, Knjiga 32, Banja Luka, 2014, pp. 363-382.

20. Шурлан Т., Место Гаагских конференций (1899 и 1907 гг.) в развитии международного права и международных отношений, у: Смолина М.Б., Залеский К.А. (ред.), Накануне Великой войны: Россия и мир – Сборник докладов и статей, Москва 2014, стр. 119-141.

21. Surlan T., Diversification of the International Criminal Judiciary, Athens Journal of Law, Volume 1, Issue 3, July 2015, pp. 165-175.

22. Šuvaković U., Topical Quality of Archibald Reiss`s Work "ECOUTEZ, LES SERBES!" at Present Day, International Scientific Conference "Archibald Reiss Days", Thematic Conference Proceedings of International Significance, 2012, Volume I, pp.167-178.

Topic IV

STRENGTHENING THE STATE'S INSTITUTIONS AND FIGHT AGAINST CRIME

UDC: 341.49
341.645

CONCEPT, MEANING AND ACTIVITIES OF INTERNATIONAL, HYBRID, AND NATIONAL CRIMINAL COURTS IN PROSECUTING PERPETRATORS OF INTERNATIONAL CRIMINAL ACTS

Academician Miodrag N. Simović, PhD[1]
Constitutional Court of Bosnia and Herzegovina
University in Banja Luka, Faculty of Law
Vladimir M. Simović, PhD
Prosecutor's Office of Bosnia and Herzegovina
Independent University in Banja Luka, Faculty of Security and Protection

Abstract: Throughout the time, up until several decades ago, one of the characteristics of international criminal law that differentiated it from the national law was the fact that international justice was not developed enough and, what was more important, that it was not mandatory but rather facultative. In regards to that it was pointed out that there was no centralised court system in the international community, as well as that countries could be submitted to the jurisdiction of international court only if they explicitly agreed to do so. On the other hand, interest in international criminal acts and systems of accountability for their perpetrators that are used by the international community to protect different forms and types of its most important valuables (peace between nations and safety of humanity) has been shown both by domestic and international professional and general public.

Efforts in achieving universal justice have resulted in the idea of international court that would be competent in criminal cases. Even though the idea had its roots in first ideas on international law it did not happen before the fifties of 20th century, after the Second World War and all that it left behind as a legacy that started some serious thinking on establishing one common court with the task of prosecuting future crimes. However, the Cold War diminished the prospects in realising this idea, additionally amending the list of horrors when it comes to human destructive actions. The period after the Cold War in the late 80's of the last century brought about significant changes in all aspects of life and therefore influenced both development and expansion of international criminal justice.

Great torments in last war on the territory of the former Yugoslavia and in Rwanda once again united the international community in desire and need to recognize and punish perpetrators of crimes in these wars. Together with establishing two *ad hoc* courts for perpetrators of these crimes, texts, proposals, and resolutions designed for new institutions were being prepared. Outcome is almost impossible to predict, but the picture of future will be clearer if the chances for success of the International criminal court, i.e. the area of activities that limits it, resources at its disposal, influence and support that it has, are defined.

Keywords: International Criminal Court, Hague Tribunal, Rome Statute, Security Council, United Nations.

1 E-mail: vlado_s@blic.net.

INTRODUCTORY REMARKS

Historically, international criminal courts are operating in, at least, four ways: (1) excluding prominent military and civilian personnel from the political scene which, sometimes, leads to important political changes. Judicial authorities know it and are very aware of their historical importance[2]; (2) research of war crimes and prosecution of perpetrators of crimes against humanity involves obtaining and collecting of huge amounts of (often strictly confidential) documents and other kids of evidences. In this way, international criminal courts are becoming archives of important historical events; (3) the court processes consist of, *inter alia*, public testimonies of various types of witnesses, for example, victims and skilled persons (experts). Thus, the courts produce "verbal history"; (4) the judges in the judgment must discuss and decide on historical facts and, thereby, decide whether the accused is guilty or innocent of all charges. This involves writing a sketch of history of armed conflict itself.

When you take into consideration the history and international criminal law, we can say that there are three (idealized) approaches in previous case-law. In the first place are those who think that a courtroom is not the place to write historical facts and that history should be kept to a minimum. In her book "Eichmann in Jerusalem" Hannah Arendt[3] claims that "the purpose of the process is to do right and nothing else." From that point of view, the very attempt to write history in the courtroom would surely lead to errors in the court proceedings.

The second approach accepts that the court cannot avoid writing of historical facts and that it should be accepted as a necessary evil. The primary role of the court proceedings is determining the degree of criminal responsibility of the accused person for criminal offenses that caused the trial. But geographical, chronological and political scope of many war crimes, that is crimes against humanity, explicitly requires the implementation of socio-political, cultural and other factors. Comprehensively, it should be accepted and acknowledged that such criminal offences are usually committed in the context of military-political agenda, where the determination of its management is complex and disputable. In other words, the cases before the international criminal court are not about criminal offences of minor scope and intensity[4]. Given that the international criminal court also has to establish a material element (*actus reus*) of crimes and criminal intention (*mens rea*) of perpetrators of the crime, it also must include dealing with the issues of politics and ideology for the crimes such as extermination and persecution. Moreover, the criminal offence of genocide cannot be proved without the presence of the so-called special intention, i.e. the intention to completely or partially destroy national, ethnical, racial or religious group. It is almost impossible to imagine a successful proving of genocide without implementation of a historical context.

There is also a third view to the historic presence in the international criminal courts, but it is difficult to find it in practice. During the Nuremberg process, the American prosecutor Robert Kempner argued that it was "the greatest history seminar that has ever been held in the history of the world"[5], while his British colleague wrote about the "authoritative and impartial record in which future historians will be able to find the truth." Lawrence Douglas is

2 In its opening remarks in the trial to Slobodan Milošević, the main Prosecutor of the ICTY, Karla Del Ponte, stated: "I admit that this process shall make history, and it would be good if we approach to our homework in the light of history" (Transcript, *Prosecutor v. Milošević*, 12 February 2002, 8).
3 Hannah Arendt (Linden, Hannover, 14.10.1906. - New York, 4.12.1975.), German philosopher.
4 So, for example, a concentration camp often becomes a place of brutal crimes in the period that may last for months. Quite rightfully, the main Prosecutor Robert H. Jackson said in Nuremberg that "never before in legal history no one has tried to consider the events of one decade within the civil lawsuit, including one third of a continent and some twenty countries, an immense number of persons and countless events" Jackson quoted in: Mettraux, 2008: 190.
5 See Kempner, R. (1983). *Ankläger einer Epoche. Lebenserinnerungen*. Frankfurt am Main, Berlin and Vienna: Ullstein, pp. 44seqq.

some more critical, and he believes that the consequence of Nuremberg is one significant but "painful" history. According to Douglas, some errors in Nuremberg were "a direct result of efforts to thoroughly consider over history by extraordinary effort of the law".

When it comes to the history of the International Criminal Tribunal for the former Yugoslavia (ICTY), it should be mentioned that the Office of the Prosecutor of the ICTY had its team of analysts from the end of the nineties. This investigative team (Leadership Research Team) for the republics and political entities of the former Yugoslavia had a role of historic analysts of the Office of Special Investigations of the US Department of Justice. Including historians in research work of the Prosecutor's Office shows that the processing of the historical context has a great importance for the prosecution of war crimes and crimes against humanity. In special situations such historical analysts act as expert witnesses (experts) on the basis of an expertise on the political and military structure and other issues. [6] Likewise, the defense brings its experts for specific questions during the proceedings.

Trials of international criminal tribunals are to a great extent based on a variety of documents. It is sometimes said for Nuremberg process that it was a "trial by documents".[7] Even at the first trial at the ICTY (to Duško Tadić), this Court had to deal with 473 exhibits and, at an unfinished trial to Slobodan Milošević, the Prosecution has given more than 1.2 million pages of documents to the defence of the accused.

APPEARANCE OF THE INTERNATIONAL CRIMINAL COURT (ICC)

The ICC was created after signing the Rome Statute, the international treaty made within the framework of the United Nations and open for accession by all UN Member States. The Statute entered into force on 1 July 2002, and the ICC began its work in March 2003. The first trial started on 26 January 2009. [21] This is a revolutionary achievement in international law, because it is the first permanent international criminal court. This court was created on the basis of experience gained by establishing an *ad hoc* tribunal for the former Yugoslavia and Rwanda and is an important step in connecting the international community. However, the establishment of the ICC was not approved by many countries which were not prepared to leave jurisdiction over their soldiers in various missions abroad to international judicial body. Among them are great powers and permanent members of the UN Security Council (Russia, USA and China), which have not signed or ratified the Rome Statute.

Even though it is called the court, the ICC is actually a creation of "tribunal kind", in terms of Anglo-Saxon law, as its integral part is the Prosecutor's Office. However, this claim is not entirely correct because the Prosecutor's Office has a significant degree of autonomy and is separate from the administrative structure of the ICC. The Court is composed of the Presidency, which is the main administrative and operational authority of the Court, judicial departments, the Secretariat and other services necessary for the functioning of the ICC. There are 18 judges elected by the Assembly of States Parties, and that is the mechanism that has been established to emphasize, in this regard, the independence of the Court in relation to any of the existing authority of the UN or some other international organization.

6 In theory, so-called friends of the court (*amici curiae*) are also entitled to bring their experts as witnesses.
7 See Douglas, 8-14.

THE COURTS ESTABLISHED BY THE UN SECURITY COUNCIL

The temporary international criminal courts were established on the occasion of concrete events within which numerous and serious crimes were committed. Such courts, associated with concrete events, are called *ad hoc* courts. They were formed in Nuremberg, Tokyo, the Hague and Arusha (Rwanda).

In the early 90s of the last century, conflicts on two continents, Europe and Africa, prompted the organization of the UN to reconsider the concept of international criminal courts. The UN Security Council, under the authority of Chapter VII of the Charter of the United Nations, established the ICTY in 1993 and the International Criminal Tribunal for Rwanda (ICTR) in 1994. As these courts were established under Chapter VII of the UN Charter, all UN member states are obliged to cooperate with them. The obligation of cooperation includes cooperation in arrest and transfer of accused persons, because these courts do not have their own police forces.

1. International Criminal Tribunal for the Former Yugoslavia (ICTY)

In response to numerous violations of international criminal law committed during the conflict associated with the breakup of Yugoslavia, the UN Security Council established the ICTY (Resolution 827 of 1993), with the aim of "stopping the commission of such crimes and taking effective measures to bring persons responsible for these offences to justice" and "contribution to the restoration and maintenance of peace". The establishment of the ICTY sought answers to questions like jurisdiction of this Court *ratione temporis*, *ratione materiae* and *ratione personae*, but also the question of punishment. ICTY has contributed to understanding that mass violations of humanitarian law and human rights cannot be an internal matter of the state and that in cases in which the states do not show sufficient degree of stability to punish the perpetrators of such crimes, the international community must react and take in its hands decision-making and that role. In that sense, the importance of the ICTY is remarkable despite numerous objections that it resulted in numerous politically motivated and unjustified decisions which are inconvenient for an independent judicial authority this court should be. [8]

The proceedings conducted before the ICTY are criminal proceedings. This means that they begin with investigative actions of the Prosecutor's Office which could lead to indictment. As soon as the proceedings by which accused persons find themselves in the detention unit of the ICTY are realized, the court proceedings are promptly initiated and it is not very different from the national criminal proceedings.

In 2003 ICTY adopted a Completion of Work Strategy, in order to ensure timely conclusion of the mandate and coordination of future trials with judicial systems in the former Yugoslavia. It was estimated that all trials, including appeal proceedings, would be completed by 2013. In order to respect the time limits determined by this strategy, the ICTY has generally focused its work on the "criminal prosecution of persons of the highest level who are suspected of being most responsible for perpetrated criminal offences" under its jurisdiction.[9] National courts shall prosecute perpetrators of lower level. Expiry of the mandate of the court is also ensured by the Resolution 1966 of the UN Security Council ensuring that the mandate of the ICTY shall expire upon the establishment of the International Residual Mechanism for Criminal Courts, i.e. *ad hoc* mechanism whose aim is to perform the essential residual

8 For objections to establishment and work of the ICTY, see, for example, Kaseze, 395-401.
9 Resolution 1534 of the Security Council, U.N. DOC. S/RES/1534 (26.3.2004.).

functions of the ICTY and ICTR.[10] Among the basic functions of the Residual Mechanism is to prosecute individuals suspected of being most responsible for crimes after the expiry of the mandate of the ICTY.

Law and case-law of the ICTY have a major impact on the development of the international criminal law. Other international, hybrid and national legal systems often use aspects of the law and case-law of the ICTY, especially in Bosnia and Herzegovina, Croatia and Serbia.

ICTY has primacy over national courts, which means it can require the States to accept its jurisdiction.[11] It understands that if the government plans to prosecute a person for crimes within the jurisdiction of the ICTY, according to the request of the ICTY, it must accept the jurisdiction of the ICTY. Under Rule 9 of the Rules of Procedure and Evidence of the ICTY, the ICTY can request for deferral when (1) the act being investigated or which is the subject of those proceedings is characterized as an ordinary crime; (2) there is a lack of impartiality or independence, or the investigations or proceedings are designed to shield the accused from international criminal responsibility, or the case is not diligently prosecuted; or (3) what is in issue is closely related to, or otherwise involves, significant factual or legal questions which may have implications for investigations or prosecutions before the ICTY.

However, after the ICTY began with the completion of its work, it shifted from the request for referral of the case from the region to the transfer of the case to the region in accordance with Rule 11bis of the Rules of Procedure and Evidence of the ICTY. Using the mechanism of Rule 11bis, the ICTY is able to refer cases from its jurisdiction to the authorities of the countries in whose territory the crime was committed, in which the accused was arrested, or state having jurisdiction and being willing and adequately prepared to prosecute the case.

The Referral Bench of the ICTY has the jurisdiction for determining whether a referral is allowed. After the assessment of the severity of the crime, the Council may order the referral after being satisfied that the trial shall be lawful and that the death penalty will not be imposed or carried out (Rule 11bis (B)). If deemed necessary, the Prosecutor may send observers to monitor the proceedings on his behalf, and if there are sufficient grounds for concern in relation to the legality of the proceedings, the Prosecutor may submit a formal request for the return of the case to the ICTY (Rule 11 bis (D)).

2. International Criminal Tribunal for Rwanda (ICTR)

The ICTR, as ICTY, was established by the Resolution 1994 of the Security Council, and in accordance with jurisdictions under Chapter VII of the UN Charter, after the genocide that had happened in Rwanda in 1994. The Statute of the ICTR is very similar to the Statute of the ICTY, and the courts have a similar structure. The ICTR and ICTY have a common Appeals Chamber and it is located in The Hague, in order to ensure that the courts have a consistent jurisprudence. Its temporal jurisdiction is narrower (it prosecutes international crimes committed between 1 January and 31 December 1994), and local jurisdiction is somewhat wider as it relates to Rwanda and its neighboring countries. The manner of procedure and evidence, and the structure of the organization of the ICTR - match those of the ICTY.

The seat of the ICTY is in Arusha (Tanzania) and it has jurisdiction over criminal offences of war crimes, crimes against humanity and genocide. However, the ICTR defines crimes against humanity differently from the ICTY. In addition, the ICTR has jurisdiction for war crimes in intrastate conflict only, and it is limited to the crimes committed in Rwanda or by Rwandan citizens in nearby (neighboring) countries.[12] The ICTR has primary jurisdiction in relation to national courts, but has also begun transferring the cases to domestic courts.

10 Resolution 1966 of the Security Council, U.N. DOC. S/RES/1966 (22.12.2010.)
11 ICTY Statute, Article 9 paragraph 1.
12 ICTR Statute, Article 1.

The ICTY adopted Completion Strategy in 2003, on a similar basis as the ICTY. [13] Under this Strategy, the ICTR, on request, referred certain number of cases to Rwanda with the primary objective of completion of all cases and shutdown by the end of 2013.[14] As in the case of the ICTY, the Resolution 1966 of UN Security Council also serves to ensure the fulfillment of the basic functions of the ICTR after the end of its mandate.[15]

MIXED INTERNATIONAL CRIMINAL COURTS

After the establishment of the ICTY and the ICTR, the need for other courts with the aim to prosecute serious crimes committed in other parts of the world was recognized. The proposal was set in the direction of establishment of mixed courts based on agreements with domestic and international entities to assist in the establishment of effective, locally situated courts prosecuting serious international crimes. The attempt of the international community to punish on its own persons responsible for the crimes, from experience with the *ad hoc* tribunals, proved to be defective. Financial and other problems forced it to seek for new solutions, the ones with long-term and efficient character. These efforts resulted in mixed international criminal courts.

Generally speaking, both international and local judges are employed in these courts. These courts are arranged according to the time of their establishment, i.e. East Timor[16] (2000), Kosovo[17] (2000), Sierra Leone (2002), Cambodia (2003) and Bosnia and Herzegovina (2004), even though the negotiations for the establishment of some of the courts began much earlier.

According to the characteristics of these courts, they could be classified among the national and international courts. Mixed international criminal courts are a combination of domestic and international criminal legislation and a result of need to divide the need for responsibility to punish the perpetrators of the most serious crimes between the state where the crimes were committed and the international community. This need arises from the basic need, since the states where the crimes were committed are most often not able to face the crimes themselves. At the same time, the countries in question have neither enough human

13 Resolution 15093 of the Security Council, U.N. DOC. S/RES/1503 (28.8.2003.).

14 Report on strategy for ending the work of the International Criminal Tribunal for Rwanda, 25.5.2010., S/2010/259; Statement of the Prosecutor of the ICTR Hassan B. Jallow to the Security Council of UN, 18.6.2010., at:

15 Resolution 1966 of the Security Council, U.N. DOC. S/RES/1966 (22.12.2010.).

16 Unlike some other states where discussions and negotiations with democratically elected leadership on defining and establishing a special court for punishing the perpetrators of the worst crimes lasted for years, the establishment of such a court in East Timor occurred shortly after the United Nations established a transitional administration in that country. Although there were proposals to establish a special tribunal to try individuals responsible for crimes, the Security Council did not act on these recommendations. Instead, the United Nation Transitional Administration in East Timor (UNTAET) by its Regulation 2000/15 established the Extraordinary Chambers for Serious Crimes composed of national and international judges for the trial of persons suspected to have committed crimes in East Timor. Extraordinary Chambers were given an exclusive jurisdiction over crimes of genocide, war crimes, crimes against humanity, murders, sexual crimes and torture that took place in East Timor in the period from 1 January to 25 October 1999, but under certain conditions for crimes committed before that date as well. UNTAET Regulation 2000/11, adopted on 6 March 2000, defined the functioning and organization of the courts in East Timor.

17 Security Council Resolution 1244 placed Kosovo under civilian supervision of UN Administrative Mission (UNMIK - the UN Mission in Kosovo Interim Administration). Special Envoy of the UN Secretary General, who is the head of UNMIK, had the authority to issue decrees pertaining to the adoption and amendment of the rights, as well as the organization of the judiciary. By a Decree of 25 July 1999, the Special Envoy of the UN Secretary General was designated as the only executive and judicial authority and was granted the power of appointment of judges. The first international judge and prosecutor were appointed in the Basic Court and the EULEX Prosecution Office in Mitrovica.

nor material resources, which prevents the actions of their national courts and they, therefore, have to rely on external assistance.

Mixed international criminal courts may be separated from the UN, i.e. they may be the result of agreement of several countries. It is possible that the Security Council establishes a mixed international criminal court in the country where the crimes were committed, without an agreement with the national authorities.

Despite the inexistence of a clear definition, we can determine the main characteristics of these courts. They belong to the international criminal bodies. Just as in the case of *ad hoc* tribunals and the ICC, their goals are to sanction serious violations of international law, particularly international humanitarian law and human rights committed by individuals, and to deter future violation of rights and help re-establishing of the rule of law. Finally, like other international criminal authorities, in order to be able to achieve its goal, mixed international criminal courts must rely on international cooperation and assistance of the countries and international organizations.

Also, mixed international criminal courts have characteristics that distinguish them from the international criminal courts. They consist of international and national staff (judges, prosecutors and other staff) and apply international and domestic substantive and procedural-criminal law. Problems of retroactive application of the law, the complexity of the proceedings, the lack of funds and lack of experience of prosecutors and judges in the prosecution of war crimes are common, to a greater or lesser extent, to all of the above courts.

Mixed international criminal courts will have an important role in the future prosecution of international crimes. The reason for this is the fact that the ICC, due to the refusal of some countries to ratify the Rome Statute, has no universal jurisdiction yet. Besides that, the principle of complementarity enshrined in the Rome Statute clearly reflects the desire that the domestic courts in the countries where the crimes were committed, deal with international crimes in the first place. In addition, the possible establishment of special *ad hoc* tribunals does not seem as truly possible and probable option. The experiences of the two existing tribunals that follow high costs and long proceedings prompted the initiative to seek other forms of justice that can be achieved at the national level.

In this context, mixed international criminal courts remain a rather attractive option for the international community. These courts allow the administration of justice more effectively than most national judicial systems in the countries where the crimes were committed, and their costs are much lower and more cost-effective than the costs of *ad hoc* tribunals. However, known problems that these courts are faced with should not be overlooked.

Unlike Croatia, Serbia and Montenegro, where cases referred by the ICTY were dealt with by national courts, the War Crimes Chamber of Bosnia and Herzegovina and the War Crimes Section of the Prosecutor's Office of Bosnia and Herzegovina was founded in Bosnia and Herzegovina in 2004, consisting of local and international judges and prosecutors. In relation to the courts in East Timor, Sierra Leone and Cambodia, which were formed as a result of absence of any international mechanism of justice, the ICTY has primary jurisdiction over the crimes committed within the territory of Bosnia and Herzegovina. However, due to the inability of that tribunal to judge all persons responsible for war crimes, a special unit consisting of international and local judges has been established in Bosnia and Herzegovina.

Sections for war crimes act in accordance with the applicable legislation of Bosnia and Herzegovina. However, in the first stage of its existence the sections consisted of international judges and prosecutors and the administration. So, the Trial and Appeals Chambers consisted of two international judges and one local judge. In the later period, the judicial bodies mostly consisted of national judges, and, in the end, judicial bodies consist of local judges only. Sim-

ilarly, the Section of the Prosecutor's Office of BiH had international prosecutors who were gradually replaced by national prosecutors.

The War Crimes Chamber of Bosnia and Herzegovina has jurisdiction over three types of cases: (1) war crimes cases received after March 1, 2003, when it considers that due to their sensitivity these cases should be tried at the state level. If it considers that the sensitivity condition has not been met, the cases will be referred to the entity courts; (2) the cases referred to it by the ICTY Prosecutor's Office in which the indictment has not been filed yet and (3) the cases referred to it by the ICTY pursuant to Rule 11bis of the Rules of Procedure and Evidence in which the indictment is confirmed before that tribunal. The issue of admissibility of evidence obtained by the ICTY has been resolved by the Law on Transfer of Cases from the ICTY to the Prosecutor's Office of Bosnia and Herzegovina and the use of evidence obtained by the ICTY in proceedings before the courts of Bosnia and Herzegovina[18], which entered into force in January 2005. In accordance with the provisions of this law, evidence obtained in accordance with the Statute and the Rules of Procedure and Evidence of the ICTY - can be used in proceedings before the Court.

Discussion about the mixed international criminal courts cannot be concluded without reference to a key need for the construction of a criminal system in the countries where the crimes were committed. It is necessary to make utmost efforts to provide conditions in certain states so that their judiciary could successfully deal with the prosecution of the perpetrators of the most serious crimes. In that sense, it is necessary to provide a coordinated and appropriate international assistance to the countries in ensuring adequate working conditions, education of judges and prosecutors, as well as expert assistance in improving the domestic judiciary in order to ensure effective remedies in the fight against crime.

1. Special Court for Sierra Leone (SCSL)

In 1991 a civil war broke out in Sierra Leone between the government and rebels gathered in the organization of the Revolutionary United Front (RUF). In 1996 the war resulted in general chaos. Although a peace agreement was signed in 1999 between the Government of Sierra Leone and the RUF forces, the truce itself did not last long because the conflicts between the parties continued. Meanwhile, the RUF, supported by Liberia, wins finding of diamonds from which it funded itself. This resulted in an embargo on trade in diamonds which the Security Council introduced in June 2000[19], as well as sanctions against Liberia in May next year. The attack of the RUF forces on members of the UN peace forces strengthened the UN decision on taking decisive actions to settle the conflict.

In an attempt to promote justice and put an end to impunity for the crimes that were committed by the conflicting parties during the eleven-year civil war in Sierra Leone, the United Nations and the Government of Sierra Leone jointly established the Special Court for Sierra Leone[20] in 2002. Its mandate is criminal prosecution "of the most responsible person for serious violations of international humanitarian law and Sierra Leone law" committed within the territory of that country from 30 November 1996[21].

SCSL officially began working on 1 July 2002. The seat of the Court is in Freetown. According to Article 1 of the Statute, SCSL has jurisdiction over the persons being the most respon-

18 *Official Gazette of BiH*, no. 61/04, 46/06, 53/06 and 76/06.
19 Security Council Resolution 1315 (2000) on the Situation in Sierra Leone, U.N. Doc. S/ RES/1315 (2000), 14 August 2000.
20 Basic documents are Agreement between United Nations and Government of Sierra Leone on establishment of SCSL, the Statute of SCSL and Rules of Procedure and Evidence. The Statute of SCSL is similar in its content to the Statutes of ICTY and ICTR, and in Articles 19, 20 and 22 it explicitly refers to the case-law of *ad hoc* courts. Documents are available at: *http://www. sc-sl.org/ documents.html*.
21 Statute of SCSL, Article 1.

sible for crimes committed under the competence of this court after 30 November 1996. Real jurisdiction of SCSL encompasses crimes against humanity, violations of Article 3 of the Geneva Conventions and of Additional Protocol No. II, other serious violations of international humanitarian law and certain serious crimes under the legislation of Sierra Leone. Its jurisdiction is limited only to criminal prosecution of persons who bear "the greatest responsibility" for the commission of crimes, which is the phrase having no formal influence but directing the policy of prosecutors in investigations and criminal prosecution of a limited number of individuals.

The Statute provides that the SCSL and national courts have parallel jurisdiction, but the SCSL has primacy over national courts. Given the fact that there were many children amongst the perpetrators, SCSL extends its jurisdiction to all persons older than 15 years. The provision under which this Court's jurisdiction extends to all persons older than 15 years is one of the most controversial ones. Although the international organizations opposed to the extension of criminal liability to persons under the age of 18, the Government of Sierra Leone was relentless in this regard stating that the so-called child soldiers had a significant role in the conflicts in Sierra Leone. On the other hand, specific criteria that would demarcate the responsibility of child soldiers from the responsibility of adults are lacking. Some of the questions that arise are how a 15 years old child may know the difference between unlawful and lawful orders of their superior and whether it is justified to imply that children know the civilian population in armed conflict is not the enemy and that, therefore, they should not attack and kill them. Equal doubt in the correctness of such a solution shall arise in cases of child soldiers who were given alcohol and drugs, that they voluntarily consumed and subsequently committed crimes. This imposes a simple question, that of whether the rules applicable - in these and similar cases - to adults, shall be applicable to children as well. Given the superficial regulation of these issues in the Statute of SCSL, the concern about the respect for the rights of minors, the perpetrators of the most serious crimes, in the proceedings before this Court is justified.

Likewise, it is stipulated that sexual violence against girls older than 14 years is not a serious crime. The content of this provision clearly shows that the seriousness of the crime depends on the age of a victim and, therefore, the crime of abuse of girl aged between 13 and 14, is described as less serious and a much lighter penalty is prescribed for it than for a crime of violence against girls under the age of 13.

In terms of temporal jurisdiction, the SCSL has jurisdiction for all the alleged crimes that were committed after 30 November 1996 (although the civil war in the impoverished African country began in 1991 already). In accordance with the report of the UN Secretary General, temporal jurisdiction determined in this way ensures that the most serious crimes that have been committed by both conflicting parties are fall under the jurisdiction of the SCSL. The question that remains opened is how should an end put to the culture of impunity and how to maintain peace when only a certain period of time within the conflict that began a few years earlier, is investigated, as well as the question of justice for the victims who died in the period from 1991 until 1996. Such reduced temporal jurisdiction may cause big problems to the prosecutor in the proceedings of arguing the responsibilities of certain individuals.

The real competence of the SCSL includes crimes of international humanitarian law, having the status of a crime under international common law at the time they were committed. In this way, the objections referring to the principle of *nullum crimen sine lege* were avoided, as well as by the prohibition of retroactive application of the law. In the Statute, however, international common humanitarian law is not fully implemented, but has been adapted to the conflict and the crimes committed within a given period. As a typical example of this claim, the SCSL is not competent for the crime of genocide, as there was no allegation that there was an intention to destroy a national, ethnical, racial or religious group, which is an important element of the crime of genocide. The jurisdiction of the SCSL includes the violation of Article 3

of the Geneva Conventions and of Additional Protocol No. II, but not the serious violations of the Geneva Conventions. Therefore, it can be concluded that the crimes committed in Sierra Leone were characterized as an internal conflicts and, as such, they do not represent serious violation of the Geneva Conventions relating to the international armed conflicts. However, this definition is two-fold if you take into account that neighboring countries, Liberia and Burkina Faso, also participated in the conflict. Serious crimes under the law of Sierra Leone are also within the jurisdiction of the SCSL. Most of these crimes could be subsumed under crimes defined by the international law, but are probably singled out for political reasons.

Bodies provided for under the Statute are Chambers (Trial and Appeals), prosecutors and the Registry.

The Trial Chamber consists of three judges, two of whom are appointed by the UN Secretary General. Third judge is appointed by the Government of Sierra Leone, which does not necessarily mean that he will always be a citizen of that State. The Appeals Chamber consists of five judges, three of whom are appointed by the UN Secretary General, and the other two by the Government of Sierra Leone. Given the fact that the majority of judges of the Chambers appoint Secretary General, one can say that the SCSL is under UN control.

The SCSL prosecutor is appointed by the UN Secretary General for a three-year period and shall be eligible for reappointment. Deputy prosecutor is appointed by the Government of Sierra Leone, in consultation with the UN. The prosecutor is responsible for the investigation and prosecution of persons who bear the most responsibility for crimes under the competence of the SCSL. He shall have the power to question suspects, victims and witnesses, collect evidence and conduct investigations, and, if necessary, he can seek help from the authorities of Sierra Leone. The Prosecutor shall act independently as a separate body of the SCSL, and shall not seek or receive instructions from any government or from any other source. He shall be a person of high moral character and possess the highest level of professional competence and have extensive experience in the conduct of investigations and prosecution of criminal cases. In his work he shall be assisted by deputy and other staff. Previous experience in work with minors should be given due consideration in the appointment of the staff.

The provisions of the Rules of Procedure and Evidence of the ICTR, which were in force at the time of the establishment of the SCSL, shall be applicable *mutatis mutandis* to the proceedings before the SCSL, but the judges of the SCSL may amend the Rules[22].

The SCSL represents an early example of a "hybrid" court. It is not part of the judicial system of Sierra Leone, but includes certain aspects of the laws of Sierra Leone. The SCSL also employs the citizens of Sierra Leone and has a permanent seat in Freetown, Sierra Leone.

The SCSL is structured similarly to the ICTY and the ICTR, with the difference that the first court has jurisdiction for international crimes, which includes the Office of Criminal Defence (as part of the Registry). The Criminal Defence Office is an independent body that provides assistance to defense lawyers and ensures protection of the right to lawful trial of accused persons.

The SCSL has completed three trials of nine individuals belonging to all conflicting parties in the civil war. Eight persons were declared guilty (one of the accused persons died before the end of the trial). Upon its very establishment it was planned that the SCSL shall end its work by the end of 2012.

2. Extraordinary Chambers in the Courts of Cambodia

Extraordinary Chambers in the Courts of Cambodia were established for the criminal prosecution of persons responsible for the crimes committed under the Khmer Rouge regime

22 Article 14 of the SCSL Statute.

and the leadership of Pol Pot[23] from 17 April 1975 until 7 January 1979, when about 1.7 million people were killed[24]. After they were defeated by the Vietnamese forces, the Khmer Rouge continued with guerrilla fight. Cambodia requested assistance of the UN in bringing the perpetrators to justice and, in 2004, after long negotiations, Extraordinary Chambers were established in the Courts of Cambodia, under international agreement concluded between the UN and Cambodia, which indicated that the perpetrators could finally be brought to justice.

The agreement is implemented in Cambodia through the Law on the Establishment of Extraordinary Chambers[25]. The Extraordinary Chambers were established as part of national courts of Cambodia which have the jurisdiction to prosecute "highly-ranked Khmer Rouge leaders and the most responsible persons for the crimes and serious violations of the Criminal Code of Cambodia, international humanitarian law and customs, and international conventions recognized by Cambodia". The real jurisdiction of those chambers includes: crimes under the Criminal Code of Cambodia from 1956 (murder, torture and persecution on religious grounds); genocide[26]; crimes against humanity[27]; serious violations of the 1949 Geneva Conventions and violations of the provisions of the Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954 and the 1961 Convention on Diplomatic Relations. These chambers have no jurisdiction for the prosecution of war crimes in intra-state conflicts.

According to the Law on the Establishment of Extraordinary Chambers, Court Chambers and the Chamber of the Supreme Court are composed from both Cambodian and foreign (international) judges, but the Cambodian judges constitute the majority. The Trial Chamber is composed of five judges, of which three judges are Cambodian and two foreign. The Supreme Court consists of seven judges of which four are Cambodian judges. The presiding judge of the Trial Chamber and the presiding judge of the Supreme Court Chamber shall be appointed from among the Cambodian judges.

Decisions in the Chambers are made unanimously, and if unanimity cannot be achieved the system of qualified majority of votes shall be applied. Trial Chamber decision requires four votes, while the decision of the Supreme Court Chamber requires five votes. In this way, it is ensured that Cambodian judges, even though they have a majority in the Chambers, cannot make a decision without the vote of at least one international judge.

According to the Law on the Establishment of Extraordinary Chambers, foreign judges, as well as domestic ones, shall ultimately be elected by the Supreme Council of the Magistrate.

The main difference between the appointment of national and international judges is that the international judges are appointed from a list compiled by the UN Secretary General. Under certain assumptions, the Supreme Council of the Magistrate has the possibility to appoint international judges, on the basis of recommendation of the governments of the UN member states.

---

23 Pol Pot (province Kompong Thom, 19 May 1928 - Anlong Veng, 15 April 1998), Cambodian Dictator.
24 21% of Cambodian population did that.
25 Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea. See the text of the Agreement at: *http:// www. cambodia. gov. kh/krt/english/statments%20and%20letters.htm.*
26 Genocide is defined as an act committed with the intention of full or partial destruction of one national, ethnical, racial or religious group. Although during the Khmer Rouge regime certain ethnic groups were prosecuted, the main targets of the Khmer Rouge were Cambodians who did not share their political views. It follows that the Khmer Rouge committed crimes against humanity rather than genocide.
27 The definition of crimes against humanity is different from their understanding in modern international common law. This does not necessarily violate the principle of legality, because the crimes against humanity are defined more narrowly which favours the accused, because it additionally limits the terms of their prosecution.

The law also provides for the possibility that the international judges are completely replaced by Cambodian judges[28]. The judges are elected for an indefinite period of time, as long as the proceedings themselves are pending. Investigative judges are responsible for conducting the investigation - one Cambodian and one international judge. If the investigating judges do not agree on the question whether an investigation should be initiated, an investigation must continue, unless one of the investigating judges files a formal request within 30 days that the matter be resolved. The final decision on the initiation of the investigation, which is not subject to an appeal, is made by Trial Chamber composed of three Cambodian and two international judges. If four judges vote for the start of the investigation, the investigation shall continue immediately. If a decision not to start an investigation cannot be made by a majority of four votes, the investigation must also be continued.

The prosecutors are responsible for carrying out of criminal prosecution, one from Cambodia and one foreign. Foreign prosecutor, from a list drawn up by the UN Secretary General, shall be elected by the Cambodian Supreme Council of the Magistrate, for the period the proceedings are pending. The Prosecutors shall be persons of high moral character and possess the highest level of expertise and experience in conducting investigations and criminal proceedings. Furthermore, the Prosecutors act independently and shall not seek or accept instructions from any government or other source. In the case that prosecutors do not agree on issues of implementation of prosecution, the prosecution must be continued unless one of the Prosecutors files a formal request that the matter be resolved. The final decision, as in the case of disagreement of investigative judges on the continuation of the investigation, shall be made by the Trial Chamber.

The fact that qualified majority in decision-making is required - can somewhat mitigate concerns about the independence of these Chambers, but they cannot be completely eliminated. The decisions on the guilt or innocence of the accused shall be made by qualified majority. However, any other decision shall be taken by a simple majority of votes. In this way, the Cambodian judges may direct and control the proceedings and there is an obvious risk that they will not be able to collect all relevant evidence and create a basis for a conviction. In addition, human rights groups claim that the ability of the Government of Cambodia to influence the judges constitutes an unacceptable obstacle to justice. On the other hand, the majority of potential defendants are older than 70 years and the time to achieve justice has run out.

The Extraordinary Chambers shall apply existing Cambodian criminal procedural legislation. This legislation provides insufficient protection to the accused in relation to access to evidence or defense counsel, and the right to cross-examine witnesses. The group of experts considers that the criminal procedural legislation of Cambodia is confusing and that it prescribes different solutions in respect of the same questions[29]. The Law on the Establishment of Extraordinary Chambers in Article 35, stipulating the basic rights of the accused and, by referring to Article 14 of the International Covenant on Civil and Political Rights, to some extent mitigates reasonable suspicion that the accused shall ever have a fair trial.

The Extraordinary Chambers in the Courts of Cambodia differ from the SCSL in relation to several aspects. The Extraordinary Chambers are part of the Cambodian judiciary, as an independent entity, but they apply national and international legislation. Also, these Chambers apply a structure that is more similar to the system of continental law rather than other international or mixed courts, by which they reflect the legal system of Cambodia. In this context, investigating judges, and not the prosecutors, in the Extraordinary Chambers are responsible

28 The Agreement signed between the United Nations and Government of Cambodia does not provide for such a possibility. Compare with Article 3 of the Agreement and Article 46 of the Law on Establishment of Extraordinary Chambers.

29 Report of the Group of Experts for Cambodia Established Pursuant to General Assembly, Resolution 52/135, 125.

for the investigation. In addition, the victims are entitled to participate in the proceedings before a special Chambers.

3. Advantages and disadvantages of mixed international criminal courts

When having in mind that the national courts in the countries where the crimes are often politicized and that international criminal courts have limited resources and are not sufficiently familiar with the situation in a particular country, an effort to ensure international justice and at the same time leave trials to national courts could be achieved through the model of mixed international criminal tribunals. The advantage of mixed international criminal courts is also the fact that the country where the crimes were committed to a large extent participates in providing funds for their work. Amongst the most important benefits of mixed international criminal courts in relation to the *ad hoc* tribunals and the ICC, is certainly involvement of national judiciary in the trial of individuals who have committed crimes.

The highest values of mixed international criminal courts lie in their ability to adapt to local culture, language and legislation and, at the same time, preserve the core values of international criminal legislation. Introduction of mixed international criminal courts into legal practice changed the international and domestic legislation, has ensured bringing to justice the perpetrators of war crimes and crimes against humanity in the countries where the crimes were committed, and given support to development of the domestic legal system. However, their actual ability to adapt to local reality in efforts to serve better their local population, gives way to various pressures[30] and their flexibility may be interpreted as instability and confusion.

Mixed model of international criminal tribunals is promising and can overcome some of the inherent disadvantages of both national and international courts, but cannot ensure solution to all problems. Like any other judicial institutions, mixed international criminal courts need funds and they must be provided with independence. The trial of the highest-level state officials responsible for war crimes in the countries where they still enjoy support - can be very dangerous. And, the issue of witness protection is of utmost importance.

In terms of participation of national staff, there should be a high degree of caution. It is possible to have situations in which governing structures responsible for the crimes still control national judicial apparatus. On the other hand, the change of the existing staff can involve appointing a person with insufficient knowledge and experience who is not capable of handling complex trials, such as war crimes trials, to responsible positions in the judiciary and prosecution. Finally, in cases where it is obvious that there are problems due to excessive political interference with the work of the International Criminal Court there should be an option to transfer the trial to another country. However, in this case, a mixed court should retain its main features.

Considerable attention should be paid to the selection of judges and prosecutors. It is necessary to appoint experts in international and criminal law to these functions. Significant problems can arise from different legal systems to which international and national judges belong, which can lead to legal uncertainty and seriously undermine the faith in international criminal justice. Despite the dangers hiding in the integration of national elements into international justice, the advantages of such approach to the war crimes trials outweigh the disadvantages. If mixed international criminal courts dispose with adequate resources, human and material, and if part of their efforts are focused on the reform of the domestic judiciary, they will certainly contribute to an effective system of international justice and ensure that the perpetrators are held accountable for their (in)actions.

30 There is higher risk for mixed international criminal courts than for *ad hoc* tribunals, to be exposed to pressure of ethnic, military and political structures of the state in which they function.

INTERNATIONAL CRIMINAL COURT (ICC)

The International Criminal Court (ICC) is a permanent institution established by a contract, i.e. the Rome Statute of 1998. The Rome Statute entered into force on 1 July 2002, after being ratified by 66 States. Many features of the ICC differ from the ICTY and the ICTR, including its role of complementary rather than basic judicial institution in relation to the national courts. The ICC is the court of "last remedy" and is based on the principle of complementarity whereby the primary responsibility for the prosecution of international crimes belongs to the national judiciary, and the ICC cannot act unless the state authorized to process fails to investigate and criminally prosecute or "does not want to or is not able" to do so.[31]

The ICC has a similar structure as the ICTY and the ICTR, but there are some important differences. The organisation of the ICC is based on determining the basic authorities of that Court, which is intertwined with its functional jurisdiction. Authorities of the ICC are determined under Article 34 of Rome Statute. Those are: the Presidency; the Judicial Division, Trial Division and Pre-Trial Division; the Office of the Prosecutor and the Registry. In addition to these bodies, the Statute provides for the Assembly of States Parties which performs tasks that could be called tasks of judicial administration (Article 112). In some others provisions the Statute mentions its session of all the judges whose jurisdiction includes, for example, election of the President and Vice-Presidents of the ICC (Article 38, paragraph 1), recommendations for removal of judges (Article 46, paragraph 2, item (a)) and the adoption of regulations on the functioning of the ICC (Article 52, paragraph 1). The Presidency and the judicial divisions can be considered as judicial authorities in the strict sense, because they are composed of judges immediately connected with the performance of their judicial function. Also, the Assembly of State Parties carries out the administrative supervision of the work of the ICC.

The ICC has jurisdiction to prosecute "the most serious crimes of concern to the entire international community", i.e. crimes of genocide, crimes against humanity, war crimes and aggression committed after the entry into force of the Statute. In order to provide security and avoid the question of the principle of legality, the ICC defines in great detail criminal offenses under its jurisdiction. Elements of crimes, which the ICC uses in the interpretation and application of the law, are further defined as criminal offences.

The ICC may prosecute criminal offenses under its jurisdiction in three cases, as follows: when the state party to the Rome Statute refers the case to the prosecutor; when the Security Council on the basis of authorizations under Chapter VII refers a case to the prosecutor and the prosecutor initiates an investigation at its own initiative, with the approval of the Pre-Trial Chamber.

Personal and territorial jurisdictions of the ICC are also limited. The case can be prosecuted if the criminal offence was committed within the territory of the Member States of the Rome Statute, if the accused is a citizen of a Member State or if it a country that is not a member of the Statute recognized the jurisdiction of the ICC for the criminal offense in question. However, if the UN Security Council refers the case to the ICC, these restrictions do not apply and the ICC may act in the cases of criminal offences committed on the territory, or by a citizen of the country that is not a party to the Rome Statute. The UN Security Council, under the authority of Chapter VII (which only applies in case of threat to peace, breach of peace or an act of aggression), may also ask the ICC to postpone an investigation or criminal prosecution for a period which can be extended maximally up to 12 months.

Effectiveness of the ICC depends entirely on the cooperation of the country, because without such cooperation this court is not able to secure on its own the arrest, transfer, search,

31 Rome Statute, Preamble.

confiscation and other similar actions. Therefore, Chapter Nine of the Rome Statute on International Cooperation and Court Assistance largely determines how much the ICC will be able to achieve what is expected.

The aspect of voluntary cooperation of the states with the ICC refers not only to the question of ratification of the Statute, but also to the terminology used in the provisions of the Chapter Nine, which does not contain the "orders" but "requests". Also, Article 98 of the Rome Statute prevents Member States to act contrary to international treaties and obligations, unless the actions refer to the third country, whose consent in that case becomes a *sine qua non*. If there is a possible conflict in viewpoints between the ICC and Member State, Article 119 of the Rome Statute is of crucial importance because it entitles the ICC to decide on all the issues relating to court jurisdiction. As far as non-member states are concerned, their cooperation is regulated under Articles 12 and 87 of the Rome Statute, according to which these countries can accept the jurisdiction of the ICC, either in relation to an individual case, or unilaterally (by a simple acceptance, *ad hoc* agreement or international treaty). On the other hand, in accordance with Articles 72 and 93 of the Rome Statute, two cases may arise when a State may refuse to cooperate with the ICC: when it is contrary to public order and when it jeopardizes national security.

Although (according to the Statute) the ICC is entitled to report a state that does not cooperate with the Assembly of States Parties and Security Council (in the case described in Article 13, when a state refuses to cooperate - Article 87, paragraph 7), the provisions on the sanctioning of countries that do not cooperate are not clearly set. The provisions of Article 119 (as well as other articles regulating the issue of cooperation) are just recommendations.

PERSPECTIVES OF DEVELOPMENT OF INTERNTIONAL JUDICIARY

All the above mentioned courts have different jurisdictions and in various degrees they apply different substantive and procedural rules. Of course, they differ with respect to their personal, territorial and temporal jurisdiction. There are also differences in the crimes for which they have jurisdiction. When it comes to war crimes, the ICTY and the ICTR have jurisdiction over crimes committed during international and internal armed conflicts, the ICTR and the SCSL over the crimes of internal conflicts, and Extraordinary Councils in the Courts of Cambodia – over the crimes committed during international conflicts. All the aforementioned courts have jurisdiction for the crime of genocide, except the SCSL. All of these courts are more and more limiting their jurisdiction to only those persons they consider "most responsible" for crimes under their jurisdiction, partly as a response to the considerable time and resources needed for these procedures.

The development of international justice, on one hand, is fully random. Courts appear at different levels, in different areas and their jurisdictions largely overlap, which gives us the right to speak even now about certain proliferation of international justice. Not only that this method is a waste of too much energy and resources but it may easily result in the problem of relationship between different courts, their judgments and other decisions. As a second problem, there arises the question of how to ensure that the court decisions are really always executed.

According to previously disclosed factual situation, in the 20th century and the first years of the 21st century, the international justice is more and more encircled. In relation to that, even though at first glance it may seem excessive, it could be concluded that the claim that the international justice is optional is more and more unacceptable. In addition, there is a

constant increase in the number of various forms of mixed courts which are established upon an agreement by international organizations (for now the UN) and the countries concerned. The very existence and case-law of these mixed courts have as consequence slow obliteration of strict division between internal and international courts.

At first glance, the answer to the question about the prospects of international justice is very simple. The fate of international courts is inextricably linked with the development of humanity itself. To the extent to which the general human community will be more uniting around common values, and guided by that finding strength in itself to peacefully resolve disputes and other tensions, to that extent the international institutions, including various international courts, will be developing. Contrary to that, any serious disruption in global international relations shall be reflected on international court functions and appropriate authorities.

It is likely that certain gaps in the international judiciary will be filled in at a time to come (both in organizational and functional terms), as well as certain hierarchy relationship between the same international courts (e.g. criminal) will be established, and that the relationship between international and internal courts between states will be more accurately defined. One should not exclude the emergence of entirely new courts, whether they are already known or they occur in the new frameworks, or whether they belong to a whole new category. What we must bear in mind is that the international courts (particularly criminal courts, as well as others) are not to turn into an instrument of the powerful ones, i.e. they are not to become a tool of manipulation, especially not to become a tool of imposing the will of the strongest powers of the world. In order to be called the courts, they must be independent and impartial, in the proper meaning of the word, which will need to be implemented in some cases.

CONCLUSION

From earliest times to the present day the international community has predicted various forms of assistance and cooperation in order to prosecute and punish the perpetrators of the most serious international crimes (genocide, crimes against humanity and war crimes) which, in the most difficult and uncivil way, violate the rules of international humanitarian law and violate or endanger humanity and other goods protected by international system of legal regulations. Among aforementioned forms of assistance, the most important is the aspect which consists of establishment and functioning of the international criminal courts which in the interests of justice, and in the name of the civilized part of mankind, conduct criminal proceedings and impose fines and other criminal penalties to perpetrators of international crimes.

In order to ensure that a court has the "international" character, it must be constituted on the basis of international law, e.g. legal rules governing entities which are recognized in the international community. These courts may be established upon contract between individual states (usually, the state that comes out victorious after the end of war, as, for example, Nuremberg and Tokyo Tribunal were) or upon decision of an international body (e.g. the Security Council in the case of the ICTY or ICTR). This court must exclusively (or mostly) apply the rules of international law. This means that for the establishment and functioning of such a court there are specific international rules. Such rules do not constitute an expression of sovereignty of a country, or the expression of a particular legal system, but a legal system of the international community as a whole. In accordance with the above stated, the very composition of such Court must also be international. This implies that members of the court are persons of various nationalities who represent the international community as a whole,

rather than individual states from which such persons come. And finally, the Court has jurisdiction to prosecute and punish persons who appear as perpetrators of international crimes, i.e. crimes which are defined as the most serious forms of violations of international law, acts which are provided for as such in the relevant international legal acts.

Even a superficial view can show that during the last hundred years, especially in recent times, international courts have incredibly developed in terms of their number, type and organization, and in relation to the role they play in the international community. The history of international justice is, of course, far richer and more exciting. However, everything did not always go without problems and resistance. Many attempts at establishing international tribunals ended in failure. This applies to both the ideas and efforts to organize some *ad hoc* international courts, as well as to efforts to establish certain permanent international courts.

REFERENCES

1. Ackerman, J.E., O'Sullivan, E. (2002). Praksa i procedura Međunarodnog krivičnog tribunala za bivšu Jugoslaviju: sa odabranim materijalima Međunarodnog krivičnog tribunala za Ruandu. Sarajevo: *Magistrat;*
2. Akhavan, P. (1996). The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment. *American Journal of International Law, Vol. 90, No. 3;*
3. Ambos, K. (2006). *Remarks on the General Part of International Criminal Law*. Journal of International Criminal Justice, 1, 4(4);
4. Ambos, K., Othman, M. (eds.) (2003). *New Approaches in International Criminal Justice: Kosovo, East Timor, Sierra Leone and Cambodia*. Max-Planck-Institut für Ausländisches und Internationales Strafrecht;
5. Bassiouni, C. (2003). Introduction to International Criminal Law. New York: Transnational Publisher Inc., Ardsley;
6. Burke, W., William, W. (2002). *A Community of Courts: Toward a System of International Criminal Law Enforcement.* Michigan Journal of International Law, vol. 24, 1;
7. Douglas, L. (2001). *The Memory of Judgment: Making Law and History in the Trials of the Holocaust*. New Haven: Yale University Press;
8. Janković, B. (1957). Osnivanje međunarodnog krivičnog suda. Sarajevo: Godišnjak Pravnog fakulteta u Sarajevu;
9. Josipović, I., Krapac, D., Novoselec, P. (2001). Stalni međunarodni krivični sud. Zagreb: Narodne novine i Hrvatski pravni centar;
10. Jovanović, I. (2006). *Kreativni razvoj međunarodnog krivičnog prava: hibridni sudovi za Istočni Timor, Kambodžu i Sijera Leone*. Beograd: Godišnjak Udruženja za međunarodno pravo;
11. Kambovski, V. (1998). Međunarodno kazneno pravo. Skoplje: Prosvjetno djelo;
12. Kaseze, A. (2005). Međunarodno krivično pravo. Beograd: Beogradski centar za ljudska prava;
13. Kittichaisaree, K. (2001). International Criminal Law. Oxford University Press;
14. Linton S. (2001). *Cambodia, East Timor and Sierra Leone: Experiments in International Justice*. Criminal Law Forum, 12;
15. Matthew, H. (2006). Darfur, the Security Council, and the International Criminal Court. International and Comparative Law Quarterly, vol 55;

16. Mettraux, G. (ed.) (2008). *Perspectives on the Nuremberg Trial*. OUP Oxford;

17. *Rascmany, Z. D. (2001).* The Nationality of the offender and the jurisdiction of the international criminal court. *Washington: The American Journal of International Law, 3;*

18. Ristivojević, B. (2008). *Razvoj međunarodnog krivičnog prava. Beograd:* Pravni život, 9;

19. *Romano, C, P. R., Nollkaemper, A.K., Jann, K. (2004),* Internationalized criminal courts and tribunals: Sierra Leone, East Timor, Kosovo and Cambodia. *Oxford University Press;*

20. Stojanović, Z. (1997). *Međunarodni krivični sud: sukob prava i politike. Beograd:* Jugoslovenska revija za kriminologiju i krivično pravo, 1;

21. Stojanović, Z. (2006). *Međunarodno krivično pravo.* Beograd: Pravna knjiga;

22. Wilson, R. (2015). *Inciting Genocide with Words*. Michigan Journal of International Law. Volume 36, Issue 2, Spring;

23. Wilson, R. (2011). *Writing History in International Criminal Trials*. Cambridge University Press.

INTERNET SOURCES

1. www.cambodia.gov.kh/krt/english/statments%20and%20letters.htm. Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea;

2. www.eccc.gov.kh/en/about-eccc/introduction. Extraordinary chambers in the courts of Cambodia, Kaing Guek Eav, Case no. 001/18-07-2007/ECCC/TC, first instance judgment, 26.7.2010., 413-415 (concluding the conflict in Cambodia is an international conflict);

3. www.ejil.org/pdfs/11/3/543.pdf Robinson, P. L. (2000). *Ensuring Fair and Expeditious Trials at the International Criminal Tribunal for the Former Yugoslavia.* European Journal of International Law, 3;

4. www.ejil.org/pdfs/5/1/1248.pdf. Shraga, D., Zacklin, R. (1994). *The International Criminal Tribunal for the Former Yugoslavia*. European Journal of International Law, 1;

5. www.ejil.org/pdfs/7/4/1390.pdf. More about that court and the very genocide in Rwanda - Shraga, D., Zacklin, R. (1996). *The International Criminal Tribunal for Rwanda*. European Journal for International Law, 4;

6. www.icj-cij.org, International Court of Justice, official presentation of the Court;

7. www.icty.org/sections/AbouttheICTY i *http://www.icty.org/action/cases/4* Web site of the ICTY;

8. www.icty.org/sid/103. ICTY, referral of cases;

9. http://www.jsmp.minihub.org/courtmonitoring/spsccaseinformation2004.htm, Judicial System Monitoring Programme, Overview of the Court in East Timor in 2004, pgs. 12-13. Indictments and judgments of Extraordinary Chambers;

10. www.jsmp.minihub.org/index2.htm, Cassese, A., Mixed Courts and Tribunals Trying International Crimes, as an Alternative to Other Options for Fighting Impunity;

11. www.mvpei.hr/custompages/static/hrv/files/vodic_kroz_esop.pdf, . Guide through European security and defence politics;

12. www.ohr.int/ohr-dept/hr-rol/thedept/war-crime-tr, Rules of the Road are addition to the Rome Agreement signed on 18 February 1996 by the presidents of the Republic of Croatia, Bosnia and Herzegovina and Federal Republic of Yugoslavia;

13. www.pcug.og.au/-wildwood/01maytribunalpetition.htm, Petition for International Tribunal on East Timor: Investigations by the Serious Crimes Investigation Unit (SCIU) have been unacceptably slow. The SCIU initially concentrated on a select few cases and major atrocities, such as that committed at the Suai church compound on 6 September 1999 where dozens were murdered, have not been properly investigated. There are persistent reports that the SCIUDs work is severely hampered by problems relating to a lack of resources, management conflicts, poor communications, the lack of clear policy guidelines, and reluctance to expose the systematic nature of the 1999 violence;
14. www.sc-sl.org, Official page of the Special Court for Sierra Leone;
15. www.sc-sl.org/documents.html
16. www.unictr.org/Cases/StatusofCases/tabid/204/Default.aspx, . Web page of the ICTR.

UDC: 35.077.2/.3(497.11)

LEGAL NATURE AND SIGNIFICANCE OF GUARANTEE ACT AS PROVIDED FOR IN GENERAL ADMINISTRATIVE PROCEDURE BILL[1]

Dragan Vasiljevic, LLD[2]
Academy of Criminalistic and Police Studies, Belgrade

Abstract: The challenges faced by many countries, including Serbia, at the social, economic, political, technical and technological levels require the development of numerous capacities, including the legal ones. In this respect, the reform of administration calls for new administrative procedures. It is therefore necessary to improve the Law on General Administrative Procedure as an important systemic law in this area. The reasons for this are numerous and the most prominent among them include the following:

a) Harmonization of the national law with the legal acquis of the European Union;

b) Strengthening the rule of law;

c) Creating a foundation for the introduction of new technologies in the work of administrative bodies that will improve the way they communicate among one another;

d) Improvement of certain outdated solutions that are still in place.

A new Law on General Administrative Procedure has been proposed and one of the novelties it envisages is the institute of the guarantee act. It is defined as a written document which obliges the body to provide an administrative document of certain contents if appropriately requested by a party.

The paper discusses all aspects of the legal nature of the guarantee act and its significance, which is primarily reflected in the promotion of legality and legal certainty, but also in the creation of a predictable business environment.

Keywords: administrative procedure, administrative matter, guarantee act, legal certainty, legality.

INTRODUCTION

The beginning of the 21st century has brought about numerous challenges for many countries, including our own, at the social, economic, political, technical and technological levels. This development calls for improvements in the Law on General Administrative Procedure as an important systemic law in the administrative and legal scientific field. The reasons for this are numerous and the most prominent ones include the following:

a) Further harmonization of national law with the European Union acquis;

b) Developing capacities for further strengthening of the rule of law and legal certainty;

1The paper resulted from research within the project entitled Criminality in Serbia and instruments of state reaction, financed and carried out by the Academy of Criminalistic and Police Studies in Belgrade, the 2015-2019 cycle of scientific research.
2 dragan.vasiljevic@kpa.edu.rs

c) Creating a legal foundation for the introduction of new technologies in the work of administrative bodies that will improve the way of their mutual communication;

d) Improving a number of solutions that are still in place although they are becoming increasingly inappropriate in the social reality within which they are applied.[3]

At the time of writing of this paper, a Bill on General Administrative Procedure has been proposed.[4] One of the innovations it envisages is the institute of a guarantee act. A guarantee act is a written document which obliges the authority to adopt an administrative act of certain contents at the appropriate request of a party.

The paper discusses all aspects of the legal nature of the guarantee act and its significance which is primarily reflected in the promotion of legality and predictability, as a significant principle of the general administrative procedure.

ADMINISTRATIVE PROCEEDINGS AND ADMINISTRATIVE MATTER

Before focusing on the guarantee act (its nature and significance) as the main topic of this paper, it is necessary to deal with a preliminary issue of briefly explaining the very concepts of administrative procedure and administrative matter in the spirit of the General Administrative Procedure Bill. The reason for this is that the guarantee act is adopted with regard to an administrative matter by applying the rules of administrative procedure.

In this sense, the administrative procedure represents a set of rules that competent authorities apply when dealing with administrative matters. The competent authorities include a wide range of subjects that can, under certain conditions, carry out administrative functions. These include: state authorities, bodies of territorial autonomy and units of local self-government, enterprises, institutions, organizations, special bodies through which regulatory functions are performed, and individuals entrusted with public authority. The purpose of the administrative procedure is to achieve two interconnected and harmonized legal goals. The first is to ensure legal certainty for natural and legal persons, as well as other entities with the status of parties to the proceedings. The second is to lawfully ensure the legal order. In most of today's legal systems, administrative procedure is, modelled according to court procedures, as a formalized legal procedure performed by competent authorities. All actions within the procedure follow detailed norms in terms of sequence, time of performing, entities authorized to perform them, the form in which they are undertaken, etc. The administrative procedure involves specific legal administration of a specific non-dispute situation – an administrative matter.[5]

The significance of legal norms applied to administrative proceedings is related to the principle of the rule of law. Statutory coverage of the administrative action in substantive and procedural terms is the foundation of public order. Subjecting administration to the legal regime as a negation of arbitrariness is the basis of protecting the rights and legal interests of the parties to the procedure. This is also related to ensuring judicial control of administrative work. In order to ensure effective judicial control, it is vital to, inter alia, ensure that there are previously developed rules of administrative procedure.[6]

3 For more detail, see: D. Vasiljević, D. Milovanović, *The participation of stakeholders and general public in the legislation process* (the situation in the Republic of Serbia and a comparative overview), international scientific conference Arcibald Reiss Days, Thematic conference proceedings of international significance, KPA, IRZ, Belgrade, 2014, volume III, pp. 55-63.
4 See: http://www.srbija.gov.rs/vesti/dokumenti_pregled.php?id=256460, accessed on 13 February 2016.
5 More detail in: Z.R.Tomić, Opšte upravno pravo, Beograd, 2009, p. 248.
6 More detail in: D. Vasiljević, Francuski sistem sudske kontrole uprave i njegov doprinos izgradnji demokratske pravne države, NBP, Žurnal za kriminalistiku i pravo, Vol. XVIII, No. 2/2013, p. 61-71.

Implementation of laws and other regulations in administrative matters is subject to general and special procedural rules. Hence there are two types of administrative procedures– general and specific ones. The rules of general administrative procedure apply to all types of administrative matters. The rules of specific administrative procedure are applicable in respect of certain specific areas of administration or administrative matters. Specific administrative procedures are related to cases that involve specific administrative matters which, for reasons of expediency and rationality, call for specific procedures.

The relation between general and specific procedures is based on two principles. The first is the principle of subsidiarity. This means that special rules take precedence over the rules set forth in the Law on General Administrative Procedure. The second principle means that the rules of general administrative procedure are of accessory character with respect to issues that need not be regulated by relevant special laws.[7]

As regards the relation between the Law on General Administrative Procedure and special laws, the new Bill retains the existing provisions according to which this statute applies to proceedings in all administrative matters.[8]

It also envisages a possibility of different solutions regarding certain issues of administrative procedure in special laws, but only under certain circumstances: if it necessary in certain areas of administration; if it is in compliance with the basic principles set forth in this Law; and if it does not reduce the level of protection of rights and legal interests of the parties guaranteed by the law. Thus the existence of rules on special administrative proceedings in certain administrative areas is conditioned by the cumulative fulfillment of the abovementioned conditions.

As regards administrative matters, it should be pointed out that there is no consensus in the national theory of law regarding the definition of its concept.[9] In addition to the views taken by jurisprudence, it should be borne in mind that certain conclusions on administrative matters can also be drawn from the existing legislation. Thus Article 5 of the Law on Administrative Disputes[10] specifies that: "an administrative matter is an individual indisputable situation of public interest in which the need stems directly from the legislation to guide the future behaviour of a party by the authority of law." This is a narrower concept of the administrative matter, as an administrative dispute may challenge administrative acts which are final in administrative proceedings. On the other hand, the General Administrative Procedure Billhas broadened the concept of administrative matter. The reason for this is the desire to encompass those forms of administrative actions which have not been regulated by the Law on General Administrative Procedure so far. The Law in power governs the procedure of issuing administrative acts and issuing of public documents. However, the Bill also provides for other forms of administrative actions: the guarantee act, administrative contract, all administrative actions and not only issuing public documents and rendering public services, i.e. services of general interest.

7 More detail in: Z.R.Tomić, op.cit.p. 250; D. Vasiljević, Upravno pravo, KPA, Beograd, 2015, pp. 267-270.
8 More detail in: D. Vasiljević, D. Milovanović, *Towards new solutions in the law on inspection supervision in the Republic of Serbia*, international scientific conference *Archibald Reiss days*, Thematic conference proceedings of international significance, KPA, Belgrade, 2015, Volume II, pp. 233-241.
9 On the concept of administrative matter, see more in: I. Krbek, Pravo jugoslovenske javne uprave III, Zagreb, 1962, p.6.; I. Borković, Upravno pravo, Zagreb, 1981, p. 292.; N. Stjepanović, Upravno pravo u SFRJ, Beograd,1978, p.791.; S. Popović, Upravno pravo, Beograd, 1989, pp. 490-491.; B. Majstorović, Komentar Zakona o opštem upravnom postupku, Beograd,1977, p.6.; M. Perović, Komentar Zakona o upravnim sporovima, Beograd, 1979, pp. 86-87.; P. Dimitrijević, Pravosnažnost upravnog akta, Beograd, 1963, p. 23.; P. Dimitrijević, Osnovi upravnog prava, Beograd, 1983, p. 227.; R. Marković, Upravno pravo, Beograd, 1995, p. 196.; N. Bačanin, Teorija upravnog prava, Beograd, 1994, p. 239.; D. Milkov, Pojam upravnog akta (doktorska disertacija-neobjavljena), Novi Sad, 1983, pp. 194-195.; Z. Tomić, Upravno pravo, Beograd, 1991, p. 271.
10 See: Zakon o upravnim sporovima, Službeni glasnik RS, br. 111/2009.

The Bill envisages that "an administrative matter, in terms of this law, is a single situation in which the authority directly applies laws and other regulations and general acts to legally or factually influence the position of a party by adopting administrative acts, guarantee acts, concluding administrative contracts, taking administrative measures and providing public services. Administrative matters include any other situation that is legally designated as an administrative matter."

This broader concept of administrative matter is limited to the administrative procedure since the Bill states that this is an administrative matter "within the meaning of this Law."[11]

GUARANTEE ACT

The guarantee act is the novelty envisaged by the Bill as compared the still valid Law, although we must admit that the legal system of Serbia has already included some legal institutes that have the same goal as the guarantee act: to improve the legality and legal certainty of a party to the procedure, thereby creating a predictable business environment. Examples of this can be found in Article 19 of the Customs Law[12], Article 15 of the Law on Citizenship of the Republic of Serbia[13], and in Article 83 of the Law on Nationality and Registration of Vessels[14] and some other regulations. The guarantee act has been recognized as a legal institute by the laws of many other countries, such as Germany, Croatia, Montenegro, etc.[15].

Thus the Law on Administrative Procedure of Croatia (Article 103)[16] stipulates that "the public authority may guarantee to the party that it will be conferred certain right, when this is prescribed by law. The guarantee may not be contrary to public interest or the interest of third parties. The guarantee shall be decided on by a decision which is binding on the public authority, save when there is an essential change to the legal grounds and the facts." As we can see, there is a basis in the Croatian law for an administrative body to provide a party with a guarantee that it will acquire certain right when envisaged by law. The party's petition for providing a guarantee shall be decided by the decision (an administrative act). In the course of making the decision, the authority must take into account that the guarantee may on no account be contrary to public interest or the interest of third parties. The decision that decides on the guarantee obliges the issuing authority unless the legal basis and factual situation have significantly changed in the meantime, i.e. from the moment of issuing the guarantee to the time of issuing the document whereby the conferring of a certain right is decided upon. In other words, the administrative act which decides on the right of the party must be in compliance with the previously adopted guarantee act unless the legal grounds and factual situation have significantly altered. The law requires considerable (essential) change and not just any change in the legal basis and factual situation.

The Law on Administrative Procedure of Montenegro (Article 20)[17] also specifies that the public authority may, upon request by a party, issue a decision that guarantees the party the acquisition of a right, under conditions prescribed by a special law (Guarantee). The guarantee must be made in writing. The public authority is obliged to issue a decision on the

11 More detail in: D.Milovanović, V.Cucić, Nova rešenja nacrta Zakona o opštem upravnom postupku u kontekstu reforme javne uprave u Srbiji, Pravni život, Beograd, br. 10/2015, volumeII, pp. 100-103.
12 See: Službeni glasnik RS, br. 18/2010, 111/2012 i 29/2015.
13 See: Službeni glasnik RS, br.135/2004 i 90/2007.
14 See: Službeni glasnik RS, br. 10/2013.
15 See: Službeni glasnik RS, br. 10/2013.
16 http://www.zakon.hr/z/65/Zakon-o-op%C4%87em-upravnom-postupku, accessed on 13 February 2016.
17 file:///C:/Users/User/Downloads/Zakon%20o%20upravnom%20postupku-novi%20(4).pdf, accessed on 13 February 2016.

conferring of the right guaranteed to the party by the guarantee act if the conditions from the guarantee act are fulfilled, unless the legal basis for the acquirement of that right has ceased to exist or there have been substantial changes in the legal basis or factual situation from the time of issuing of the guarantee act to the fulfillment of conditions for the acquirement from paragraph 1 of the article. As we can see, the solutions contained in the laws of Croatia and Montenegro regarding the guarantee act do not substantially differ, apart from some small details. Unlike the Croatian law, the law of Montenegro specifies that the guarantee act is issued upon request by a party and in writing. The nature of the subject matter calls for such proceedings within the Croatian law, only it has not been explicitly provided for. As regards the duty of the authority to issue an administrative act in accordance with the guarantee act, the law of Montenegro precisely stipulates that there will be no such obligation if the legal basis for entitlement ceased to exist. We may assume that this condition also applies to Croatian law regardless of the fact that it is not expressly provided for. If there is no obligation in the situation when the legal basis has considerably changed, it is logical that the same applies to a situation in which the legal basis ceased to exist. Besides, there must be a legal basis for adopting every administrative act. It should be noted that the law of Montenegro unlike the Croatian law does not stipulate that the guarantee act may not be contrary to public interest or the interest of third parties. It is possible to compensate for this deficiency by special laws that will envisage it.

The General Administrative Procedure Bill of the Republic of Serbia stipulates that the administrative entities may, acting in an administrative matter by applying the rules of administrative procedure, exhibit a form of administrative action by issuing an administrative act, guarantee act, concluding an administrative contract, taking administrative action and providing a public service. Hence the guarantee act is one of a number of possible forms of administrative actions.

The Bill defines the guarantee act as a written document in which an administrative body guarantees a party (commits itself) to issue an administrative act of certain contents upon the party's request under certain conditions. It is issued when the special law stipulates it should be issued and must not be contrary to public interest or the interest of third parties.

The Bill also stipulates that the authority adopts an administrative act in accordance with the guarantee act only if a party requests so. In other words, in order to adopt an administrative act in keeping with the previously issued guarantee act it is necessary that a party submits a request for its adoption. There are, however, situations when the authority is not obliged to adopt an administrative act in compliance with the guarantee act. These include the following cases:

1) If the request for adopting the administrative act is not filed within a year from the issuing date of the guarantee act or other period specified by the special law;

2) If the factual situation on which the request for the adoption of an administrative act is based significantly differs from the one described in the request for issuing the guarantee act;

3) If the legal basis upon which the guarantee act was passed changes because the new regulation envisages annulment, revocation or amendment of administrative acts made based of the previous regulations;

4) When there are other reasons specified by the special laws.

As regards the first case, it is good that a deadline is envisaged, lasting from the date of issuance of the guarantee act for submitting the request in order to make an administrative act. The main objective of the guarantee act is to provide a higher level of legal security and certainty for the party. On the other hand, it can be assumed that the party itself has a serious intention to submit a request for issuing the administrative act after receiving the guarantee

act in order to definitely acquire the right in question. Therefore it is meaningful and justifiable to set the deadline. It should be borne in mind that special laws may prescribe a deadline different from the one envisaged in the Bill. This solution is expedient given that each administrative area has it specifics.

The second case is also indisputable. The guarantee act is issued for a specific case. It is logical that there can be no obligation on the part of the administrative authority to adopt an administrative act in keeping with the previously issued guarantee act if the facts on the basis of which it was issued have in the meantime considerably (essentially) altered.

As for the third case, we are of the opinion that it is logical and justified from the standpoint of respect of lawfulness. Its existence means that the legislator relieves the administrative authority of duty to issue an administrative act in keeping with the guarantee act if the legal basis on which the guarantee act was issued was altered in the meantime as the new regulation envisaged annulment, revocation or amendment of administrative acts passed based on the previous regulations. This actually implies retroactive implementation of new regulations. These new regulations affect both administrative and guarantee acts that have been issued. It makes little sense that someone who has just received a conditional guarantee that a certain administrative act will be issued has more rights and therefore a safer legal position that those persons whose rights and obligations have already been regulated by the administrative act. Conversely, the omission of the third condition would lead to inequality in the legal statuses of persons in the same situations, which in itself would violate the principle of legality. On the other hand, the need to protect public interest as well as the rights of other people justifies the existence of this condition. Finally, all administrative acts must be based on legal grounds, so how is it possible to adopt an administrative act of certain contents if there is no adequate legal basis for it?

The fourth case allows the possibility for a special law to provide reasons which will relieve the authority from adopting the administrative act in accordance with the guarantee act. Bearing in mind the existence of specific features in some administrative areas, this solution has its justification. However, we have to point out that the reasons possibly envisaged by special laws must comply with the basic principles of administrative procedure and must not reduce the level of protection of rights and legal interests of the parties.

The Bill foresees an analogous implementation of the provisions on administrative act on the guarantee acts. In this regard, analogous implementation applies to the provisions on legal remedies. Thus a party could, under conditions set forth in this Bill, lodge an appeal against the guarantee act as a regular legal remedy. Similarly, an appeal can be filed by any person whose rights, obligations or lawful interests may be affected by the outcome of the administrative procedure. As far as other authorities and organizations are concerned, they can also lodge complaints if they are authorized by law to do so. In this way the Bill specifically states who may lodge an appeal. However, it is essential here to be familiar with the provisions of the Bill that specify who can be a party to the procedure. In this regard, a party to an administrative procedure is a natural or legal person whose administrative matter is the subject to the administrative procedure and any other natural or legal person whose rights, obligations or legal interests may be influenced by the outcome of the administrative procedure. The party in the administrative procedure can also be a body, organization, settlement, group of people and others who are not a legal person may be parties to the administrative procedure under conditions under which a natural or legal person may be a party. Representatives of collective interests and advocates of general public interests, organized in keeping with relevant regulations, can have the status of parties to administrative proceedings if the outcome of the administrative proceeding can influence the interests they represent.

The competent national authorities have the status of a party to administrative proceedings within the powers established by law. As for the public prosecutors, they have the right

to file legal remedies in administrative proceedings when administrative actions violate the law. As regards provisions envisaged by the Bill on Administrative Procedure which apply to the right to appeal and which determine who may be a party to the proceedings, a question may arise regarding their effectiveness in terms of protecting the rights and legal interests of the subjects that can potentially be parties to the procedure and have the right to appeal, but are not in fact the ones who have submitted a request for the issuance of the guarantee act and therefore cannot be regarded as parties to the administrative matter. The point is that the body does not inform these persons on the initiation of the procedure or issue them a guarantee, and the outcome of the administrative procedure can affect their rights, obligations or legal interests. The question arises whether these solutions may infringe some of the proclaimed basic principles of the general administrative procedure. Since the guarantee act is issued when special laws on certain administrative matters provide for it is possible to compensate for the vagueness in the said special laws, because – inter alia – they must not reduce the level of protection of rights and lawful interests of the parties.

In connection with all the previously said about the guarantee act there is a question as to whether the Bill itself should introduce the guarantee act in all administrative areas or just create a basis for its introduction in special regulations in certain administrative areas. The proposed Bill has chosen the latter option. Bearing in mind that this is a new institute, it is to be introduced gradually and separately for each administrative area, when the authorities are prepared for this type of activity. Otherwise, it may lead to a situation in which this institute would be devalued despite its great potential for improving legal certainty. Legislation in a given administrative area should be first stabilized, so that frequent changes of regulations would not render the guarantee act meaningless. The above reasons indicate that caution is recommended when introducing the guarantee act in special regulations.

The fact that the present legal system in the Republic of Serbia, as we have already noted in this paper, features legal institutes that are in many ways similar to the guarantee act in a number of specific administrative areas does not mean that at this point we should regard them as equal to them and the guarantee acts in the way proposed by the Bill. The reasons of respect for the principle of legality require that following the adoption of the new Law, the solution existing in special laws should be harmonized with the new law's provisions on the guarantee act. On this occasion, among other things, one should take into account the issue of terminology, so as to ensure that these acts – although envisaged (or about to be provided for) by special laws – are given the same denominator (guarantee act) instead of using different terms (binding information, binding opinion, confirmation) which may imply substantial differences among them. Disregard of this issue may bring about problems not only in practice, in the implementation of the regulations, but also in the legal doctrine, when defining their legal nature.

Solutions that are now contained in the General Administrative Procedure Bill relating to the guarantee act clearly indicate that it is an act *sui generis*.

There is no doubt that the guarantee act is one of the acts of the administration. It is issued in administrative matters in keeping with the rules of administrative procedure. It is issued in writing, which means that it is a formal act. The guarantee act shall be issued when provided for by a special law. It is based on the legal regulation (law). Its foundation in the law consists in applying the law to a particular case. In other words, there must be a rule of general nature which empowers the administrative body to issue a guarantee act and this rule has to, generally, define the contents of the guarantee act, as well as determine the condition, procedure and form of its issuance. It is important that the issuance of the guarantee act is preceded by a general legal norm and that there is a prior concretization of the norm in a specific case until the administrative act is adopted that will specify the primary disposition from the general

legal norm. In any event, the guarantee act has to be bound by law and this bind stems from respect for the principle of legality in the work of administration, i.e. from subjecting the administration to the law.

Since the acts of the administration can be legal and material, the guarantee act can be regarded as a legal act.[18] This actually means that it is a statement of intent with certain legal effects. Yet its legal effect is somewhat different from the legal effect of an administrative act. The legal effect of the guarantee act applies to the addressee to whom it is referred as the addressee thereby receives guarantee and right to require the authority to adopt an administrative act in accordance with the guarantee act. Legal effects of the guarantee act extend to the issuing body (subject of the administration). In fact, the guarantee act commits the administrative authority to – upon the appropriate request of the party – adopt an administrative act of certain contents (in compliance with the guarantee act). Only exceptionally, in cases expressly provided for, the administrative authority is not obliged to adopt the administrative act in accordance with the guarantee act. The point of this document is to provide a guarantee that a specified rule of conduct shall apply to the authority in question in future, thereby eliminating all uncertainty. It actually eliminates legal uncertainty that has so far existed for the parties. Legal effects of the guarantee act also extend to third parties whose rights, obligations or legal interests may be affected by the outcome of the administrative procedure. It is therefore not recommended that such persons ignore the existence of the guarantee act.

Similarly to the administrative act, the guarantee act is a separate – specific – act. It is issued in a particular case on the occasion of one life event and it actually provides a guarantee for the party as to what kind of administrative act will be adopted regarding the administrative matter in question upon request.

The guarantee is an authoritative act because it is brought with the authority, i.e. from the position of the state authority by the subjects legally authorized to act with a stronger will in relation to the entity to which the act is addressed in order to protect public interest.

Bearing in mind the fact that the Bill envisages that the guarantee act should be subject to provisions on the administrative act we can say that of all acts of the administration the guarantee act is the most similar to the administrative act in terms of its legal nature, but that they cannot be equated in terms of either form or contents. This view is supported by the provisions of the Bill which explicitly stipulate that, in administrative matters, the administrative authority adopts administrative acts, issues guarantee acts, concludes administrative contracts, undertakes administrative actions, and provides public services.

This clearly states that there are various forms of administrative actions and that one of them is the guarantee act, as well as that there are various legal regimens for all of these forms.

Further legal analysis of similarities and differences between the guarantee act and other forms of administrative actions at this point exceeds the purpose of this paper and would not be expedient as the solutions outlined in the proposed Law are not final.

CONCLUSION

There is no doubt that the guarantee act is one of the best instruments for achieving as high a level of legal certainty as possible, and that, as such, it is suitable in our conditions for improving the level of predictability of business environment.

The guarantee act primarily ensures greater legal security for the parties and at the same time ensures efficiency and effectiveness in the work of administrative bodies. In fact, the

18 More detail in: R.Marković, Upravno pravo, Beograd, 2002, pp. 247-256.

issuance of the guarantee act significantly facilities the work of administrative bodies on the adoption of administrative act. It is facilitated to such an extent that the authority only needs to compare whether the party's request for issuing the administrative act in compliance with the guarantee act is timely and whether the factual situation and legal basis have been considerably changed. The guarantee act reduces the need for filing appeals regarding the given administrative matter, so that it contributes to unburdening of the second-instance authority, thereby unburdening the entire administration.

Regardless of the need for reviewing certain specific elements of the legal arrangement related to the guarantee act in certain separate fields, it is unquestionable that the institute should be provided for in the Bill and that active support should be extended for the creation of conditions for its introduction in as many special administrative areas as possible, especially if we bear in mind the reasons for which this institute of law is introduced into our legal system and what is expected of it.

REFERENCES

1. Bačanin N., Teorija upravnog prava, Beograd, 1994.
2. Borković I., Upravno pravo, Zagreb, 1981.
3. Dimitrijević P., Pravosnažnost upravnog akta, Beograd, 1963.
4. Dimitrijević P., Osnovi upravnog prava, Beograd, 1983.
5. Krbek I., Pravo jugoslovenske javne uprave III, Zagreb, 1962.
6. Majstorović M., Komentar Zakona o opštem upravnom postupku, Beograd,1977.
7. Marković R., Upravno pravo, Beograd, 1995.
8. Marković R., Upravno pravo, Beograd, 2002.
9. Milkov D., Pojam upravnog akta (doktorska disertacija-neobjavljena), Novi Sad, 1983.
10. Milovanović D., Cucić V., Nova rešenja nacrta Zakona o opštem upravnom postupku u kontekstu reforme javne uprave u Srbiji, Pravni život, br. 10/2015, tom II.
11. Perović M., Komentar Zakona o upravnim sporovima, Beograd, 1979.
12. Popović S., Upravno pravo, Beograd, 1989.
13. Stjepanović N., Upravno pravo u SFRJ, Beograd,1978.
14. Tomić Z., Upravno pravo, Beograd, 1991.
15. Tomić Z., Opšte upravno pravo, Beograd, 2009.
16. Vasiljević D., Upravno pravo, Beograd, KPA, 2015.
17. Vasiljević D., Francuski sistem sudske kontrole uprave i njegov doprinos izgradnji demokratske pravne države, NBP, Žurnal za kriminalistiku i pravo, Vol. XVIII, No. 2/2013.
18. Vasiljević D., Milovanović D., *The participation of stakeholders and general public in the legislation process (the situation in the Republic of Serbia and a comparative overview)*, International scientific conference Archibald Reiss days, Thematic conference proceedings of international significance, KPA, IRZ, Belgrade, 2014, Volume III.
19. Vasiljević D., Milovanović D., *Towards new solutions in the law on inspection supervision in the Republic of Serbia*, International scientific conference Archibald Reiss days, Thematic conference proceedings of international significance, KPA, Belgrade, 2015, Volume II.

LEGISLATION

20. Zakon o upravnim sporovima, Službeni glasnik RS, br. 111/2009.
21. Carinski zakon, Službeni glasnik RS, br. 18/2010, 111/2012, 29/2015.
22. Zakon o državljanstvu Republike Srbije, Službeni glasnik RS, br. 135/2004, 90/2007.
23. Zakon o državnoj pripadnosti i upisu plovila, Službeni glasnik RS, br. 10/2013.

INTERNET SOURCES

24. http://www.srbija.gov.rs/vesti/dokumenti_pregled.php?id=256460
25. http://www.zakon.hr/z/65/Zakon-o-op%C4%87em-upravnom-postupku
26. file:///C:/Users/User/Downloads/Zakon%20o%20upravnom%20postupku-novi%20(4).pdf

UDC: 343.137.5(497.11)

MAIN CHARACTERISTICS OF NEW LEGISLATION ON CRIMINAL PROCEEDINGS AGAINST JUVENILES IN SERBIA

Vladimir V. Veković, PhD[1]
University of Priština, Kosovska Mitrovica, Faculty of Law

Abstract: Draft Law on Juvenile Criminal Offenders and Protection of Juveniles in Criminal Proceedings, which should be adopted during 2016, provides for a number of innovations in the following areas: substantive criminal law applicable to juveniles; criminal proceedings against juveniles; protection of juveniles as victims in criminal proceedings, as well as executive juvenile criminal law.

The paper analyzes in detail the new legislation criminal proceedings against juveniles. Special attention is paid to: the subject-matter jurisdiction of courts; the principle of substantial truth; expanding possibilities for proceeding in accordance with the principle of opportunity; inability to enter into a party agreement with a juvenile; non-application of the rules on direct and cross examination of witnesses and court experts in a proceeding before a juvenile judge; course of first instance proceedings against juveniles, as well as the changes in extraordinary legal advice. The proposed normative solutions eliminate the omissions and deficiencies contained in the current Law on Juvenile Crime Offenders and Criminal Protection of Juveniles, which entered into force on 1 January 2006. In this way, the criminal proceedings against juveniles is significantly improved, which is a necessary prerequisite for effective prevention and suppression of their criminal behaviour.

Keywords: juvenile criminal law, juveniles, criminal procedure, Draft Law/15, Serbia.

INTRODUCTORY CONSIDERATIONS

Within the general review of criminal legislation, the National Assembly of the Republic of Serbia adopted the Law on Juvenile Crime Offenders and Criminal Protection of Juveniles on 29 September 2005 (hereinafter referred to as: Law/05, current law),[2] which entered into force on 1 January 2006 and is in place even nowadays, with no amendments adopted in the meantime. Provisions of Law/05 apply to juvenile perpetrators of criminal offences (under certain conditions even to persons of legal age when tried for criminal offences committed as juveniles, as well to persons who have committed a criminal offence as young adults), and they pertain to substantive criminal law, relevant implementing bodies, criminal proceeding and enforcement of criminal sanctions against these offenders. Therefore, the Law/05 has fully regulated the criminal proceedings of juveniles, which has placed Serbia among those countries that have codified this matter and separated it into a specific whole through a separate law.[3] The Law/05 was a radical turn compared to previous solutions – it set off from the

1 vladimir.vekovic@pr.ac.rs
2 "Službeni glasnik RS", no. 85/05.
3 Stojanović, Z., *Krivično pravo – Opšti deo,* Beograd, 2009, p. 336.

idea of restoration justice and is developing it consistently; follows new tendencies in science of juvenile criminal law; it stipulates the possibility of "diversion" of criminal proceedings (*la diversion*), and for the first time, application of attendance orders as alternative measure; gives priority to non institutional treatment and insists on acquiring specific knowledge and professional development of all players in juvenile criminal justice system.[4] Specific value of the Law/05 is its compliance with highest international norms and standards in this area, set forth in relevant documents adopted under the auspices of the United Nations,[5] as well as in recommendations of the Council of Europe Committee of Ministers.[6]

There is no doubt that current law, due to its innovative and progressive approach to reforms of juvenile justice system belongs to our best laws.[7] A decade long application and problems observed in practice indicated however that certain provisions of the current law need to be additionally specified, with introduction of certain novelties as well. Taking into account that this requires amendments and supplements of more than a half of provisions contained in the Law/05, in accordance with Unified Methodological Rules for regulations development,[8] it has been concluded that a new law should be adopted to regulate this area. In accordance with that, Draft Law on Juvenile Criminal Offenders and Protection of Juveniles in Criminal Proceedings was developed and presented to public in 2015 (Draft Law/15). The adoption of new law is expected in 2016, upon the completion of public consultations and appropriate procedure.

Draft Law/15 follows the system of the Law/05, so novelties stipulated for adoption pertain to the following: 1) substantive criminal law applied to juveniles; 2) relevant implementing bodies; 3) criminal proceedings against juveniles; 4) enforcement of pronounced criminal sanctions, and 5) protection of juveniles as injured parties in criminal proceedings.

Subject of further discussion in this paper will include characteristics of new legal regulation of criminal proceedings against juveniles.

---

4 Veković, V. V., *Sistem izvršenja krivičnih sankcija,* Beograd, 2013, p. 156.

5 *United Nations Standard Minimum Rules for the Administration of Juvenile Justice – The Beijing Rules* (Adopted by General Assembly Resolution 40/33 of 29 November 1985); *United Nations Convention on the Right of the Child* (Adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 of 20 November 1989); *United Nations Guidelines for the Prevention of Juvenile Delinquency – The Riyadh Guidelines* (Adopted and proclaimed by General Assembly Resolution 45/112 of 14 December 1990)*; United Nations Rules for the Protection of Juveniles Deprived their Liberty – The Havana Rules* (Adopted by General Assembly Resolution 45/113 of 14 December 1990); *United Nations Standard Minimum Rules for Non-custodial Measures – The Tokyo Rules* (Adopted by General Assembly Resolution 45/113 of 14 December 1990).

6 *Recommendation No. R (87) 20 of the Council of Europe Committee of Ministers to Member States on Social Reactions to Juveniles Delinquency* (Adopted by the Committee of Ministers on 17 September 1987 at the 410th Meeting of the Ministers' Deputies); *Recommendation No. R (88) 6 of the Council of Europe Committee of Ministers to Member States on Social Reactions to Juvenile Delinquency among Young People Coming from Migrant Families* (Adopted by the Committee of Ministers on 18 April 1988 at the 416th Meeting of the Ministers' Deputies); *Recommendation No. R (92) 16 of the Council of Europe Committee of Ministers to Member States on the European Rules on Community Sanctions and Measures* (Adopted by the Committee of Ministers on 19 October 1992 at the 482nd Meeting of the Ministers' Deputies); *Recommendation No. R (2000) 22 of the Council of Europe Committee of Ministers to Member States on Improving the Implementation of the European Rules on Community Sanctions and Measures Justice* (Adopted by the Committee of Ministers on 29 November 2000 at the 731st Meeting of the Ministers' Deputies); *Recommendation No. R (2003) 20 of the Council of Europe Committee of Ministers to Member States Concerning New Ways of Dealing with Juveniles Delinquency and the Role of Juvenile Justice* (Adopted by the Committee of Ministers on 24 September 2003 at the 853rd Meeting of the Ministers' Deputies).

7 This is also corroborated by opinions of Carol Conragan and Frider Dünkel, experts of the UNICEF and Council of Europe respectively. See: *Maloletni učinioci krivičnih dela i krivičnopravna zaštita maloletnih lica,* Beograd, 2005, pp. 9 and 10.

8 "Službeni glasnik RS", no. 21/10.

NEW LEGAL REGULATION OF CRIMINAL PROCEEDING AGAINST JUVENILES

Criminal proceeding against juveniles is a specific criminal proceeding, which means that criminal proceeding in cases with this age category of perpetrators has a range of specificities compared to regular (general) criminal proceedings. The main difference between these two types of criminal proceedings is more favourable criminal proceeding position of juveniles compared to persons of legal age.[9] From these basic conclusions, it is derived that our proceedings against juveniles are appropriate combination of elements of judicial and protection models, so it can be specifically denoted as modified judicial model.[10] This model of criminal proceeding is promoted by the current law, and is also retained by the Draft Law/15.

When it comes to novelties brought into the area of criminal proceedings against juveniles by the Draft Law/15, specific attention should be paid to the following solutions.

Subject-Matter jurisdiction of courts

Provisions of Article 42, paragraph 1 of the current law set forth that first instance proceedings against a juvenile are conducted before a juvenile judge and juvenile court bench of the District Court. This solution is justified by the need to concentrate subject matter jurisdiction in juvenile cases to relatively small number of courts, which enables rational use of human resources and their professional specialisation. However, since the area is covered by competence of certain district courts was too large, difficulties commonly faced were related to collection of information and better presentation of a juvenile's personality, supervision over the enforcement of pronounced educational measures and so on.[11] In order to enable overcoming of problems observed in practice, the Draft Law/15 stipulates that first instance proceedings against a juvenile are conducted before a juvenile judge and competent juvenile court bench, whether basic or higher, while second instance proceedings are always decided upon by the Appeal Court (Article 46, paragraph 1, and Article 47). Namely, there was a prevailing opinion that there was no reason to bypass basic courts in first instance proceedings, and that professional specialisation of court officials in charge of juvenile proceedings can be implemented without greater difficulties. Besides that, it is rational to retain Appeal Court as competent one in second instance proceedings, because that enables creation of unified judicial practice in this area.[12]

Principle of substantial truth

Unlike the current Law on Criminal Proceedings[13] where the provision on principle of substantial truth had been cancelled, Draft Law/15 in its Article 51 explicitly stipulates that court and state authorities participating in criminal proceedings against a juvenile shall truly and completely determine the facts which are of importance for making legal and fair decision. Provision of this article reaffirms the principle of substantial truth in a way specific for continental-European criminal proceedings. More specifically, this means that all relevant

9 Veković, V. V., Postupak pred većem za maloletnike između normativnog i stvarnog, *Zbornik radova Pravnog fakulteta Univerziteta u Prištini sa privremenim sedištem Kosovskoj Mitrovici,* Kosovska Mitrovica, 2014, p. 90.
10 Škulić, M., Reforma maloletničkog krivičnog prava u Srbiji, *Maloletnici kao učinioci i žrtve krivičnih dela i prekršaja*, Beograd, 2015, p. 46.
11 Perić, O., *Komentar Zakona o maloletnim učiniocima krivičnih dela i krivičnopravnoj zaštiti maloletnih lica,* Beograd, 2007, p. 102; Lazarević, Lj., Grubač, M., *Komentar Zakona o maloletnim učiniocima krivičnih dela i krivičnopravnoj zaštiti maloletnih lica,* Beograd, 2005, p. 94.
12 Škulić, M., *op. cit.,* p. 57.
13 "Službeni glasnik RS", no. 72/11, 101/11, 121/12, 32/13, 45/13. and 55/14.

facts must be surely and truly established, so that factual state taken by the decision as established one, is equivalent to what really happened, i.e. what is really in existence.[14] In other words, only truly established facts can form the basis for legal, proper and fair decision, and can enable achievement of goal of a proceeding against a juvenile – realisation of his/her best interest.[15]

Wider possibilities for proceeding in accordance with the principle of opportunity

Draft Law/15 stipulates wider possibilities for proceeding according to the principle of opportunity in criminal prosecutions against juveniles. New solution is very similar to the current one, but with the extension to possible proceedings according to opportunity of criminal prosecution and when it comes to criminal offences for which the prescribed punishment is up to eight years imprisonment (currently it is up to five years imprisonment).

In addition, there is newly introduced obligation of public prosecutor to conduct check by virtue of official duty and in all cases to determine whether proceeding according to principle of opportunity in criminal proceedings is justified, if criminal offence is of certain severity. When criminal charges have been filed against a juvenile because of criminal offence for which fine or up to five years imprisonment is prescribed, or if criminal charges have been filed against a juvenile who is already under enforcement of sanction or educational measure, public prosecutor for juveniles shall immediately and by rule, before taking any other action against the juvenile, and obligatory before submitting the motion for initiation of proceeding against the juvenile to a juvenile judge, explore whether conditions are met to proceed in compliance with rules pertaining to the principle of opportunity in criminal proceedings (Article 72, paragraph 1 of the Draft Law/15).

By introducing the duty for public prosecutor to explore possibility of proceeding according to the principle of opportunity in criminal prosecution against a juvenile in any case when in legal terms (according to severity of criminal offence) such proceeding is possible, and to establish that in his/her official notes, enables on one hand the public prosecutor for juveniles not to act too routinely with regard to this important question, while on the other hand creates a part of necessary conditions for wider application of principle of opportunity in criminal prosecution against juveniles, especially for the application of attendance orders.

Inability to enter into a party agreement with a juvenile

Draft Law/15 excludes possibility to enter into a party agreement with a juvenile, bearing in mind that contrary solution would be inappropriate for conducting of criminal proceeding against a juvenile perpetrators of criminal offences. According to provision of Article 65 of the Draft Law/15, no agreement on confession of criminal offence or agreement on testimony can be concluded with a juvenile. *Ratio legis* of this norm is that a juvenile is not a typical party in criminal proceeding, and taking into account his/her age, he/she cannot take certain obligations anyway based on the statement of his/her legally relevant will in any other situation, so this naturally should be avoided also in cases of agreements on the confession of criminal offence or agreement on testimony.

Direct and cross examination of witnesses and court experts in a proceeding before a juvenile judge

In a proceeding before a juvenile judge no rules of direct and cross examination of wit-

14 Vasiljević, T., Grubač, M., *Komentar Zakonika o krivičnom postupku,* Beograd, 2003, p. 49.
15 Đurđić, V., Priroda, struktura i principi krivičnog postupka prema maloletnicima, *Maloletnici kao učinioci i žrtve krivičnih dela i prekršaja,* Beograd, 2015, p. 102.

nesses and court experts are applied in compliance with the Law on Criminal Proceedings, but those persons are interrogated by the juvenile judge, and the juvenile, his/her lawyer, public prosecutor, as well as parent or foster parent or guardian of the juvenile can, as approved by the juvenile judge, pose questions to witnesses and court experts. Without prejudice to the rule of prohibition of direct and cross examination, the juvenile judge can allow for suitable application of the rule of direct and cross examination of witnesses and court experts, if he/she estimates that this is justified by reasons of justice, as well as if such procedure is in interest of the juvenile who has a lawyer (Article 78, paragraphs 4 and 5 of the Draft Law/15). Similar rules apply in cases when main hearing is conducted in proceedings against juveniles.

Course of first instance proceedings against juveniles

When it comes to the course of first instance proceedings against juveniles, provisions of the Draft Law/15 are introducing far-reaching novelties. The main change is the cancellation of preparatory proceeding against a juvenile and conversion of that former first phase of this proceeding into classic first instance proceeding, when criminal offences are of certain severity. The main idea is that all necessary actions are conducted in preliminary investigation, and no prosecutorial investigation can be conducted against a juvenile.

The proceeding starts when public prosecutor for juveniles sends to the juvenile judge a motion for pronunciation of criminal sanction to a juvenile, in cases when he/she clarified criminal office in preliminary investigation (if he/she has not previously applied the principle of opportunity in criminal prosecution), and then the juvenile judge acts as has acted so far, but he/she will, provided that public prosecutor for juveniles proposed pronunciation of non-institutional criminal sanction, finalise the entire first instance proceeding and will decide about the subject of the proceeding.

The same as earlier, the decision made by the juvenile judge could suspend the proceeding, whether due to the lack of inexpedience of the criminal prosecution, or due to reasons for liberating or rejecting verdict in general criminal proceedings, or when the juvenile judge has pronounced certain criminal sanction to the juvenile. This must be criminal sanction which is not institutional, and of public prosecutor for juveniles had proposed institutional criminal sanction, or juvenile judge estimated that pronunciation of institutional sanction is possible, and then juvenile judge, after sufficiently clarifying the factual state, shall present the case to the juvenile bench. The composition of the juvenile bench is the same as it has been so far, but with an important difference, that is, the bench is chaired by the other juvenile judge, not the one who conducted previous phase of the proceeding. The proposed solution gives on the one hand potentially great contribution to faster and more efficient course of criminal proceedings against juveniles, since it avoids unnecessary duplication of work and process phases, while on the other, it is far fairer and more adequate in criminal process terms and is fully compliant with practice of the European Court of Human Rights.

The proceeding before the juvenile judge can alternatively be:

1) the only stage of first instance proceeding against a juvenile, i.e. at the same time the initial and final phase of the proceeding against the juvenile, and is finalised by the decision denoting the end of first instance proceeding, or

2) first, i.e. initial stage of first instance proceeding against a juvenile, actually an appropriate preparation for the next first instance process stage – proceeding before the juvenile judge, which, as set forth in the Draft Law/15, shall be conducted only in form of main hearing and with application of rules set forth in the Law on Criminal Proceedings (which means with certain rational exceptions), which pertain to conduct of the main hearing in general criminal proceedings.

After having determined all relevant facts pertaining to criminal offence, maturity and other circumstances of importance for introduction of juvenile's personality and circumstances of his/her living, the juvenile judge shall submit the file to public prosecutor for juveniles, who shall respond to the juvenile judge within eight days stating that: 1) he/she gives up further criminal prosecution or 2) he/she shall submit reasoned proposal to continue the proceeding against the juvenile and to pronounce a criminal sanction (Article 81 of the Draft Law/15).

If public prosecutor proposes pronunciation of certain non-institutional sanction, as well as when the juvenile judge estimates that the complexity of the case requires the main hearing, or in case of most serious crime (prescribed punishment is from 30 to 40 years imprisonment), he/she shall present the case before the juvenile bench. In such case, first instance proceeding against a juvenile shall be conducted by the juvenile bench, with introduction of two new rules:

1) juvenile bench shall be chaired obligatory by a different juvenile judge, not by the one who conducted the previous stage of first instance proceeding due to reasons of fairness, and in compliance with the existing practice of the European Court of Human Rights, and

2) unlike the existing solution when the proceeding before the juvenile bench could have been conducted either within the bench session, or within the main hearing, now the main hearing is obligatory, which is logical taking into account that in such case there is a possibility to pronounce institutional criminal sanctions against the juvenile.

The juvenile bench can make the same decisions upon the completion of the main hearing as could have been previously made by the juvenile judge; but in addition to that, the bench can also pronounce institutional criminal sanctions to the juvenile.

Changes in extraordinary legal advice

Draft Law/15, for the reasons of fairness, but also due to the need to protect the interests of the juvenile, has introduced a rule about certain violations of law which must be taken into account by virtue of official duty in second instance proceeding, thus deviating from restrictive rules of the new Law on Criminal Proceedings. According to the provision of Article 90, paragraph 2 of the Draft Law/15, it is stipulated that when a complaint is lodged in favour of a juvenile, the second instance court examines on the basis of official duty whether the Criminal Code was violated at the expense of the juvenile, as well as whether there are some of the following violations of procedural provisions: 1) if the court was irregularly composed or if the judge participated in pronouncing a decision that had to be challenged; 2) if the decision issued by the court which, because of the actual lack of subject-matter jurisdiction could not judge in the case, and 3) if the decision is based on the proof which cannot be the basis for the case pursuant to the law pertaining to criminal proceedings.

Provision of Article 92, paragraph 2 of the Draft Law/15, it is set forth that Supreme Court of Cassation cannot reject the motion for the protection of legality submitted for the benefit of a juvenile, because of the assessment that this is not the matter of importance for proper and equal application of law.

CONCLUSION

Draft Law on Juvenile Criminal Offenders and Protection of Juveniles in Criminal Proceeding is introducing numerous and substantial novelties into Serbian juvenile criminal law. When it comes to criminal proceedings against juveniles, it should be emphasised that those novelties are fully harmonised with modern tendencies in science of juvenile criminal law, highest international norms and standards in this area established in a range of universal and

regional documents, solutions in comparative juvenile criminal legislation, as well as with current practice of the European Court of Human Rights. Based on detailed analysis of normative solutions contained in the Draft Law/15, there is a clear conclusion that our proceeding against juveniles to greatest extent presents an appropriate combination of elements of judicial and protection models, so it can be substantially denoted as modified judicial model.

There is no doubt that Draft Law/15 is a considerable qualitative progress in comparison to the current Law on Juvenile Criminal Offenders and the Protection of Juveniles in Criminal Proceeding. Adopting the new law in 2016, necessary normative presumptions will be created for more efficient prevention and suppression of this type of crime, as well as achievement of goal of the proceeding against a juvenile – achieving his/her best possible interest. If these effects are expressed in practice and become a rule, not an exception, Serbia can rightfully be placed among states with progressive juvenile criminal legislation.

REFERENCES

1. Burfeind, W. J., Bartusch, J. D., *Juvenile Delinquency: An Integrated Approach*, New York, 2016.
2. Dünkel, F., *Juvenile Justice Systems in Europe – current situation, reform developments and good practices*, International Conference, organised by the Department of Criminology, University of Greifswald, 2007.
3. Đurđić, V., Priroda, struktura i principi krivičnog postupka prema maloletnicima, *Maloletnici kao učinioci i žrtve krivičnih dela i prekršaja*, Beograd, 2015.
4. Hudson, L. D., Marzilli, A., *Juvenile Justice*, Broomall, 2010.
5. Jedinstvena metodološka pravila za izradu propisa, "Službeni glasnik RS", no. 21/10.
6. Lazarević, Lj., Grubač, M., *Komentar Zakona o maloletnim učiniocima krivičnih dela i krivičnopravnoj zaštiti maloletnih lica*, Beograd, 2005.
7. *Maloletni učinioci krivičnih dela i krivičnopravna zaštita maloletnih lica*, Beograd, 2005.
8. Obrazloženje Nacrta Zakona o maloletnim učiniocima krivičnih dela i zaštiti maloletnih lica u krivičnom postupku, http://www.mpravde.gov.rs/sekcija/53/radne-verzije-propisa.php (26.01.2016.)
9. Perić, O., *Komentar Zakona o maloletnim učiniocima krivičnih dela i krivičnopravnoj zaštiti maloletnih lica*, Beograd, 2007.
10. *Prava deteta i maloletničko pravosuđe – odabrani međunarodni instrumenti*, sveske 1-7, Beograd, 2005.
11. Shoemaker, J. D., *Juvenile Delinquency*, Playmouth, 2013.
12. Siegel, J. L., Welsh, C. B., *Juvenile Delinquency: The Core*, Belmont, 2010.
13. Siegel, J. L., Welsh, C. B., *Juvenile Delinquency: Theory, Practice, and Law*, Stamford, 2014.
14. Stojanović, Z., *Krivično pravo – Opšti deo*, Beograd, 2009.
15. Škulić, M., Reforma maloletničkog krivičnog prava u Srbiji, *Maloletnici kao učinioci i žrtve krivičnih dela i prekršaja*, Beograd, 2015.
16. Vasiljević, T., Grubač, M., *Komentar Zakonika o krivičnom postupku*, Beograd, 2003.
17. Vekovi, V. V., *Sistem izvršenja krivičnih sankcija*, Beograd, 2013.
18. Vekovi, V. V., Postupak pred većem za maloletnike između normativnog i stvarnog, *Zbornik radova Pravnog fakulteta Univerziteta u Prištini sa privremenim sedištem Kosovskoj Mitrovici*, Kosovska Mitrovica, 2014.
19. Whitehead, T. J., Lab, P. S., *Juvenile Justice – An Introduction*, New York, 2015.
20. Winterdyk, A. J., *Juvenile Justice Systems (International Perspectives)*, Toronto, 2002.
21. Zakon o maloletnim učiniocima krivičnih dela i krivičnopravnoj zaštiti maloletnih lica, "Službeni glasnik RS", no. 85/05.
22. Zakonik o krivičnom postupku, "Službeni glasnik RS", no. 72/11, 101/11, 121/12, 32/13, 45/13. and 55/14.

UDC: 343.341
341.48:323.285

PROHIBITION OF TERRORISM IN INTERNATIONAL LEGAL PRACTICE

Duško Dimitrijević, PhD[1]
Institute of International Politics and Economics, Belgrade

Abstract: The article sheds light on the nature of terrorism as social and political phenomenon and the question of the evolution of the prohibition of terrorism which becomes one of the main issues of contemporary international criminal law. In the first part of the paper the author elaborated the legal definition of terrorism. The reason was primarily in its "chameleon nature", that is the fact that it appeared in a number of forms depending on the circumstances exercised. Hence, it could represent the different types of international crimes - from war crimes and crimes against humanity, to separate international crime. However, over time this term got multiple meaning since terrorism has become proliferate. It has taken on new dimensions which seek new and significant growth of legislation which could provide prohibition against different kind of terrorist acts which is no longer the activity of individuals but of organised groups, even states which finance and mastermind it. In the concluding part of the paper, the author expresses the opinion that with the involvement of the United Nations, the European Union and other important international organizations in this process, the international community will gradually develop mechanisms on the universal level to punish and suppress various types of terrorist acts.

Keywords*:* international terrorism, definition, international legal practice, conventions, United Nations, EU, criminal liability.

EVOLUTION OF THE CONCEPT

Through long and bloody history it is possible to identify certain events which were the forerunners of terrorism. Thus, in Roman times, the assassination, murder, kidnapping and taking of hostages were the primary instruments of political struggle. Significant changes in terms of the emergence of organized terrorism are recorded in the medieval historical artefacts mentioning Arab Shiite sect "Fidain" or "angel of death" and Islamic order "Assassins" whose acts of terrorism remained a model for today's terrorists. The terrorist, motivated by personal or ideological passion that has used assassination as a political weapon became linked with the 16th century doctrine of *tyrannicide*. In the New Ages terrorism acquires a new meaning. Terrorism is increasingly linked to revolutionary movements (for example, after the French Revolution in 1789, emerged the Jacobin *régime de la terreur* that lasted until 1794).[2] This type of terrorism has become a prototype for the so-called "state" or "government terror". Since the 18th century, piracy on the high seas is treated as a kind of terrorist act directed against the international law, which is why the pirates are called the "enemies of humankind"

1 E-mail: dimitrijevicd@diplomacy.bg.ac.rs.
2 John Murphy, "Defining International Terrorism: A Way Out of the Quagmire" *Israel Yearbook on Human Rights,* 1989, Vol. 19, pp. 13.

(hostes humani generis).[3] In the mid-19th century, the international community has sanctioned killings and assassinations of heads of state and their families through the adoption of so-called *attentat clausula* in extradition proceedings. This practice has influenced the change of attitude towards political performance that was no longer allowed in the form of a radical anarchist. Between the two world wars, terrorism has had a right-wing or left-wing ideological orientation (i.e., the "black" and "red terror") and served the establishment of totalitarian regimes. During Second World War, terrorist secessionism and state repression provided the background for the tragic cycle of terror and counter-terror in a context of self-determination. With establishment of the United Nations the international community which is based on the principles of prohibition of the use of force and protection of human rights, could not get rid of terrorism but on the contrary, terrorism spread across the world - from Asia, to the Middle East, Africa and Latin America. Thus the concept of terrorism evolved along with the development and progress of mankind. Technical, material and cultural progress contributed so that terrorism has modified its meaning, the form, content, strategy and tactics of action.

DEFINING TERRORISM - ATTEMPTS AND TENDENCIES

Terrorism is a social phenomenon occurring with the aim of achieving political goals primarily by causing fear and insecurity for people and threat to peace and instability of the states or the international community as a whole. Although international law is not the only instrument that the international community has at its disposal in the fight against terrorism, it is certainly its most important one. Despite the fact that in the doctrine and in the legal practice there is no absolute consensus what conducts constitute acts of terrorism, there is agreement that terrorism affects human rights, fundamental freedoms and the rule of law, which are general pillars of the contemporary international legal order. An analysis of the history of international relations and international law indicates that the international community has long been on the side of those who thought that the states will never agree about the definition of international terrorism. Such a situation was not in favour of the prevention, nor did it affect the observance of the principle of legality in international relations *(nullum crimen, nulla poena sine lege)*.[4] The reasons was primarily in "chameleon nature" of terrorism, which appears in a number of forms and depending on the circumstances exercised, terrorism could represent different types of international crimes - from war crimes and crimes against humanity, to separate international crime.[5] An important distinction between a terrorist act and other international crimes was the fact that these acts were criminalized in most of the national legal systems, and then it has the same relation to the most serious crimes such as murder, kidnapping, taking hostages, bombing, torture as well as other serious forms of crimes that had been directed against a particular group of individuals, the state and even international organizations with the aim of provoking a general fear and insecurity.[6] Unlike

3 Henry Wheaton, *Elements of International Law,* Stevens & Sons, London, 1916, pp. 113.
4 Vojin Dimitrijević, *Strahovlada (Terror),* Rad, Belgrade, 1985, pp. 112.
5 Yoram Dinstein, "Terrorism as an International Crime", *Israel Yearbook on Human Rights,* 1989, Vol. 19, pp. 55; Ben Saul, "Reasons for Defining and Criminalizing 'Terrorism' in International Law", *Legal Studies Research Paper* No. 08/121, Sydney Law School, 2008, pp. 208.
6 Among a few authors who believe that international law has an acceptable definition of international terrorism is the famous jurist Antonio Cassese. His conclusion derives from the premise that the definition of terrorism is contained not only in international law of treaties, but also in international customary law. According to his opinion, there are three main elements to identify international terrorism, namely: the acts must constitute a criminal offence under the most national legal systems (for example murder, kidnapping, arson, etc); they must be aimed at spreading terror among the public

purely political crimes that were motivated by political reasons and which by nature have purely political aims, the acts of terrorism as very serious acts of violence could have been motivated not only politically, but also religiously and by other ideological reasons which is why they should be legally treated differently.[7] This is not surprising if we take into account its roots and meanings that it had for the previous times.

In the previous century, the international community tried unsuccessfully to define the conceptual meaning of international terrorism. The first attempt to define international terrorism was between the two world wars, under the auspices of the League of Nations, and after the series of killings of high state officials. Certainly the most famous cases were related to the murder of the Yugoslav King Alexander Karađorđević and the French Foreign Minister Louis Barthou in Marseilles in 1934, by notorious Croatian terrorist group called "Ustasha" and the members of the Macedonian Revolutionary Organization (IMRO),[8] and then the assassination of the Austrian Chancellor Engelbert Dollfuss by the Nazis the same year. These events contributed to the convening of an international conference in Geneva in 1937, where the Convention on the Prevention and Punishment of Terrorism was drafted. The Convention defined terrorism in an extensive way, as "criminal acts directed against a state and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public". With regard to the definition of terrorism, the Convention reaffirms "the duty of every state to refrain from any act designed to encourage terrorist activities directed against another state and to prevent the acts in which such activities take shape". Linked to this Convention, and dependent upon its entry into force, was a Convention for the Creation of an International Criminal Court for the trail of persons accused of having committed acts of terrorism. The Terrorism Convention was only ratified by India and, unfortunately, due to the outbreak of the Second World War, never came into force.[9]

In the post-war period, the international community under the auspices of the United Nations codified certain binding norms of international law in the United Nations Charter. The constitutive act of world organizations has the prevention of war as its primary goal. Working on prevention of international conflicts, the United Nations defined the prohibition of use of force in international relations and certain exceptional cases where its application could be possible in self-defence. The founders of the United Nations, however, have not explicitly envisaged terrorism as international crime. They did not anticipate the emergence of new international circumstances which was initiated by the Cold War between the great powers and their military-political blocs, nor did they anticipate the new technological revolution that occurred in the meantime, which resulted in that the Charter simply did not directly address

or particular groups of persons; they must be politically, religiously or ideologically motivated. See: Antonio Cassese, *International Criminal Law,* University Press, Oxford, 2003 (Serbian translation, O. Račić at. all., Belgrade, 2005, p. 143).

7 Terrorism is usually the result of multiple causal factors - psychological, economic, political, religious and social. See: Rex Hudson, "The Sociology and Psychology of Terrorism: Who becomes a terrorist and why?", *A Report Prepared under an Interagency Agreement by the Federal Research Division*, Library of Congress Federal Research Division, Library of Congress, Washington 1999, Internet: http://www.loc.gov/rr/frd/ 10/01/2014, pp. 19.

8 Sreten Kovačević, *Terorizam i Jugoslavija (Terrorism and Yugoslavia),* Arkade Print, Belgrade, 1992, pp. 79.

9 In 1937, the League of Nations drafted the Convention for the Prevention and Punishment of Terrorism, to which a Convention for the Creation of an International Criminal Court with jurisdiction over individuals for crimes of terrorism was annexed which included *inter alia,* attempts against the life and person of heads of state or their families, in addition to other high government officials; the injury to public property and endangering of human life if done by a citizen of one state against the another. See: "Convention for the Prevention and Punishment of Terrorism", *League of Nations Official Journal,* 1938, vol. 19, p. 23; Manley O. Hudson, *International Legislation*, Oceana Publication, New York, 1972, vol. VII, pp, 862, etc. Thomas M. Franck, Bert B. Lockwood, "Preliminary Thoughts towards an International Convention on Terrorism", *American Journal of International Law,* 1974, vol. 68, pp. 69–70.

the more delicate uses of force which terrorists began to pursue actively. The absence of an explicit recognition of terrorism in the Charter was later matched by the absence of a single definition of terrorism in general international law.

In these early days of the United Nations, the world organization was presented with its greatest opportunity to bring terrorism within the domain of the Charter through the key General Assembly Resolution 3314 adopted in 1974 which defined aggression. Instead to use the term "terrorism" the United Nations chose to classify the activities of states which send, organize, or support "armed bands, groups, irregulars, or mercenaries, which carry out acts of armed force against another State" as engaging in unlawful aggression in direct violation of the Charter.[10] During the 1980s, the attempts of the United Nations to define terrorism in one comprehensive way failed mainly due to the differences of opinion between state members about the use of violence in the context of conflicts over "national liberation" and "self-determination".[11] This reason has remained until today since in the international community the ideological rift has existed between the developed and developing countries concerning the interpretation of the so-called "freedom fighters" and the various categories of national-liberation movements which fight for self-determination.[12]

The right of peoples to self-determination occurred in parallel with the humanization of the international law which, *a fortiori*, has led to the possibility of its implementation at the national level through the so-called *internal law of self-determination*, which includes the right to choose a political status, form of government, economic, social and cultural development and individual participation in government, and to the possibility of its realization at external level through the so-called *external self-determination* that allows the exercise of the right of peoples to free determination of their own international status, including the possibility of achieving political independence.[13] In the international practice, the realization of that right in all its aspects (in the era of decolonization and after this period), has become the basis for distinguishing legitimate campaign of national liberation movements as opposed to illegitimate and illegal acts of terrorist groups.[14] This realization of self-determination, how-

10 Articles 8 and 11 of the Draft Articles on State Responsibility codify the relevant rules pertaining to state responsibility for terrorist acts committed by private persons. ILC, See: "Draft Articles on State Responsibility", in ILC, *Report of the International Law Commission on the Work of its 53rd Session*, UN Doc A/56/10 (2001), 44–45.

11 The UN General Assembly adopted *Resolution 40/61*, which provided: "unequivocally condemning, as criminal, all acts, methods and practices of terrorism wherever and by whomever committed (…) and calling upon all States to fulfill their obligations under international law to refrain from organizing, instigating, assisting or participating in terrorist acts in other States, or acquiescing in activities within their territory directed towards the commission of such acts". See: UN Doc A/RES/40/61 (1985)

12 The right to self-determination proclaimed in the Charter of the United Nations as one of the basic objectives and principles which international community should be based on (Article 1 (2) and Article 55). With the progressive development of this principle, there is the completion of its contents through the United Nations Declaration on the Granting of Independence to Colonial Countries and Peoples of 1960, where by "anti-secession clause" it is expressly confirmed that self-determination cannot serve as justification for breaking the national and territorial unity of the country. The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights of 1966, it was confirmed that the right to self-determination has political, legal, economic, social and cultural aspects which is manifested in the internal and external action. In the Declaration on Principles of International Law concerning Friendly Relations and Cooperation of State from 1970, it is envisaged that self-determination can be realized in the case of foreign subjugation, domination or exploitation, while in Additional Protocol I of 1977 to the Geneva Conventions on humanitarian law of 1949, it is considered that right to self-determination outside the context of decolonization belongs to the people in the struggle against foreign occupation and racist regime.

13 W. Michael Reisman, Mahnoush H. Arsanjani, Gayl S. Westerman, Siegfried Wiessner, *International Law in Contemporary Perspective*, Foundation Press, New York, 2004, pp. 262, etc.

14 United Nations General Assembly emphasized this in its terrorism resolutions. All references to terrorism included a standard qualification that "the struggle of peoples under colonial and alien

ever, is not uniquely accepted in the international community, and what is terrorism for the developed countries, for national liberation movements of the Third World countries represents the struggle for freedom in which all kinds of fights are allowed, including violent means.[15] Therefore, it is considered that it will not be possible to achieve the agreement on the definition of terrorism until it eliminates the historical, social, political and economic causes on which this crime bases.[16]

In this sense, it is necessary to make a distinction between the rights to use force in relation to the prohibited methods of keeping the action in order to achieve a legitimate objective, such as the right of peoples to self-determination. In fact, this approach raises a legal issue of lawful and unlawful use of force because, if the current international law permits the use of force only in exceptional cases, then the right to self-determination cannot be justified if its implementation violates the basic norms of international humanitarian law under the pretext that it is a liberation struggle against the colonial, racist, alien, occupying, or oppressive regime.[17]

As is well known, contemporary international humanitarian law clearly establishes the prohibition of terrorism. Here are a few examples. In Article 33 of the Fourth Geneva Convention it provides in part that, "collective penalties and likewise all measures of intimidation or of terrorism are prohibited". Article 51(2) of Protocol I on international armed conflict and 13(2) of Protocol II on non-international armed conflict which is added to the four Geneva Conventions provide in part that, "acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited". Article 4(2) of Additional Protocol II provides also that, "acts of terrorism" against civilians and non-combatants "are and shall remain prohibited at any time and in any place whatsoever". International humanitarian law also contains provisions which, without using the term *terrorism*, prohibit terrorist offences which are prohibited by one of the universal conventions against terrorism. Based on these findings, it is clear that the margin between terrorist acts and prohibited acts of international humanitarian law is not clearly drawn and terrorist acts are in some cases part of the body of international humanitarian law.[18] But nevertheless, there is a fundamental difference

domination and racist regimes for the implementation of their right to self-determination and independence is legitimate and in full accordance with principles of international law." See: "Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations", G.A. Resolution 2625 (XXV), U.N. GAOR, 25th Session Supplement No. 28, U.N. Doc. A/8028, p. 121; "Definition of Aggression", G.A. Resolution 3314 (XXIX), Annex, U.N. GAOR, 29th Session Supplement No. 31, U.N. Doc. A/9631, pp. 143-144; "Basic Principles of the Legal Status of the Combatants Struggling Against Colonial and Alien Domination and Racist Regimes", G.A. Resolution 3103 (XXVIII), U.N. GAOR, 28th Session Supplement No. 30, U.N. Doc. A/9030, p. 142.

15 After the murder of Israeli athletes at the 1972 Olympic games in Munich by the members of the organization "Black September", the General Assembly of the United Nations adopted the resolution 3034 (XXVII), which established the *ad hoc* Committee for the fight against terrorism. With this resolution, and subsequently adopted resolutions of the General Assembly, in an indirect way the United Nations justified the violent actions of the national-liberation movements in the struggle for liberation from colonialism, occupation and racist regime. See: Anthony Aust, *Handbook of International Law*, Cambridge, 2010, p. 266.

16 Antonio Cassese, *Terrorism, Politics and Law – The Achille Lauro Affair*, Polity Press, Oxford, 1989, pp. 1.

17 Additional Protocol to the Geneva Conventions of 1977 contains an affordable solution to the problem of how to avoid that the "freedom fighters" are not equated with terrorists. The Protocol in Article 44 (3) granted certain conditions legal status as combatants and prisoner of war status in case of capture, to fighters who are not members of the armed forces of a state and who normally do not carry their arms openly. See: Antonio Cassese, International Law, University Press, Oxford, 2004, p. 259.

18 Even if terrorism is not an international crime per se, it may still constitute an international crime. In international judicial practice of the ICTY this fact was confirmed. See: *Prosecutor v. Galić,* 20 November 2006, Appeals Chamber. Similary, in the draft of Statute of Special Tribunal for Lebanon, Secretary General of the United Nations noted that terrorist acts can constitute a crime against humanity, when such acts are widespread or systematic. See: S/2006/893, paras. 23-35.

in sanctioning of these acts which, according to international humanitarian law are attributed to states, but not to non-state actors who refuse to be subordinate to its rules.[19] Thus, a precise legal distinction is required in order to confront the terrorist menaces for the preservation of social security and international order.[20]

To support this view it is necessary to pre-determine the common elements that would constitute the conceptual meaning of terrorism.[21] If it is not quite possible, it is possible to treat this crime as a crime against humanity as the elements of *actus reus* are already present in the defined crimes which substantially inferred from the various international legal sources (conventions, treaties, protocols, international customs, resolutions and declarations of the United Nations and other international organizations, etc.). In this case, between the law governing terrorism and international humanitarian law, there is the exclusivity that must be clearly delimited in international instruments.[22] What is more, if it is clear that uniform and exact definition of terrorism cannot be reached, this access should be performed in international judicial practice. Divergences regarding the legal determination of terrorism certainly should not be an obstacle in its eradication. The fact that terrorism as international crime is not subsumed under the authority of the International Criminal Court and other judicial bodies in the international community should not be a major problem to its sanctioning.[23] In the contemporary international community unfortunately understanding is still present that it is most efficient to prosecute the terrorists at the national level and only in exceptional cases at the international level with the participation of a larger number of countries.

As modern international terrorism acquires increasingly transnational character because it transcends national borders, and that in respect of persons who participate in it, and in terms of means and ways of manifest violence, and then in terms of the consequences that often affect persons and goods of more states, the fight against terrorism stops being criminal activity against which the state can fight alone and it becomes increasingly universal phenomenon that represents a threat to world peace and security.[24] This act was clear when the

19 Bruce Hoffman, *Inside Terrorism,* Columbia University Press, New York, 1998, p. 34.

20 Hence, it would be possible to accept the conclusion that terrorist conduct cannot be excused by invoking opposition to a colonial, racist, alien, occupying, or oppressive regime, and self-determination cannot be used to justify outlawed methods of violence. See: Benjamin Netanyahu, *Fighting Terrorism: How Democracies Can Defeat Domestic and International Terrorists,* Farrar, Straus and Giroux, New York, 2001, p. 21.

21 In recent years in international jurisprudence there have been attempts to identify common elements of the definition of terrorism. Thus, the Appeals Chamber of the Special Tribunal for Lebanon concluded that terrorism is present in customary international law and for the determination of its existence it is sufficient to presume that there are the following three elements: use of threat or use of violence; the discriminate act in that the immediate victims are chosen randomly and are not the ultimate audience of the act; the violence is intentionally targeted towards civilians as opposed to combatant forces. Purposes of the act are to compel government or an organization to perform or to abstain from performing a certain action. See: *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, and Preparation,* Cumulative Charging, Case No. STL-11-01/I, par. 85-86, 16 February 2011.

22 This exclusivity in practice appears in the form of contractual clauses that allow criminal acts to remain covered by the provisions of one or the other is right. For example: if a state has an obligation to prosecute or extradite a hostage- taker under one of the Geneva Conventions or Protocols, then the Convention against hostage-taking will not be applied; but if no such obligation exists, then the Convention against hostage taking must be applied. See: Daniel O'Donnell, "International Treaties Against Terrorism and the Use of Terrorism during Armed Conflicts and by Armed Forces", *International Review of the Red Cross*, 2006, Vol. 88, p. 864.

23 "Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court", G.A. Resolution E, Annex 1, U.N. Doc. A/CONF.183/10, 17 July 1998. The Rome Statute contains the following provision: "No generally acceptable definition of the crime of terrorism (…), could be agreed upon for the inclusion, within the jurisdiction of the Court".

24 Resolution no. 1368 adopted by the Security Council on 12 September 2001, qualifying terrorist attacks in New York and Pennsylvania from the previous day, as well as acts of terrorism that threaten

United Nations General Assembly formed an *ad hoc* Committee on Terrorism 1996.[25] The Committee was entrusted to draft a Comprehensive Convention on International Terrorism which should be adopted under the auspices of the United Nations. It is supposed to cover all the shortcomings of previously adopted conventions on terrorism. Although work began by the end of 2000, the definitional impasse has prevented its adoption. The main reason is the divergence between the countries on the inclusion or exclusion of the national liberation movements and "freedom fighters" in the definition of terrorism.[26]

Because of those ideological and political divisions which are not conducive to systematic "legislation" of the concept of terrorism, the UN Security Council has found its place in so called, *quasi-legislative role*.[27] In fact, in rather unstable international political situation that began with the process of overcoming the Cold War in the early 1990s, the Security Council has increasingly begun to address the issues of international terrorism. This is done either in the context of sanctions for the acts which it considered as unlawful acts of states or governments contrary to the Charter of the United Nations, either because of serious violations of international humanitarian law and human rights law that could be carried out by different perpetrators. Its resolutions in practice often relied on the implementation of the measures envisaged in Chapter VII of the Charter, which means that the Security Council perceived terrorist acts as serious threats and attacks on international peace and security. Thus, for example, on the occasion of the terrorist attacks in New York and Washington on 11 September, 2012, the Security Council adopted the Resolution 1368 in which the acts of terrorism are identified as a threat to international peace and security, and member states are invited to "join forces and work without delay to bring to justice the perpetrators, organizers and sponsors of these terrorist acts".[28]

---

international peace and security. The Resolution urges member states to "jointly and promptly work to bring to justice the perpetrators, organizers and sponsors of these terrorist acts".

25 A/RES/51/210, 17 December 1996. India took the initiative to pilot a draft Comprehensive Convention on International Terrorism (CCIT) in 1996.

26 The definition of the crime of terrorism which has been on the negotiating table of the Comprehensive Convention since 2002 reads as follows: "1. Any person commits an offence within the meaning of this Convention if that person, by any means, unlawfully and intentionally, causes: (a) Death or serious bodily injury to any person; or (b) Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or the environment; or (c) Damage to property, places, facilities, or systems referred to in paragraph1 (b) of this article, resulting or likely to result in major economic loss, when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act." See: Report of the *ad hoc* Committee on Terrorism, Sixth session, 28 January-1 February 2002, Annex II, art. 2.1.

27 Vera Gowlland Debbas, "The Relationship between the International Court of Justice and the Security Council", *American Journal of International Law,* 1994, vol 4, pp. 643.

28 A few years before this event, the Security Council adopted a number of resolutions that imposed sanctions to states that supported terrorism (for example, to Libya on the basis of Resolution 731 (1992) due to the overthrow of Pan Am airplane 103 over Lockerbie; to Sudan, on the basis of Resolution 1054 and 1070 (1996) for refusing to extradite terrorists who carried out the assassination of the President of Egypt in Ethiopia and finally, to the Taliban regime in Afghanistan on the basis of Resolutions 1267 (1999), 1333 (2000) and 1390 (2002) regarding the refusal to extradite Usama bin Laden). According to Resolution 1267, the Security Council had established a strong counter-terrorism tool: the Committee, made up of all Council members, tasked with monitoring the sanctions against the Taliban. In the aftermath of terrorist attack on 11 September 2012, the Security Council established a Counter-Terrorism Committee under Resolution 1373. The Resolution obliges member sates to take a number of measures to prevent terrorist activities and to criminalize various forms of terrorist actions, as well as to take measures that assist and promote cooperation among countries including adherence to international counter-terrorism instruments. Member states are also required to report regularly to the Counter Terrorism Committee on the measures they have taken to implement Resolution 1373. Through Resolution 1540 (2004), the Council established an additional Committee with the task of monitoring member states' compliance with this Resolution which calls on states to prevent non-state

At the jubilee Summit of the UN General Assembly on 16 September, 2005, *(World Summit Outcome)* the member states unequivocally condemned terrorism in all its forms and manifestations, committed by whomever, wherever and for whatever purposes.[29] Building on this historic platform, the Summit requested the member states to work through the General Assembly and adopt a counter-terrorism strategy, based on the recommendations of the Secretary-General that would promote comprehensive, coordinated and consistent responses at the national, regional and international level to counter terrorism. Acting on those recommendations, the Secretary-General Kofi Annan submitted to the General Assembly an elaborate set of recommendations in a report on 2 May 2006.[30] Those recommendations formed the initial basis of a series of consultations by member states that lead to the adoption of a *Global Counter-Terrorism Strategy for the United Nations.* The Strategy was adopted on 8 September 2006 in the form of a resolution and an annexed Plan of Action.[31] It is unique global instrument that will enhance national, regional and international efforts to counter terrorism. This is the first time that all members of the United Nations have agreed to a common strategic approach to fight terrorism, not only sending a clear message that terrorism is unacceptable in all its forms and manifestation, but also resolving to take practical steps individually and collectively to prevent and combat it.[32]

It is well known from the international legal practice that if terrorist acts are committed within a state, other states may take acts of persecution, or could extradite perpetrators to the country on whose territory the offense was committed or to punish the perpetrators of terrorist acts against its judicial authorities based on the application of the principle - *aut dedere, aut judicare*.[33] That possibility as a right and obligation may follow not only from the international agreement concluded between the states concerned, but also from general international legal principle of universality, which applies in cases of the injured common values when, on the basis of the rights to self-preservation and the sovereignty as well as the protection of the interests of the international community as a whole, trying to suppress certain acts that constitute war crimes, crimes against humanity and separate international crimes - such terrorist

actors (including terrorist groups) from accessing weapons of mass destruction.

29 A/RES/60/1, 16 September 2005. On the margins of the World Summit Outcome, the Security Council held a high-level meeting and adopted Resolution 1624 (2005) condemning all acts of terrorism irrespective of their motivation, as well as the incitement to such acts. It also called on member states to prohibit by law terrorist acts and incitement to commit them and to deny safe haven to anyone guilty of such conduct. Through a number of additional resolutions, the Council has in the past years strengthened the work of its counter-terrorism bodies.

30 Report of Secretary General: "Uniting against Terrorism: Recommendations for a Global Counter-Terrorism Strategy", See: A/60/825, 27 April 2006.

31 A/RES/60/288, 20 September 2006.

32 The Security Council convened on 27 September 2010 an open debate on the threats to international peace and security by terrorist acts. In an ensuing presidential statement, the Security Council expressed concerns that the threat posed by terrorism had become more diffuse, with an increase, in various regions of the world, of terrorist acts, including those motivated by intolerance or extremism, and reaffirmed its determination to combat this threat. Noting that terrorism would not be defeated by military force, law enforcement measures and intelligence operations alone, the Council members emphasized the need to address the conditions conducive to the spread of terrorism. In particular, they called for sustained international efforts to enhance dialogue and broaden understanding among civilizations, in an effort to prevent the indiscriminate targeting of different religions and cultures, could help counter the forces that fuelled polarization and extremism. In its statement, the Council reaffirmed that all terrorist acts were criminal and unjustifiable, regardless of their motivations, whenever and by whomsoever committed, and that terrorism could not and should not be associated with any religion, nationality or ethnic group. See: S/PRST/2010/19.

33 In international practice, starting from the 19th century states made certain exceptions to the principle *aut dedere, aut judicare,* in the case of so-called "political offences" which were motivated by political reasons. Over time, these exceptions have been interpreted in restrictive ways. Modern multilateral instruments against terrorism exclude the possibility of making "political exceptions". See: Joseph J. Lambert, *Terrorism and Hostages in International Law,* Grotius Publications, Cambridge, 1990, pp. 234.

acts certainly are since they violated not only national interests but also the international legal order as a whole embodied in the purposes and principles of the Charter of the United Nations *(jus gentium delicti)*.[34]

Since terrorism has become a threat to world peace and security, sanctioning its forms in particular anti-terrorist instruments therefore no longer are limited. This is vividly shown by the International *Convention for the Suppression of the Financing of Terrorism* adopted in 1999 within the framework of the United Nations which has gone furthest in terms of a comprehensive definition of terrorism. Thus, Article 2(1) (b) of the Convention defines terrorism as:

"Any other act intended to cause death or serious bodily injury to a civilian, or any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or the context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act." [35]

From the above it is clear that the formula of the Convention for the Suppression of the Financing of Terrorism has determined the basic elements of a specific conceptual definition of international terrorism. Given the nature of the phenomenon which the Convention addresses, financing of terrorism is just an additional offense connected with terrorist acts. Although the definition adopted only for the purposes of this Convention, but not for the purpose to criminalize international terrorism as a whole, this definition still has essential importance because it regulates the issue of criminalization of terrorism in all its forms in which it is manifested and it was sanctioned in the convention previously adopted and listed in the annex to the Convention (Article 2(1) (b)). The said annex with anti-terrorist conventions listed is not constant because the Convention provides that the states may be supplemented by other relevant treaties or even excluded from some of them because the convention has not been ratified. But despite that, the Convention represents a milestone in the development of international law in the area of terrorism, because it is the first treaty definition to refer to the purpose of terrorism as recognized by general international law.

However, it should be realistic and admit that until today the international community has not adopted a comprehensive definition of that international crime. In the current situation, the international community decided to regulate a particular issue of international terrorism by concluding universal and regional conventions and multilateral treaties governing the prevention and suppression of specific forms of this criminal act. International law is thus limited to a relative number of widely accepted conventions that proscribe particular types of terrorism such as crimes against the safety of civil aviation and maritime navigation, taking of hostages, the use of nuclear and chemical weapons, and the crimes against internationally protected persons and on financing terrorism which likely reflects customary norms of international law. These conventions will be discussed in the next part of the study.

UNITED NATIONS LEGAL PRACTICE

The United Nations plays a leading role in the fight against terrorism. It is the forum for the development and adoption of international conventions that provides the international community with common instruments for combating terrorism in all its forms and manifestations. International law covered by the United Nations Charter, the Universal Declaration of Human

34 On 17 December 1996, the UN General Assembly adopted a Declaration that terrorism is contrary to the purposes and principles of the UN. This approach represents a milestone in the understanding of terrorism that is starting to be treated as a crime against humanity. In that way, the Declaration contributes to this evolutionary interpretation of the United Nations Charter.

35 *International Instruments related to the Prevention and Suppression of International Terrorism,* United Nations, New York, 2008, p. 91.

Rights, the two Covenants on Human Rights and special conventions adopted under the auspices of the United Nations play a key role in the prevention and suppression of international terrorism. Special conventions concluded in the form of multilateral agreements are the codification and progressive development in the matter of anti-terrorism. Given the limited space of the study, at this point we should mention only this one that has been adopted within the United Nations and which represents in most cases *lex lata* of contemporary international legal order. The study will start from the analysis of five conventions that criminalize the unlawful seizure of aircraft, physical attacks upon them and other illegal acts in civil air traffic.

The first one is *the Convention on Offences and Certain Other Acts Committed on board Aircraft (Aircraft Convention)* adopted in Tokyo in 1963.[36] It dealt with on board offences during flight. The Tokyo Convention authorizes the aircraft commander to impose reasonable measures, including restraint, on any person he or she has reason to believe has committed or is about to commit such an act, when necessary to protect the safety of the aircraft. The Convention obliges States parties to the contract to take custody of offenders and to return control of the aircraft to the lawful commander.

The second is *the Convention for the Suppression of Unlawful Seizure of Aircraft (Unlawful Seizure Convention)* adopted in The Hague in 1970.[37] The Convention makes it an offence for any person on board an aircraft in flight to "unlawfully, by force or threat thereof, or any other form of intimidation, to seize or exercise control of that aircraft" or to attempt to do so. It requires parties to the Convention to make hijackings punishable by "severe penalties". Also it requires parties that have custody of offenders to either extradite the offender or submit the case for prosecution; and requires parties to assist each other in connection with criminal proceedings brought under the Convention. Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft adopted in 2010 a supplement to the Convention concerning the protection of the different forms of kidnapping aircraft using modern technical equipment.[38]

The third multilateral instrument is *the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Civil Aviation Convention)* adopted in Montreal in 1971.[39] It is a supplementary pact aimed primarily at in-flight acts of violence and destruction of aircraft in service. The Convention makes it an offence for any person unlawfully and intentionally to perform an act of violence against a person on board an aircraft in flight, if that act is likely to endanger the safety of the aircraft (to place an explosive device on an aircraft, to attempt such acts or to be an accomplice of a person who performs or attempts to perform such acts). The Convention requires parties to make offences punishable by "severe penalties" and also requires those that have custody of offenders to either extradite the offender or submit the case for prosecution. In order to further protect civil aviation from terrorism, a Protocol of the Suppression of Unlawful Act of Violence at Airports Serving International Civil Aviation *(Airport Protocol)* was adopted by the ICAO in 1988. This Protocol supplements and extends the Civil Aviation Convention, primarily aimed at in-flight acts of violence.

The fourth significant multilateral convention which criminalize aero-terrorism is *the Convention on the Marking of Plastic Explosives for the Purpose of Detection (Plastic Explosives Convention)* adopted by the ICAO in Montreal in 1991.[40] The Convention regulates control of the use of unmarked and undetectable plastic explosives (negotiated in the aftermath of the 1988 Pan Am flight 103 bombing). Parties to the Convention are obligated in their respective territories to ensure effective control over "unmarked" plastic explosive, i.e., those that do not

36 *United Nations Treaty Series,* 1963, Vol. 704, p. 219.
37 *United Nations Treaty Series,* 1970, Vol. 860, p. 105.
38 Protocol is not yet in force. See: *DCAS Doc No. 22 – ICAO.*
39 *United Nations Treaty Series,* 1971, Vol. 974, p. 177.
40 *United Nations Treaty Series,* 1991, Vol. 2122, p. 359.

contain one of the detection agents described in the Technical Annex to the treaty. In general, each party must, *inter alia*, take necessary and effective measures to prohibit and prevent the manufacture of unmarked plastic explosives, prevent the movement of unmarked plastic explosives into or out of its territory, exercise strict and effective control over possession and transfer of unmarked explosives made or imported prior to the entry into force of the Convention, ensure that all stocks of unmarked explosives not held by the military or police are destroyed, consumed, marked, or rendered permanently ineffective within three years, take necessary measures to ensure that unmarked plastic explosives held by the military or police are destroyed, consumed, marked or rendered permanently ineffective within fifteen years and, ensure the destruction, as soon as possible, of any unmarked explosives manufactured after the date of entry into force of the Convention for that State.

The fifth Convention of importance to the prevention and suppression of illicit acts of terrorism in air transport refers to *the Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation (New Civil Aviation Convention)* which was adopted in Beijing in 2010.[41] The Convention criminalizes the act of using civil aircraft as a weapon to cause death, injury or damage. It sanctioned the act of using civil aircraft to discharge biological, chemical and nuclear (BCN) weapons or similar substances to cause death, injury or damage, or the act of using such substances to attack civil aircraft. Also, the Convention prohibits the act of unlawful transport of BCN weapons or certain related material, a cyber-attack on air navigation facilities which constitutes an offence. According to the provisions of the Convention a threat to commit an offence, conspiracy to commit an offence, or its equivalence are not allowed.

In the 1970s and 1980s, the United Nations was particularly involved in combating criminal acts against internationally protected persons. In this respect, the universal Organization has adopted the following conventions:

The first one is *the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents (Diplomatic Agents Convention),* adopted in 1973.[42] This multilateral instrument defines an "internationally protected person" as a head of state, minister for foreign affairs, representative or official of a state or international organization that is entitled to special protection in a foreign state, and his/her family. The Convention requires parties to criminalize and make punishable "by appropriate penalties which take into account their grave nature" the intentional murder, kidnapping or other attack upon the person or liberty of an internationally protected person, a violent attack upon the official premises, the private accommodations, or the means of transport of such person, then a threat or attempt to commit such an attack and also an act "constituting participation as an accomplice". The Convention provides the extradition of the perpetrators of those crimes, and excludes the application in respect of political offenses.

The second is *the International Convention against the Taking of Hostages (Hostages Convention)* which is adopted in 1979.[43] It provides that "any person who seizes or detains and threatens to kill, to injure, or to continue to detain another person in order to compel a third party, namely, a state, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostage within the meaning of this Convention". The Convention makes limits in cases of hostage-taking when the offense was committed in a state whose citizenship is held by the perpetrator which has been arrested in the territory of the same state. Essentially these restrictions may constitute an obstacle to the effective implementation of the Convention because citizenship is inherently flexible concept.

41 The Convention is not yet in force. See: *DCAS Doc No. 21 – ICAO.*
42 *United Nations Treaty Series,* 1973, Vol. 1035, p. 167.
43 *United Nations Treaty Series,* 1979, Vol. 1316, p. 205.

The terrorist acts in the field of maritime navigation are sanctioned by *the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (Maritime Convention)* and by *the Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*. Initiated by the IMO, the Maritime Convention was adopted in Rome in 1988,[44] whereas the Protocol was signed in London in 2005.[45] The Convention establishes a legal regime applicable to the acts against international maritime navigation that is similar to the regimes established for international aviation. It makes an offence for a person unlawfully and intentionally to seize or exercise control over a ship by force, threat, or intimidation, to perform an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of the ship, to place a destructive device or substance aboard a ship and other acts against the safety of ships. The Protocol supplements the Convention in respect of criminalization of the use of a ship as a device to further an act of terrorism. It criminalizes the transport on board a ship of various materials knowing that they are intended to be used to cause, or in a threat to cause, death or serious injury or damage to further an act of terrorism. Also, it punishes acts of transporting on board a ship of persons who have committed an act of terrorism. Finally, it introduces the procedures for governing the boarding of a ship believed to have committed an offence under the Convention.

In a broader sense, the suppression of terrorism in the maritime area is the subject of another important international legal instrument adopted in Rome in 1988. It is *the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (Fixed Platform Protocol)*.[46] The Protocol establishes a legal regime applicable to acts against fixed platforms on the continental shelf that is similar to the regimes established against international aviation. In 2005, this Protocol was attached to the new Protocol which aligned the changes made in the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation to the context of fixed platforms located on the continental shelf.

In the field of protection against nuclear terrorism, under the auspices of the United Nations and on the initiative of the IAEA, the international community adopted in Vienna in 1979 *the Convention on the Physical Protection of Nuclear Material (Nuclear Materials Convention)*.[47] It criminalizes the unlawful possession, use, transfer or theft of nuclear material and threats to use nuclear material to cause death, serious injury or substantial property damage. With the Amendments that were adopted during 2005, the parties to the Convention took over additional responsibilities in terms of protection of nuclear facilities and material for peaceful domestic use. Also, they took obligations in terms of storage, transport as well as expanded cooperation regarding rapid measures to locate and recover stolen or smuggled nuclear material, mitigate any radiological consequences or sabotage, and prevent and combat related offences.

Another convention against nuclear terrorism was adopted in 2005. It is *The International Convention for the Suppression of Acts of Nuclear Terrorism (Nuclear Terrorism Convention)*.[48] The Convention provides a broad range of terrorist acts aimed at different targets, including but not limited to nuclear power plants and nuclear reactors. This multilateral instrument regulates threats and attempts to commit such crimes or to participate in them as an accomplice. It stipulates that offenders shall be either extradited or prosecuted. Also, it encourages states to cooperate in preventing terrorist attacks by sharing information and assisting each other in connection with criminal investigations and extradition proceedings and deals with both crisis and post-crisis situations. Last but not the least important, it provides obligations for parties to render nuclear material safe through the IAEA.

44 *United Nations Treaty Series,* 1988, Vol. 1678, p. 201.
45 IMO, Doc. LEG/Conf. 15/22, 1 November 2005.
46 *United Nations Treaty Series,* 1988, op.cit.
47 *United Nations Treaty Series,* 1979, Vol. 1456, p. 101.
48 UN Doc. A/RES/59/290, Annex

In connection with the aforementioned multilateral treaties concluded under the auspices of the United Nations there is *the International Convention for the Suppression of Terrorist Bombings (Terrorist Bombing Convention)* which was adopted in 1997.[49] It establishes a regime of universal jurisdiction over the unlawful and intentional use of explosives and other dangerous devices in, into, or against various defined public places with intent to kill or cause serious bodily injury, or with intent to cause extensive destruction of the public place. In spite of its title, this multilateral anti-terrorist instrument does not define terrorism nor draws the distinction between terrorist and bombings. Also, it does not apply to offences committed within a single state nor to acts of military forces of states. However, several provision of the Convention suggest that terrorist bombings committed by military forces will still entail the international responsibility of that state. All criminal acts stipulated in the Convention cannot be justified by political, philosophical, ideological, racial, ethnic, religious or other similar reasons. Going further compared to the previously adopted UN Conventions, this Convention stipulates the obligation of States to cooperate in the prevention and prohibition of illegal activities that serve as the financial support for their realization.

The International Convention for the Suppression of the Financing of Terrorism (Terrorist Financing Convention) which we mentioned earlier in this study, was adopted in 1999.[50] The Convention aims to more broadly establish mechanisms for combating the financing of terrorist acts by the prosecution and punishment of their perpetrators. States are obliged to cooperate in the prevention of the offenses set forth in the Convention and that, by preventing illegal activities of persons (physical and legal) who perform or encourage illegal acts of the financing of terrorists, whether direct or indirect, through groups claiming to have charitable, social or cultural goals or through engaging in illicit activities such as drug trafficking or gun running. This Convention, unlike other anti-terrorist conventions therefore provides for the liability of legal persons, which is a complete novelty. Article 5 of the Convention applies only to legal entities located in the territory of a contracting parties or which are established by their laws. In that sense each state has the opportunity to determine its responsibility towards its own law (criminal, civil or administrative). In addition to these novelties in the regulation of terrorism, the Convention introduced the obligation for parties to take appropriate measures to check the suspicious financial transactions and to provide identification, freezing and seizure of funds allocated for terrorist activities. States are committed to cooperate through the exchange of accurate and verifiable information, and the conduct of investigations related to criminal offenses. The Convention establishes the obligation for states to inform the Secretary-General of the United Nations about the final outcome in action against the perpetrators of criminal acts who forwards this notification to other member states of the Convention.

With regard to the aforementioned anti-terrorism conventions adopted under the auspices of the United Nations, it can be generally concluded that all conventions prescribe universal competence of member states to prosecute the perpetrators of terrorist acts who find themselves in their territory.[51] In other words, the conventions shall apply irrespective of the facts where the crimes were committed, which nationality perpetrator has and what are the motives which were decisive in committing the offense. In practice, the state that has custody of the alleged offender has the first option to prosecute, and then has the option to extradite him, depending on the fact where the crime was committed.[52] Therefore, the principle of *aut*

49 UN Doc. A/RES/52/164, Annex

50 UN Doc. A/RES/54/109, Annex

51 The judge and a professor of international law Higgins states that, "the right to exercise jurisdiction under the universality principle can stem either from a treaty of universal or quasi-universal scope, or from acceptance under general international law" See: Rosalyn Higgins, *Problems & Process: International Law and How We Use It,* University Press, Oxford, 1994, p. 58.

52 Records on extraditions pursuant to the conventions are not easy to find, although most states seem to prefer measures of deportation or expulsion since they can be quicker.

dedere aut judicare (extradite or prosecute) is essential for the effectiveness of the conventions. In addition, the conventions mostly contain general and specific clauses on the protection of human rights. General protection does not prejudge the performance of other international obligations of state parties. Special protection relating to the rights of the arrested or accused persons in implementing the criminal proceedings and in extradition.[53] Of course, a prerequisite for the foregoing is that the state parties incorporate into its legal system the provisions taken from anti-terrorist conventions.

REGIONAL LEGAL PRACTICE

There are a large number of regional organizations who work on the adoption of rules to the prevention and suppression of international terrorism. The mandate and law making powers of these organizations vary considerably. Some have extensive legislative and supranational authority, others only the power to adopt non-binding recommendations.[54] Regional anti-terrorist efforts of recent years include many international conventions of which we mention only the most important ones which highlight the meaning of terrorism as contemporary threat to international peace and security.

Three important conventions were adopted under the framework of Council of Europe. The first convention is the European Convention on the Suppression of Terrorism which was adopted in Strasbourg in 1977.[55] It attempted to restrict severely the political offence exception when claimed by terrorist, but the Convention neither defined a political offence, nor any terrorist acts. A list of proscribed acts was drawn up, but major exceptions were permitted. In that way the Convention stayed merely precatory in nature. Many of the state members added their reserves about its text. In 1979 the EEC adopted the Agreement on the Application of the European Convention at Dublin.[56] This instrument insisted on the application the principle of *aut dedere aut judicare.* The Additional Protocol was adopted in Strasbourg in 2003.[57] According to it, the member states are further obliged to comply with the obligations under the anti-terrorist conventions universal character. The protocol emphasizes the obligation of harmonization of legislation on extradition of perpetrators of terrorist crimes. The Council of Europe adopted a new Convention on the Prevention of Terrorism in 2005.[58] The purpose of the Convention is to enhance cooperation in the prevention, both at domestic level in the context of national preventive measures, and at the international level to provide protection to victims of terrorist acts. It establishes as criminal offenses the activities that may lead to the commission of terrorist acts, including public provocation, recruitment and training. The Convention also contains provisions concerning the protection of human rights and fundamental freedoms in terms of strengthening cooperation at the international and national level.[59]

53 Some of the recent conventions contain a provision that in effect prohibits the practices known as "rendition" and "extraordinary rendition" which mean the concept that is most often used to describe the transfer of prisoners to the United States or to the US custody, then the capture of a suspected terrorist by the US forces in a foreign country and the transfer of that person to another foreign country, or the transfer by the US forces of a person in the custody of a government other than that of the United States primarily or exclusively for purposes of interrogation. Common to all of these cases is taken illegality of acts which seriously violate the human rights of persons suspected for terrorism.

54 Eric Rosand, Alistair Millar, Jason Ipe, Michael Healey, *The UN Global Counter-Terrorism Strategy and Regional and Sub-Regional Bodies: Strengthening a Critical Partnership,* Center for Global Counterterrorism, Washington, 2008.

55 *European Treaty Series*, 1977, No. 90.

56 *Bulletin of the European Communities,* 1979, Vol. 12, p.90.

57 *European Treaty Series*, 2003, No. 190.

58 *European Treaty Series*, 2005, No. 196. Entered into force June 1, 2007.

59 With that Convention, Council of Europe adopted a very important "Council Framework Decision

It should be noted at this point that other regional organizations in the world have adopted important legal instruments and conventions on the fight against terrorist acts. Because of the limitations of the text, we will mention only those that we believe are important. Thus, in Bridgetown in 2002 the Organization of American States adopted the Inter-American Convention against Terrorism which reaffirms prevention, punishment and elimination of terrorism.[60] This Convention replaces the earlier Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance adopted in 1971.[61] The Convention establishes a series of obligations for state parties with respect to the crimes defined in ten treaties: the 1999 Convention against the financing of terrorism and the nine international treaties listed in the annex thereto.[62] In addition to the aforementioned Convention, the following regional conventions have an important significance in the fight against terrorism:

1. SAARC Regional Convention on Suppression of Terrorism, signed in Kathmandu on 4 November 1987 (deposited with the Secretary-General of the South Asian Association for Regional Cooperation);[63]
2. Arab Convention on the Suppression of Terrorism, signed at a meeting held at the General Secretariat of the League of Arab States in Cairo on 22 April 1998 (deposited with the Secretary-General of the League of Arab States);[64]
3. Convention of the Organization of the Islamic Conference on Combating International Terrorism, adopted in Ouagadougou on 1 July 1999 (deposited with the Secretary-General of the Organization of the Islamic Conference);[65]
4. OAU Convention on the Prevention and Combating of Terrorism, adopted in Algiers on 14 July 1999 (deposited with the General Secretariat of the Organization of African Unity);[66]
5. Treaty on Cooperation among State Members of the Commonwealth of Independent States in Combating Terrorism, done in Minsk on 4 June 1999 (deposited with the Secretariat of the Commonwealth of Independent States);[67]
6. Shanghai Convention against Terrorism, Separatism and Extremism adopted in Shanghai on 15 June 2001 (deposited with the People's Republic of China);[68]

2002/475 on Combating Terrorism". See: *Official Journal of the European Union,* 2002, L 164, p. 3. This Decision was amended with "Council Framework Decision 2008/919/JHA of 28 November 2008". See: *Official Journal of the European Union,* 2008, L 330, pp. 21-23. According to Article 1 of the Decision, "terrorism constitutes one of the most serious violations of the universal values of human dignity, liberty, equality and solidarity, respect for human rights and fundamental freedoms on which the European Union is founded. It also represents one of the most serious attacks on democracy and the rule of law, principles which are common to the member states and on which the European Union is based".

60 *International Instruments related to the Prevention and Suppression of International Terrorism,* op. cit, pp. 242-249.

61 *United Nations Treaty Series,* 1971, Vol. 1438, p. 191.

62 AG/RES. 1840 (XXXII-O/02).

63 The SAARC Regional Convention on Suppression of Terrorism came into force on 22 August 1988 following its ratification by all member states. Additional Protocol to the SAARC Convention was adopted on 12 January 2004. See: SAARC/SUMMIT.12/SC.29/27, Annex-III; *International Instruments related to the Prevention and Suppression of International Terrorism,* United Nations, New York, 2008, pp. 174, 250.

64 *International Instruments related to the Prevention and Suppression of International Terrorism,* op. cit., pp. 178-193.

65 Annex to Resolution No. 59/26-P

66 *United Nations Treaty Series,* 1999, Vol. 2219, p. 303. The Orgnisation of the African Union adopted Protocol to the Convention at AdisAbaba on 8 July 2004.

67 *International Instruments related to the Prevention and Suppression of International Terrorism,* op. cit, pp.194-203.

68 Ibid., pp. 232, etc.

7. Convention of the Cooperation Council for the Arab States of the Gulf on Combating Terrorism adopted in Kuwait on 4 May 2004 (deposited with the General Secretariat of the Cooperation Council for the Arab States in Gulf);[69]
8. ASEAN Convention on Counter Terrorism, adopted in Cebu on 13 January 2007 (deposited with the Secretary-General of the Association of Southeast Asian Nations).[70]

INSTEAD OF A CONCLUSION

In the present paper, the author points to the gradual and evolutionary development of the concept of terrorism in history. Then, the author analyses the unsuccessful attempts made by the international community in the development of a comprehensive definition of terrorism between two world wars. In a transparent way, the analysis show the events that followed the Second World War and which led the international community to tackle the problem of terrorism under the framework of the United Nations. The study provides a detailed explanation of the trend of the phenomenon of terrorism, how it is being legally regulated and what are the main issues that do not permit the achievement of a general consensus on the issue of defining terrorism as a special international crime separate from war crimes, crimes against humanity or other defined international crimes most of which are criminalized in the national legal system.

This paper provides an overview and analysis of the most important international legal instruments adopted under the auspices of the United Nations and regional organizations. All these instruments have contractual forms through which the country agreed to fight against terrorism. Regardless of whether the struggle is through the universal organization of the United Nations, its specialized agencies or through regional organizations, this international instruments oblige states to cooperate in taking measures to prevent the preparation of terrorist acts (preventive measures) as well as the adoption of the necessary internal regulations to punish the perpetrators of those acts (measures of repression). In this sense, there is a general international obligation in assisting in the detection, extradition, prosecution and punishment of the perpetrators of a terrorist offense.[71]

Finally, this study argues that terrorism should be defined and criminalized because it may be a threat to human rights, fundamental freedoms and the rule of law, which are general pillars of the contemporary international legal order and international peace and security.

REFERENCES

1. Aust, A., *Handbook of International Law*, Cambridge, 2010.
2. Cassese, A., *International Criminal Law,* University Press, Oxford, 2003.
3. Cassese, A., International Law, University Press, Oxford, 2004.
4. Cassese, A., *Terrorism, Politics and Law – The Achille Lauro Affair*, Polity Press, Oxford, 1989.
5. Dimitrijević, Strahovlada *(Terror),* Rad, Belgrade, 1985.
6. Dinstein, Y., "Terrorism as an International Crime", *Israel Yearbook on Human Rights,* 1989, Vol. 19.

69 Ibid., pp. 259, etc.
70 Ibid, pp. 336, etc.
71 Obrad Račić, *Međunarodno pravo: stvarnost i iluzije (International law: the reality and illusion),* Službeni glasnik, Belgrade, 2015, p. 357.

7. Franck, T.M., Lockwood, B.B., "Preliminary Thoughts towards an International Convention on Terrorism", *American Journal of International Law,* 1974, vol. 68.

8. Gowlland Debbas, V., "The Relationship between the International Court of Justice and the Security Council", *American Journal of International Law,* 1994, Vol 4.

9. Higgins, R., *Problems & Process: International Law and How We Use It,* University Press, Oxford, 1994.

10. Hoffman, B., *Inside Terrorism,* Columbia University Press, New York, 1998.

11. Hudson, M.O., *International Legislation*, Oceana Publication, New York, 1972, vol. VII.

12. Hudson, R., "The Sociology and Psychology of Terrorism: Who becomes a terrorist and why?", *A Report Prepared under an Interagency Agreement by the Federal Research Division*, Library of Congress Federal Research Division, Library of Congress, Washington 1999, Internet: http://www.loc.gov/rr/frd/ 10/01/2014.

13. Kovačević, S., *Terorizam i Jugoslavija (Terrorism and Yugoslavia),* Arkade Print, Belgrade, 1992.

14. Lambert, J.J., *Terrorism and Hostages in International Law,* Grotius Publications, Cambridge, 1990.

15. Murphy, J., "Defining International Terrorism: A Way Out of the Quagmire" *Israel Yearbook on Human Rights,* 1989, Vol. 19.

16. Netanyahu, B., *Fighting Terrorism: How Democracies Can Defeat Domestic and International Terrorists,* Farrar, Straus and Giroux, New York, 2001.

17. O'Donnell, D., "International Treaties against Terrorism and the Use of Terrorism during Armed Conflicts and by Armed Forces", *International Review of the Red Cross*, 2006, Vol. 88.

18. Račić, O., *Međunarodno pravo: stvarnost i iluzije (International law: the reality and illusion),* Službeni glasnik, Belgrade, 2015.

19. Reisman, W.M., Arsanjani, M.H., Westerman, G.S., Wiessner, S., *International Law in Contemporary Perspective*, Foundation Press, New York, 2004.

20. Rosand, E., Millar, A., Ipe, J., Healey, M., *The UN Global Counter-Terrorism Strategy and Regional and Sub-Regional Bodies: Strengthening a Critical Partnership,* Center for Global Counter-terrorism, Washington, 2008.

21. Saul, b., "Reasons for Defining and Criminalizing 'Terrorism' in International Law", *Legal Studies Research Paper* No. 08/121, Sydney Law School, 2008.

22. Wheaton, H., *Elements of International Law,* Stevens & Sons, London, 1916.

DOCUMENTS

1. Bulletin of the European Communities, 1979, Vol. 12.

2. "Basic Principles of the Legal Status of the Combatants Struggling Against Colonial and Alien Domination and Racist Regimes", G.A. Resolution 3103 (XXVIII), U.N. GAOR, 28th Session Supplement No. 30, U.N. Doc. A/9030.

3. "Convention for the Prevention and Punishment of Terrorism", League of Nations Official Journal, 1938, vol. 19.

4. Charging, Case No. STL-11-01/I, par. 85-86, 16 February 2011.

5. "Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations", G.A. Resolution 2625 (XXV), U.N. GAOR, 25th Session Supplement No. 28, U.N. Doc. A/8028.

6. "Definition of Aggression", G.A. Resolution 3314 (XXIX), Annex, U.N. GAOR, 29th Session Supplement No. 31, U.N. Doc. A/9631.

7. DCAS Doc No. 21, No. 22 – ICAO.

8. "Draft Articles on State Responsibility", in ILC, *Report of the International Law Commission on the Work of its 53rd Session*, UN Doc A/56/10 (2001).

9. European Treaty Series, 1977, No. 90; 2003, No. 190; No. 196. 2005.

10. "Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court", G.A. Resolution E, Annex 1, U.N. Doc. A/CONF.183/10, 17 July 1998.

11. IMO, Doc. LEG/Conf. 15/22, 1 November 2005.

12. Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, and Preparation, Cumulative

13. International Instruments related to the Prevention and Suppression of International Terrorism, United Nations, New York, 2008.

14. Official Journals of the European Union: 2002, L 164; 2008, L 330.

15. Report of Secretary General: "Uniting against Terrorism: Recommendations for a Global Counter-Terrorism Strategy", See: A/60/825, 27 April 2006.

16. Report of the ad hoc Committee on Terrorism, Sixth session, 28 January-1 February 2002, Annex II, art. 2.1.

17. S/2006/893; S/PRST/2010/19; SAARC/SUMMIT.12/SC.29/27, Annex-III;

18. UN Doc A/RES/40/61 (1985) UN Doc. A/RES/52/164, Annex; UN Doc. A/RES/54/109, Annex; UN Doc. A/RES/59/290, Annex; A/RES/60/288, 20 September 2006; AG/RES. 1840 (XXXII-O/02); Annex to Resolution No. 59/26-P; A/RES/51/210, 17 December 1996. A/RES/60/1, 16 September 2005.

19. United Nations Treaty Series: 1963, Vol. 704; 1970, Vol. 860; 1971, Vol. 974; 1971, Vol. 1438; 1973, Vol. 1035; 1979, Vol. 1316; 1979, Vol. 1456; 1988, Vol. 1678; 1991, Vol. 2122; 1999, Vol. 2219.

UDC: 343.851(497.11)

PROTECTION ORDERS IN SERBIA

Slađana Jovanović, LLD[1]
Union University, Faculty of Law, Belgrade

Abstract: The author analyzes protection orders (barring and restraining orders) in Serbian law in the perspective of victims' protection, bearing in mind the growing importance of these measures in the European Union, which has been confirmed by the adoption of the Directive on the European Protection Order and the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence. She criticizes certain legal solutions, while also stressing the importance of the existence of the protection orders and their proper application in practice (not just in cases of domestic violence but also in stalking cases and other forms of harassment). Emphasis is on comparative legislative measures which offer possibilities for immediate intervention (by the police) to protect the victim, with the conclusion that some of them are welcomed in Serbia.

Keywords: protection order, protective measure, domestic violence, stalking, restraint to approach and communicate with the injured party

INTRODUCTION

Different protection orders are novelty in Serbian legislation. They could be defined as decisions, provisional or final, adopted by a civil, criminal or misdemeanor court[2] imposing rules of conduct (obligations and prohibitions) on a person causing danger with the aim of protecting another person (victim of violent act/harassment, witness of crime) against an act which may endanger his/her life, physical or psychological integrity, dignity, personal liberty or sexual integrity[3]. They have different requirements for the application, and to some extent the content and goals. These measures and their efficiency are usually discussed in the context of the protection of victims of domestic violence, but one must not forget victims of stalking that is not occurring in domestic violence context, as well as other victims of harassing acts.

In Serbia, the protection orders against domestic violence have been envisaged in family law in 2005, while those from the sphere of the criminal (substantive and procedural) law came into force in 2009. They are designed upon the comparative law provisions, under the pressure of appeals for better protection of victims of domestic violence. However, they suffer criticism from the standpoint of normative regulation, but also from the point of application in practice, as will be discussed in this paper.

1 E-mail: sladjana. jovanovic@pravnifakultet.rs.
2 In comparative legal systems, an administrative court or other judicial authority, as well as police authority can impose some of these measures.
3 Similar definition in: Directive 2011/99/EU of the European Parliament and of the Council on the European Protection Order (Art. 2. sec. 2), Official Journal of the EU, L 338/2, 21.12.2011.

PROTECTIVE MEASURES IN FAMILY LAW

The protective measures against domestic violence have been envisaged by Family Act[4] in 2005. The circle of family members entitled to protection is determined extensively, which has been exposed to criticism from the point of traditional notion of the family relations and possible misuse of the measures. Criticism has especially affected "persons who have been with each other or are still in emotional or sexual relationship"[5]. The justification of family members definition is based on the response to the need for more effective protection of above mentioned persons suffering violence from a partner who is not a spouse or cohabitee (according to the relevant legal provisions), and in that sense is not a member of the family. International legal instruments dealing with issues of violence against women and domestic violence (as two inseparable themes) insist on efficient protection of these persons.

The reason of broader interpretation of family members is also related to the translation of the term "domestic violence", used in international legal documents[6] which cannot be reduced to family violence (which is the most frequently used term in Serbian translation), because it is much wider notion. In any case, legally binding document of the Council of Europe has resolved this dilemma and gave legitimacy to the said family law provisions. Council of Europe Convention on preventing and combating violence against women and domestic violence[7] defines domestic violence as "all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim" (Art. 3b).

A court may order one or more protective measures against domestic violence pertaining to a family member who acts violently, temporarily prohibiting or limiting the maintenance of his/her personal relations with another family member: the issuance of a warrant for eviction from a family apartment or house, regardless of a right to property or a lease to immovable property; the issuance of a warrant for moving into a family apartment or house, regardless of a right to property or a lease to immovable property; prohibition of getting closer to a family member than a certain distance; prohibition of access to the vicinity of the place of residence or workplace of a family member; prohibition of further molestation of a family member (Art. 198 of the FA). All these measures are envisaged as emergency barring and restraining orders aiming to protect victims of domestic violence (regardless of criminal proceedings and legal status of injured party) temporarily (for a period of one year, at least) and to prevent the recurrence of violence (Art. 199 of the FA). They have been presented as measures suitable to respond to mild forms of violence preventing its escalation[8].

4 „Official Gazette of the Republic of Serbia", 18/2005, 72/2011, 6/2015

5 This provision has been assessed as extremely exorbitant and absurd illustrated by examples of pupils' first love and relationships of prostitutes and their customers (who, according to this provision, would also be eligible for protection against domestic violence), see: M.Škulić "The Basic Elements of the Normative Structure of the Criminal Offence of Domestic Violence - Some Issues and Dilemmas" in M. Škulić (ed.) *Domestic Violence*, Association of Public Prosecutors and Deputy Public Prosecutors of Serbia, Belgrade, 2009 , pp . 20-21

6 See: S. Jovanović, „International Legal Framework of Protection against Family Violence", *Legal Life,* 9/2008, pp. 209-226

7 „Official Gazette of the Republic of Serbia – International Agreements", No. 12/2013; Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, CETS. No 210. https://www.coe.int/t/DGHL/STANDARDSETTING/EQUALITY/03themes/violence-against-women/Conv_VAW_en.pdf

8 N. Petrušić, S. Konstatinović-Vilić, *Guidelines through the System of Family Law Protection against Domestic Violence*, Autonomous Women's Center and Women's Center for Education and Communication, Belgrade,2006, p. 25

Although the concept of family law protection from domestic violence is well-conceived, the practice shows a different picture: the state agencies have been criticized for not respecting the law or because they do not use their authorities to ensure better protection of victims. The courts do not use their official authority to order most adequate protection measure[9] imposing only the measure the party claims for; they fails to order protective measures in a judgment in other dispute (matrimonial dispute, maternity or paternity dispute, dispute over the protection of a child's rights and in a dispute over the exercise or deprivation of parental rights) even though they have been reasonable[10]. Thus, usually legally ignorant parties - victims of domestic violence remain without adequate protection. Also, the courts are often oblivious to the best interest of the child: they do not order protective measure for children even though it is obvious they have suffered harm along with their mother which is party in the dispute; they rarely use the possibility of appointing a temporary representative for the child; a small number of children are entitled to free expression before court[11].

The courts are also reluctant to issue a warrant for eviction of the perpetrator from the family apartment or house, although the argument of inviolability of property rights has been overruled by the Constitutional Court of Serbia[12] (and before that moment – by the European Court of Human Rights and other international legal bodies) which has declared that restrictions of the right to property is socially justified and allowed if there has been need to protect higher interests such as the right to life and right to protection of physical and mental integrity. However, the courts rely on most common practice of issuing non molestation order, and the eviction of the perpetrator from the family apartment becomes an option if the apartment is jointly owned[13].

The urgency of the procedure, stipulated by the law, in cases of domestic violence is of great importance, but it is also in dispute, taking into account the results of the research: hearings are often delayed due to the absence of the defendant, but also due to the failure of centers of social welfare to deliver their reports on time, or due to absence of the social worker... Also, the problem is a great number of withdrawn lawsuits for the issuance of protection measures. The presiding judges often order victims to redact the lawsuit for the issuance of protection measures, but victims as ignorant parties usually fail to do that (they must provide for legal assistance, but very often they don't have money or other resources), so they remain without protection. In practice, the court proceedings in average last from three to six months (in 30% of cases), and sometimes even longer (20%) and protection measures lose their purpose, so it is absolutely clear why victims in such cases withdraw their request[14][15].

9 The court is not bound by the limits of the claim for protection from domestic violence. It could order a protective measure which has not been demanded if it finds that by such a measure the protection is achieved (Art. 287 of the FA).

10 N. Petrušić, S. Konstantinović-Vilić, *Family Law Protection against Domestic Violence in the Judicial Practice in Belgrade*, Autonomous women's Center and Women's Center for Education and Communication, Belgrade Belgrade, 2008, p. 24

11 Ibidem, p. 33

12 Decision of the Constitutional Court of the Republic of Serbia, C-No. 296/05 of 9.7.2009. „Official Gazette of the Republic of Serbia", No.101/2009

13 See: N. Petrušić, S. Konstantnović-Vilić, *Family law Protection*…, p. 34; V. Macanović, "Right to Achieve Equal Family Law Protection of All Victims of Family Violence in Serbia – Analysis of the Proceedings for the Issuance of Protection Measures from Domestic Violence" in: B. Branković et al., *Annual Report of the Observatory on Violence against Women 2012*, Network Women Against Violence and Network for European Women's Lobby, Belgrade, 2013, p. 88

14 There were more withdrawn lawsuits in 2011 than judgements: 285:284; in 2012 the ratio is: 264:380. V. Macanović, op. cit., pp. 92-93

15 About inefficiency of the "urgent" proceedings, see: Z. Ponjavić, *Family Law*, Faculty of Law in Kragujevac, 2005, p. 390

Although action for ordering a protective measure against domestic violence could be initiated by the public prosecutor and the guardianship authority, they often fail to do so, leaving the victim on his/her own. They are reluctant to file lawsuits for protection against domestic violence, shifting the responsibility on each other or on the victim. Thus, in 2012 the public prosecutors filed 37 lawsuits, and centers for social welfare just 14[16]. Having in mind that the largest number of lawsuits, when it comes to prosecution, have been filed by the Basic Public Prosecutor's Office in Zrenjanin, it becomes clear that the involvement of prosecutors' offices depends on the willingness and enthusiasm of individuals (as well as in the centers for social welfare). It is clear that a systematic approach is missing, despite the adoption of the various regulations on actions of different agencies and their coordinated action in order to protect the victims. Another problem is related to the fact that almost 90% of all lawsuits are filed in bigger towns where the NGOs and legal clinics provide free legal aid to victims, as well as "active" public prosecution offices and centers for social welfare[17]. It is obvious that victims of domestic violence throughout Serbia do not enjoy the same level of legal protection.

Even though the Family Act prescribes that the records on issued protection measures from domestic violence are to be kept by centers of social welfare, it often happens that courts do not send judgments to centers. The Family Act does not regulate the situation when protection measures is issued in the form of temporary measures and therefore court is not obliged to send such rulings to centers. Also, they are not obliged to send their decisions to police/public prosecutor' offices (even though it seems important to send them information even before the end of the proceedings, so they could act promptly if elements of an offence are determined). Once again, the need for a coordinated effort and cooperation of mentioned subjects should be emphasized in order to ensure their timely reaction.

It should be noted that if the imposed measure of protection is violated, criminal protection would be activated, because it is considered criminal offence (Art. 194 para.5 of the Criminal Code)[18]. In this respect, let's pay attention to an interesting case that had epilogue before the Supreme Court of Cassation of the Republic of Serbia. The imposed measures of protection against domestic violence (for the protection of wife and minor children) have been violated by the perpetrator who approached children at a prohibited distance. He argued that there was mutual consent to do that, so there was no violation of the order "because he has just brought the sneakers to his son, as previously agreed with his wife". The Basic Court in Zrenjanin and the Appellate Court in Novi Sad ruled that there was no violation of the protection order and no criminal offence, because the act of the defendant was not unlawful. The judges at seminars on protection orders[19] were of the same opinion, without exception. That way of thinking speaks of insufficient knowledge of the problems of domestic violence and even of the criminal law. The Supreme Cassation Court has pointed out at the big mistake when deciding on the request for protection of legality. There is a hope that the judges in the future will not be lenient to those who violate the measures of protection against domestic violence, because "... imposed measures of protection against domestic violence are unconditional, taken in order to protect the victim and must not depend on any of the possible agreement with the victims...".

16 V. Macanović, op. cit., p. 94
17 Ibidem, p. 97
18 „Official Gazette of the Republic of Serbia", No. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014
19 The seminars for public prosecutors and judges „Domestic Violence and Protective Measures" organized by the Autonomous Women's Center during 2013 and 2015.

PROTECTIVE MESAURES IN MISDEMEANOR AND CRIMINAL LAW

Misdemeanor Law of 2005[20] envisaged a protective measure named prohibition of the access to the injured party, structures or to the place of committing a misdemeanor which has been slightly changed and better arranged in new Misdemeanor Law (Art. 61)[21]. The measure has a preventive character with the purpose of preventing an offender to repeat a misdemeanor or to continue to threaten the injured party. The measure shall be imposed to a written petition of the petitioner of the motion to institute the misdemeanor proceedings or to an oral request of the injured party, made at the hearing in the misdemeanor proceedings. A decision of the court imposing prohibition of access contain: the time period in which it is enforced, data on the persons to whom the offender must not access, indication of structures he/she must not access and at what time, places or locations within which access is prohibited to the offender. The imposed measure of prohibition of access to the injured party shall also include the measure of prohibition of access to a joint apartment or household within the period during which the prohibition is in effect. The measure may be imposed for any duration of up to one year, reckoning from the date of the legally binding judgment. The court is obliged to inform the injured party, the interior affairs authority which is in charge of measure execution and center for social affairs if the measure prohibits access to children, spouse or family members. Afore mentioned provision makes confusion about the interpretation of the concept of a family member, as emphasis is on spouse which implies traditional family concept. It is not clear why children and spouse are emphasized when it is undisputed that they are considered family members (it would be better to accept the interpretation given by the Family Act). Article 62 corrected an error that existed in the previous law by resolving the question of sanctions for violations of measures imposed - sanctions would be imposed according to the regulation which determines the offence for which the measure has been ordered.

New Misdemeanor Law has been envisaged procedural measure of prohibition of the access to the injured party, structures or to the place of committing a misdemeanor until the judgment becomes final in order to protect the injured party upon his/her request and presented evidence (Art. 126 sec. 3 item 4) . What is the real situation in practice of misdemeanor courts no one could say, because there is no research on this subject. It is necessary to gather relevant data, having in mind that the issue of misdemeanors has been ignored for too long, even though they are in fact "mini - criminal acts". Their commission usually precedes criminal behavior, so it is important to protect victim promptly and efficiently, which rules of misdemeanor procedure should provide.

Above mentioned protective order suffers criticism because it does not contain no-contact provision, although the art. 62 envisaging sanction for order violation refers to "getting in contact with injured party in improper way or time". The protective order should be extended to a ban on communication with the injured party (by phone, e-mail, messages). It is also clear that the measures protect a wider circle of people than measures of family law protection, as they protect persons who are not necessarily family members, which is a good solution. However, bearing in mind that the existence of an offence against public peace and order means fulfillment of the criteria related to the publicity (public place)[22], when violence occurs in the home (which is the most common case), family members will not be able to ask for protection by applying these measures if an act of violence does not disturb public order and peace. In such a case other types of protection will be applied and the perpetrator's behavior will be qualified as a criminal offence.

20 „Official Gazette of the Republic of Serbia", No. 101/2005,116/2008, 111/2009
21 „Official Gazette of the Republic of Serbia", No. 65/2013
22 „Official Gazette of the Republic of Serbia", No. 6/2016

Criminal law protective measures appeared in the legislation (both substantive and procedural) in 2009, and have suffered several changes since then. The substantive law measure is a safety measure named "restraint to approach and communicate with the injured party" (Art. 89a of the CC). The sanction can be imposed with a fine, a sentence of community service, suspension of driving license, a suspended sentence and judicial admonition (Art. 80 sec. 6). The court may prohibit an offender from approaching the injured party at a specified distance, from accessing the area surrounding the injured party's residence or place of work, and further harassment of the injured party, *i.e.* further communication with the injured party, provided it is reasonable to believe that any such further action taken by the offender would pose a threat to the injured party.

The question is whether the application of the measures could cause the eviction of the offender from the apartment/house which is the property of the offender, because unlike of family law or misdemeanor law provisions regulating similar measures there is no word about the eviction, so it is likely to expect that criminal courts won't prohibit access to the place of residence if it is owned by the offender, even though this would be reasonable. It is interesting to find out how harassment of the victim is interpreted, because according to the linguistic interpretation of the harassment it means (malicious) actions that differ from abusive and violent behavior, which the injured party finds embarrassing, uncomfortable, humiliating, provoking, and disturbing. Fortunately, there is an interpretation given by the Gender Equality Act[23] (Art. 10), according to which harassment means any unwanted verbal, non-verbal or physical act, committed with the aim or which has as the consequence a violation of dignity and cause of fear or establishment of unfriendly, humiliating, degrading or insulting environment. Of course, such actions should be objectively considered harassing, whereby one must take into account the situation that preceded imposing the measure.

The court shall determine the duration of the measure, which may not be less than six months or more than three years, calculating from the date of final decision, with the proviso that time spent in prison and/or medical institution wherein the security measure was enforced is not calculated into the duration of this measure (Art. 89a sec. 2 of the CC). This provision is vague, because it implies the possibility of imposing measures to the prison sentence, which he is not true , but the time spent in custody or other deprivation of liberty is not calculated into the duration of the measure (which is better, clearer formulation). It is questionable why the measure could not be imposed to the imprisonment sentence in order to strengthen its effects, as well as in the case of the prohibition to practice a profession, activity or duty. The same question applies to compulsory psychiatric treatment and confinement in a medical institution or compulsory psychiatric treatment at liberty when one of these security measures is imposed as individual sanction on a mentally incompetent criminal offender.

The problem with this security measure is failure of the legislator to envisage way of its execution, as well as the sanctions in the case of violation (especially if the act of violation doesn't constitute a new offence, when it could be taken into account as an aggravating circumstance in determining the punishment prescribed for that particular offence). The provision of Article 194, paragraph 5 of the Criminal Code could not be applied (although even some judges think differently)[24], given the fact that it implies to protective measures from domestic violence imposed by courts on the basis of family law. It is true that above mentioned security measure is welcomed as a measure of protection against domestic violence, but it is not reserved just for domestic violence victims and the extensive interpretation of criminal law is unacceptable, so we have to wait for the legislator to correct the mistake. It would be best, considering the fact

23 „Official Gazette of the Republic of Serbia", No. 104/2009

24 They express such opinion at seminars for public prosecutors and judges „Domestic Violence and Protective Measures"organized by the Autonomous Women's Center during 2013 and 2015.

that the measure can be imposed if the offender is under pronouncement of suspended sentence, to envisage the possibility of revocation of the suspended sentence if the if the offender violates the prohibition (which has been done in other cases regarding security measures of prohibitions: security measures of prohibition to drive a motor vehicle; prohibition to practice a profession, activity or duty). It has been expected of the Act on Execution of Non-custodial Sanctions and Measures[25] to solve the problem, but it hasn't happened. The Act hasn't even mentioned that measure of security, even though it has provided some provisions on execution of similar measures (related to criminal proceedings). The provisions of the Article 19 are about the defendant, not about the convicted person, emphasizing "the obligation of the defendant to report to the probation officer," which leads to the conclusion that the execution of the restraint to approach and communicate with the injured party has not been regulated.

Although the execution of security measures and their eventual violation are not regulated properly, statistics show that Serbian courts have been imposing it, mostly for offences relating to marriage and family. Thus, in 2014 there were 52 security measures ordered, the most of them for criminal offences relating to marriage and family – 26, crimes against freedoms and rights of man and citizen are on the second place (19 measures). It is interesting that the most of them were imposed on perpetrators in Vojvodina (25); in the region "Serbia - South" – 15, and in Belgrade – 13[26]. When we take into consideration a small number of lawsuits for protection against domestic violence in the territory of Niš and Kragujevac[27] and the information that has been just exposed, it may be concluded that the public awareness rising campaigns and education of professionals, as well as research of judicial practice would be welcomed in above mentioned areas.

If there are circumstances which indicate that a defendant could disrupt the proceedings by exerting influence on an injured party, witnesses, accomplices or concealers or could repeat a criminal offence, complete an attempted criminal offence or commit a criminal offence he is threatening to commit, the court may prohibit the defendant from approaching, meeting or communicating with certain persons or prohibit the defendant from visiting certain places. Also, the court may order the defendant to periodically report to the police, an officer of the public authority in charge of executing criminal sanctions or other public authority specified by law (Art. 197 of the Criminal Procedure Code), but the police authority is in charge of exercising control over implementation of measures (Art. 198 sec. 6). How police would exercise control is unclear, because the Act on Execution of Non-custodial Sanctions and Measures (Art. 19) has envisaged "the delivery of the court order to the probation officer if the order imposes on the defendant the obligation to report periodically, as well as the obligation of the probation officer to inform the court about the violation of reporting obligations". The police and its actions in monitoring the perpetrator are not mentioned.

The control of protective measure execution is of paramount importance from the perspective of victims' protection, but it is obvious that Serbian legislation has to be seriously improved in that sphere. Electronic surveillance of the defendant/convicted person could be one of the solutions (although pretty expensive and demanding). It is suitable for exercising control over the defendant or convicted person who is at liberty, which since 2009. has existed in Serbia for the purpose of executing a sentence of imprisonment that is executing in the premises wherein convicted person lives, or when the convicted person is released on parole, as well as for procedural measure - prohibition of leaving a dwelling. However, since 2011 electronic surveillance could not be applied any more in execution of the prohibition of approaching, meeting or communicating with a certain person and visiting certain places,

25 „Official Gazette of the Republic of Serbia", No. 55/2014.
26 The Statistical Office of the Republic of Serbia, "Adult Perpetrators of Criminal Offences in the Republic of Serbia", 2014, *Bulletin* No. 603, Belgrade, 2015, p. 74
27 V. Macanović, op. cit., p. 90

and as it has been already said, security measure - restraint to approach and communicate with the injured party is not also eligible for electronic surveillance. Here's another example of non-compliance within related regulations. Essentially similar measures have different treatment. Otherwise, electronic tracking of the victim protected by restraining measure is praised as a good way to prevent the offender violates the restraining order[28].

The above mentioned procedural protective measure aims to protect the criminal proceedings, its unobstructed conduct and only indirectly it protects the injured party (while previous concept of this measure took into consideration the protection of the injured party explicitly, envisaging the possibility of applying electronic surveillance to control compliance with restrictions). The concept of mentioned protective measure raises a question: what if the defendant and the injured party live together in the same apartment, bearing in mind that the measure does not include the eviction of the perpetrator from the apartment? It seems that these difficulties should be resolved before ordering the measure. Otherwise, another measure should be ordered or the injured party (or public prosecutor, center for social welfare) should file for protective order against domestic violence.

There is no data on the application of criminal procedural measures nor about their violations, which must be researched in order to draw conclusions about their effectiveness and need for specific changes in their regulation and implementation.

CONCLUSION

The existence of the regulation on protective measures in Serbia is undoubtedly necessary and it presents the response to international law requirements, and to appeals of organizations of civil society (at first place) advocating for women's rights, and protection from domestic violence. However, there is room for improvement in this area since the efficiency of existing protective measures has been an open question, and all the requirements of the international legal documents have not been yet accomplished. Serbian legislation and practice must comply to provisions of the Council of Europe Convention on preventing and combating violence against women and domestic violence, but we must not forget that other victims also deserves help and efficient protection. We still cannot argue that there are measures that meet the requirement of urgency, although it is proclaimed when it comes to family law measures. The Council of Europe Convention requires urgent reaction and emergency barring orders imposing eviction of the perpetrator from the apartment for a sufficient period of time and prohibition from further harassment) in situations of immediate danger (as well as other restraining or protection orders), as well as sanctioning of their violation.

The Austrian legislation model (and its implementation) presents example of good practice that could be recommended to Serbian legislator. Amendments to the Police Act[29] have given authority to police to evict perpetrator from the home and to issue a restraining order (Art. 38) in cases of "immediate danger to life, physical integrity or liberty of another", which is estimated in respect of the previous violent act. The measure protects all persons living in the apartment, regardless of ownership or whether they're related to perpetrator; the issuance of a prohibition does not depend on the will of the victim. The police officers also have an obligation to inform the victim about the other organizations for support and protection, as well as about the possibility of obtaining judicial protection. They seize the keys to the house from the offender, allowing him to take the necessary personal items and inform him about

28 N. Mrvić-Petrović, *Prison Crisis*, Military Publishing Institute, Belgrade, 2007, p. 273
29 Sicherheitspolizeigesetz – Nouvelle, 1999, in: Federal Laws on Protection against Domestic Violence, http//www.legislationline.org/legislation.php?tid

accommodations. Every prohibition shall be reviewed within 48 hours and every relevant institution is obliged to assist in determining the facts. The police authority is in charge of control and must check at least once in the first three days if prohibition is respected. The prohibition may be valid for at least ten days, but if the victim files a lawsuit in family court demanding an interim measure of protection in that period, the duration of the ban is automatically extended to twenty days. Perpetrator which violates the order will be sanctioned with a fine (up to 360 Euros) or with the imprisonment for a period of two weeks (if the fine is not paid). The research results indicate that Austrian model has achieved proper enforcement and effects[30]. Slovenia has got a similar model[31].

An adequate assessment of the risks to the safety of the injured party when deciding on the measures is of paramount importance for victims' protection. This is especially important in criminal proceedings, having in mind that the interests of the proceedings are in the first place, and victims' protection is secondary objective. Research results show that the nature/severity of previous violence, its incidence, persistence of the perpetrator, the presence of stalking, as well as perpetrator's resistance to the order in court have to be taken into account[32].

Beside other problems with Serbian protection orders that were discussed above, one must not be forgotten: stalking is not yet criminalized in Serbia, although this is one of the requirements of the European Convention[33]. There is necessity to acknowledge its dangerousness and provide efficient protection (by imposing various no-contact, stay-away orders, etc.) for all victims, regardless of the relation between perpetrator and the victim. Good practice examples exist in Scandinavian countries. In Denmark, Finland, Sweden urgent issuance of protection measures by the police or public prosecutor (independently from the criminal proceedings) is provided in a specific administrative or "quasi-criminal" procedure[34]. These procedures do not require the occurrence of a criminal offence or a link with criminal procedure. There are also specific legislative acts establishing conditions and procedure for the administration of protection orders. What matters is whether a person is in need for protection, which is the principle which Serbia should follow.

REFERENCES

1. Benitez, C. T. et al. „Do Protection Orders Protect?", *Journal of American Academy of Psychiatry and the Law*, 38/2010, pp. 376-385
2. Jovanović, S. „International Legal Framework for Protection against Domestic Violence", *Legal Life,* 9/2008, pp. 209-226
3. Jovanović, S. „Stalking in the Light of the Existing Incriminations and International Legal Requirements" in: Kolarić, D. (ed.) *Countering Contemporary Forms of Crime - Analysis of the Current Situation, European Standards and Measures for Improvement*, The Academy of Criminalistics and Police Studies and Hanns Seidel Foundation, Belgrade, vol. I, 2015, pp. 207-216

30 Više o tome: S. Jovanović, *Legal Protection against Domestic Violence*, Institute of Criminological and Sociological Research, Belgrade, 2010, pp. 126-129
31 Ibidem, pp. 138-140
32 C. T. Benitez et al. „Do Protection Orders Protect?", *Journal of American Academy of Psychiatry and the Law*, 38/2010, pp. 376-385.
33 See: S. Jovanović, „Stalking in the Light of the Existing Incriminations and International Legal Requirements" in: Kolarić, D. (ed.) *Countering Contemporary Forms of Crime - Analysis of the Current Situation, European Standards and Measures for Improvement*, The Academy of Criminalistics and Police Studies and Hanns Seidel Foundation, Belgrade, vol. I, 2015, pp. 207-216
34 S. van der Aa, „Protection Orders in the European Member States: Where Do We Stand and Where Do We Go from Here?", European Journal on *Criminal Policy and Research* 18/2012, p. 199-200

4. Jovanović, S. *Legal Protection against Domestic Violence*, Institute of Criminological and Sociological Research, Belgrade, 2010

5. Macanović, V. „Right to Achieve Equal Family Law Protection of All Victims of Family Violence in Serbia – Analysis of the Proceedings for the Issuance of Protection Measures from Domestic Violence" in: B. Branković et al., *Annual Report of the Observatory on Violence against Women 2012*, Network Women Against Violence and Network for European Women's Lobby, Belgrade, 2013, pp. 83-100

6. Mrvić-Petrović, N. *Prison Crisis*, Military Publishing Institute, Belgrade, 2007

7. Petrušić, N., Konstantinović-Vilić, *Family Law Protection against Domestic Violence in the Judicial Practice in Belgrade*, Autonomous Women's Center and Women's Center for Education and Communication, Belgrade Belgrade, 2008

8. Petrušić, N., Konstatinović-Vilić, S. *Guidelines through the System of Family Law Protection against Domestic Violence*, Autonomous Women's Center and Women's Center for Education and Communication, Belgrade, 2006

9. Ponjavić, Z. *Family Law*, Faculty of Law in Kragujevac, Kragujevac, 2005

10. Škulić, M. „The Basic Elements of the Normative Structure of the Criminal Offence of Domestic Violence - Some Issues and Dilemmas" in: Škulić, M. (ed.) *Domestic Violence*, Association of Public Prosecutors and Deputy Public Prosecutors of Serbia, Belgrade, 2009, pp. 10-22

11. Van der Aa, S. „Protection Orders in the European Member States: Where Do We Stand and Where Do We Go from Here?", European Journal on Criminal Policy *and Research* 18/2012, pp. 183-204

UDC: 343.163(497.7)

POSIBILITIES AND PERSPECTIVES OF THE SPECIAL PUBLIC PROSECUTION OF THE REPUBLIC OF MACEDONIA

Temelko Risteski, PhD[1]
FON University, Skopje
Vesna Sijic

Abstract: In February 2015, the Social Democratic Union, the biggest opposition party in Republic of Macedonia, made public that the Government had been listening in to telephone conversations of 20 thousand citizens of the Republic without authorization and had audio recordings of monitored conversations. Shortly thereafter, the Government began to publish the audiorecordings within the project called "The Truth for Macedonia". By the published audiorecordings the citizens of the Republic were informed about the grounds of suspicion for numerous committed offenses of abuse of power by senior state officials. It fundamentally shook up the position of the Government and led to severe political crisis in the country. The international community intervened in resolving the crisis, namely the European Union and the United States of America. One of the imperatives of the crisis resolving was the investigation and prosecution of crimes related to and arisen from the contents of unauthorized listening in to communications. Due to the high degree of partisanship and failure of professional capacities, it was assessed that the Macedonian judicial body, primarily the public prosecution, are not able to process these crimes. There was a need for establishing a special public prosecutor for this purpose. To create a legal framework for its establishment, the Parliament of the Republic adopted the Law on Public Prosecution for Crimes Related and which Arise from the Content of the Illegal Eavesdroppring of Communications (Special Public Prosecution).

But, the formation of the Special Public Prosecution pitted numerous problems and dilemmas related to financing of the Prosecution, providing professional administrative staff servicing (public prosecution service), providing appropriate facilities and equipment, taking the documents of criminal cases by the Public Prosecution of the Republic, taking audio recordings and other proof materials from the entities that possess it, cooperation with the courts and public prosecution offices whose staff is mostly composed by people close to the government and so on. Part of the problems is solved and some of them need to be resolved. But, major problems lie ahead. These are the problems of cooperation with police authorities and other bodies of administration, as well as problems about the processing of cases before particised and close to the government linked courts. Special Public Prosecutor expect numerous obstructions that side. The question is what are its abilities to overcome these obstructions and in link with it, what are the perspectives for achieving the purpose for which the Prosecution was established.

Due to the high level of interest in opposition for the processing of these cases, the perspectives are good if it wins the upcoming parliamentary elections. However, it can not be told, if it lost them. In that case, they'd expect major obstructions to the work

1 temelko_mkd@yahoo.com

of the Special Public Prosecutor by the state bodies, especially by the courts. These obstruction will lead to unefficient processing of the cases which final result will be some offenders from the tops of the government, to avoid the hand of justice.

Keywords: specifically, public prosecutor, prosecuting, crime, communications.

INTRODUCTION

In parliamentary elections held in 2008, the right wing political party VMRO – DPMNE[2], in coalition with the Democratic Union of Albanians (DUI) and other smaller parties, won an absolute majority in the Parliament.

The ruling coalition began to exploit the political power stemming from that majority to strengthen their positions in Macedonian society.

The absolute majority allowed them to adopt undisturbedly the so-called systemic laws and parliamentary decisions for the adoption of which, two-thirds majority of the total number of members of the Parliament is necessary. The opposition practically became a meaningless factor in the political life of the country. Its role comes down to criticism of the moves of the ruling coalition, without significant effects on changing the existing situation.

The coalition ran an early parliamentary elections whenever they noticed a significant drop in ratings and possible negative developments in the future which would affect the further staying in power. Such elections were held in 2008, 2011 and 2014. There are indications that these elections were marred by numerous violations of the legality: voting hindering (Article 158 of the Criminal Code) - with serious threats to employment termination, reassignment to less paid jobs, and even threats to physical integrity of some voters, with violations of the right to vote (Article 159 of the Criminal Code) - enabling even the dead to "vote" due to untreated electoral lists, with violations of the freedom of voters (Art. 160 of the Criminal Code) - forcing voters with use force, serious threat, deceit or otherwise to perform, not to perform, or to perform the right to vote in a certain sense (to vote for the other), with misusing the law (Art. 161 of the Criminal Code), vote instead of another , voting more than once or bringing to the polls people who do not have the right to vote (citizens from Albania who do not have Macedonian citizenship).[3]

Over time, the ruling coalition established control over controlling-protective institutions in society (courts, public prosecution, state attorney, Constitutional Court, Ombudsman, Commission for Prevention of Corruption, inspection services), then it established control over the media, education, science, culture, a number of key non-governmental organizations such as the Association of Pensioners, Association of Reserve Military Officers, trade unions, etc.

By employing party soldiers, the ruling coalition created a politically colored and therefore loyal public administration which, according to some estimates, counts about 180,000 employees.

---

2 Internal Macedonian Revolutionary Organization - Democratic Party for Macedonian National Unity. The party took the name of the Macedonian Revolutionary Organization founded in 1893 in Thessaloniki, which was the organizer of the revolutionary struggle of the Macedonian people to form an independent Macedonian state. Suffix DPMNE (Democratic Party for Macedonian National Unity) was added during the formation of the Party, in 1990.

3 The existence of these indications was most directly evidenced by the project of oppositional Social Democratic Union of Macedonia called "The truth about Macedonia", within which, among other things, were released audio recordings of conversations of senior government officials in connection with irregularities in the elections and about the events that immediately preceded them.

With all of these moves, the coalition poke deep roots in the society in which it solidifies its rule to the maximum. Once their staying in power had been secured in this way, the people of first and second echelon of power started to use it for personal gain and illegal privileges for themselves and their relatives and close friends. Any expression of dissatisfaction was sanctioned with employment termination, racquet, and selectively enforced draconian penalties, even destruction and demolition of buildings and business of citizens who were not pleasing to those in power. The ship of Macedonian society set sail to a kind of Bermuda Triangle.[4]

The arrogance of the government went as far as December 24th, 2012. To allow unimpededly to adopt the budget, which provided huge funds for non-profit investments, the Government used a unit of special police which forced the MPs from the opposition to leave the session, after having removed the press from the conferrence room so as not to see and record what was to follow. That sharpened to maximum relations between the government and the opposition and led to frequent boycotting of parliamentary sessions, which after extraordinary and, it seems, irregular parliamentary elections of 2014, turned into a continuous boycott. The country plunged into a deep political crisis.

The crisis culminated on January 31, 2015 when Nikola Gruevski the Prime Minister announced that criminal charges against four people, including the leader of the opposition Social Democratic Union Zoran Zaev, were submited, because of the existence of grounds for suspicion that they had committed the crimes of espionage and violence against the representatives of the highest state authorities. According to him, the greatest sin that the suspects did was their collaboration with foreign intelligence in collecting data which would be used by them, for political purposes, against him and his government.[5]

A most serious problem appeared before the Macedonian society: how to defend from the criminality of state power or, how to defend the legal state from the "state."[6]

Soon after, the opposition SDSM started the implementation of a project called "The Truth for Macedonia" by announcing that the Security and Counterintelligence Administration (SCA) in the Ministry of Interior, headed by a close relative of the Prime Minister's, unautorisedly monitors phone conversations of 20 thousand Macedonian citizens, including Government Ministers, other senior government officials and foreign diplomats accredited in Skopje. Only the conversations between the Prime Minister and the director of SCA were not monitored. After the disclosure of these information, SDSM started to present to public the monitored phone calls.

Presenting the phone talks before the eyes of the Macedonian public appeared to expose the grounds of suspicion of committing a number of crimes of abuse of power by the senior government officials. It fundamentally shooke up the position of power and deepened the political crisis in the country. In resolving the political crisis the international factor was involved: the European Union and the United States.

The European Commission sent an expert group to Macedonia headed by the retired director at the European Commission, German, Reinhard Pribe who, during the months of April and May, visited Macedonia several times. The Expert Group compiled a report on the situation in the country based on on the direct insight into the situation on the ground and

4 more: Mitevski M .: System 2014, Skopje, 2015, p.77 -126.

5 Article 316, paragraph 4, of the Criminal Code prohibits the gathering of secret information and documents with intention to announce or surrender them to a foreign state, a foreign organization or a person which serve them. As it emerges from the statement of the Prime Minister, the suspected persons did not intend to give that data to any foreign state or foreign organization, nor a person who serves them, but simply to use in political struggle against the ruling government headed by him, because its replacement by another government.

6 Kambovski V.: Organized crime, Skopje, 2005, p. 58-59.

on the discussions with the representatives of the Ministry of Interior, the Public Prosecution Office, the courts and other state bodies, as well as with the representatives of civil associations. The report read: "The range of illegal recording of conversations, the concentration of power within the SCA, the wide powers in the mandate of SCA (which despite the wide range was exceeded) and dysfunction of the external oversight mechanism resulted in numerous violations: violations of fundamental rights of the individuals; serious violation of legislation on protection of personal data; violation of the Convention on Diplomatic Relations of 1961 (the Vienna Convention) given that diplomats were also illegally tapped; apparent direct involvement of senior government and party officials in illegal activities, including election fraud, corruption, abuse of power and authority, conflicts of interest, blackmail, extortion (pressure on public employees to vote for a particular party by threatening to dismiss them)- crime; serious violations of public procurement procedures in order to obtain illegal profits, nepotism and cronyism; indications of unacceptable political interference in the nomination / appointment of judges and interference with other supposedly independent institutions for personal or partisan benefit".[7] This excerpt from the expert group report clearly indicates the fact that it is a severe crime, which in criminological theory is covered by the term "crime of abuse of power."[8]

One of the imperatives for the crisis solving was an investigation and prosecution of crimes related to and arising from the contents of unauthorized eavesdropping of communications. Due to the high degree of partisanship and failure of professional capacities, it was assessed that the Macedonian judicial organs, primarily the Public Prosecution Office, are not able to process these crimes. There was a need for establishing a special public prosecutor for that purpose. To create a legal framework for its establishment, the Parliament of the Republic adopted the Law on Public Prosecution for Crimes Related and which Arise from the Content of the Illegal Eavesdropping of Communications (Special Public Prosecution). Immediately afterwards, by the proposal of the Parliament of the Republic, the Council of Public Prosecutors, elected Special Public Prosecutor, and upon his suggestion, with some ado, prosecutors within the Prosecution.

LEGAL FRAMEWORK FOR THE ORGANIZATION, FORMATION, COMPETENCES AND OPERATION OF THE SPECIAL PUBLIC PROSECUTION

Special Public Prosecution is the result of the political agreement of the leaders of four political parties with the largest number of representatives in the Parliament of the Republic of Macedonia, signed on June 15, 2015.

After this agreement the Parliament of the Republic of Macedonia adopted the Law on the Special Public Prosecutor on September 15, 2015. It shall apply five years after the date of its adoption by the Parliament with the possibility his application to be prolonged by one year.

According the Law, on the proposal of Parliament, the Special Public Prosecutor was elected by the Council of Public Prosecutors of the Republic with a two-thirds majority votes of the total number of members. The Parliamnet of the Republic forms proposal by a two-thirds majority of the total number of members, on the basis of the proposal of the Commission for Election and Appointment of Parliament. The Commission can not make a proposal without the consent of the four political parties with the largest number in Parliament.

7 See: "Report of Priebe", www.vesti.mk
8 Kambovski V.: Organized crime, Skopje, 2005, p. 69.

The mandate of the Special Public Prosecutor last four years, eligible for re-election.

Special Public Prosecutor is empowered to investigate and prosecute crimes related to and arising from the contents of unauthorized eavesdropping of communications in the period from 2008 to 2015. Within this, Special Public Prosecutor is empowered to take actions and to advocate courses in basic courts, appellate court and the Supreme Court of the Republic of Macedonia, and independently perform all investigative and prosecutorial functions, which include:

- participation in litigation and starting any judicial proceedings, including civil and criminal, which the Spiecial Prosecutor deems necessary;

- lodging an appeal against any decision of the Court in any matter or proceeding in which the Special Public Prosecutor participates as competent;

- review of all available documentary evidence from any source;

- obtaining all security exemptions for a review of intelligence and information that are not available to the public and

- initiation and conduct of, prosecutions in any competent court, in the name of Republic of Macedonia.

Special public prosecutor has full autonomy in the investigation and prosecution of crimes related to and arising from the contents of unauthorized eavesdropping of communications. No public prosecutor in the Public Prosecutor's Office of Republic of Macedonia, including the Public Prosecutor of the Republic of Macedonia, can affect his work or to request reports related courses from the Special Public Prosecutor or prosecutors within the Public Prosecution.

Special Public Prosecutor can not bi called and he does not attend on collegiates in expanded composition of the Public Prosecutor of the Republic of Macedonia. At these collegiates can not be discusses issues under its jurisdiction. Public Prosecutor of the Republic of Macedonia can not require him referring to a particular subject or criminal legal event. He can not undertake investigations and prosecute cases that fall under the jurisdiction of the Special Prosecutor without his written consent.

Special Public Prosecutor, for his work, respond to the Parliament and the Council of Public Prosecutors. He reports his activities every six months, including a description of progress in any investigation or prosecution taken by him.

Besides the Special Prosecutor in charge of the Special Public Prosecutor, the Prosecution up public prosecutors who assist him. They are elected by the Council of Public Prosecutors, from a list proposed by Special Public Prosecutor, with a two-thirds majority of votes of the Council members.

Special Public Prosecutor can establish Research Centre in accordance with the Criminal Procedure Code. Then, he may establish specialized departments in their Prosecution. He can hire associates, experts, consultants, investigators and administrative staff working at the investigation center.

Special Public Prosecutor may seek international legal assistance and cooperation on issues that are within his jurisdiction, alone, according to the law and ratified international treaties.

Government is obliged to provide the Special Prosecutor adequate financial resources and personnel, including administrative and investigative personnel.

The working premises of the Special Public Prosecutor shall be provided by the Ministry of Justice of the Republic of Macedonia. These premises must be outside of the facilities of the Public Prosecutor of the Republic of Macedonia in order to achieve a real and proper investigatory and prosecutorial independence.

Ministry of Justice provides the Special Public Prosecutor sufficient computer and information resources.

Special Public Prosecutor has all the powers and responsibilities with regard to access to data and information as well as the Public Prosecutor of the Republic of Macedonia and the Basic Public Prosecutor for Organized Crime and Corruption.

Financial resources for the Special Prosecution are provided from the Budget, via the budget borrower - Public Prosecutor of the Republic of Macedonia, on the basis of a separate annual financial plan that is submitted by the Special Prosecutor. Public Prosecutor of the Republic of Macedonia, the Ministry of Finance and Parliament can not alter the financial plan. They have a legal obligation to incorporate it in the budget of the Public Prosecutor of the Republic of Macedonia.

The function of Special Public Prosecutor can be terminated:

- upon his request,
- if he permanenttly losses the capacity to perform public prosecutor function;
- if he is elected or appointed to another function;
- if there is a final court decision of his imprisonment of at least six months or a shorter sentence or other criminal sanction for curvature work that makes him unsuitable for the performance of public prosecutor function and
- with dismissal due to illegal, incompetent and unprofessional performance his function.

The procedure for dismissal of the Special Public Prosecutor begins the Council of Public Prosecutors. It shall within a reasonable time to submit a report of the facts and grounds for dismissal to the Parliament. The report must be made available to the public, through committees in Parliament, unless one of the committee not to delay or prevent the release the report or part of it, if it finds it necessary to protect the rights of a person referred in the report, or prevent undue influence in any criminal prosecution.

Based on the report submitted by the Council, the Commission on Elections and Appointments shall prepare a proposal for dismissal. Commission submit proposal to Parliament. The Parliament, after receiving the proposal, is obliged to obtain the consent of the four political parties with the largest number in it. After the consent will be obtained, the Parliament proposes to the Council of Public Prosecutors to dismiss the Special Public Prosecutor. The Council, acting on a proposal from the Parliament, dismiss the prosecutor.

Parliament determines the proposal for dismissal of the Special Public Prosecutor with a two-thirds majority, including a majority of votes of members who belong to the communities which are not in the majority in the country.

Dismissed Special Prosecutor may file a complaint to the Basic Court Skopje 2, in Skopje, to review the decision for his dismissal. By decision of the court, the Public Prosecutor can be reinstated.

Special Public Prosecutor shall be dismissed upon completion of all investigations within the prosecution of criminal offenses related to and arising from the content of the illegal eavesdropping of communications. With the termination of his position on this base, the Special Prosecution is canceled.

This legal setup of Special Public Prosecution prevents it to decline before the policy of the ruling government,[9] as is often the case in the practice of modern jurisprudence - phenomenon in modern law and political empiricism called as Decline of Law, about which Hayek wr ote in his work the Constitution of Liberty.[10]

9 Shkaric S.: Comparative and Macedonian Constitutional Law, Matica Makedonska, Skopje, 2004, p. 732
10 Hayek F.: The Constitution of Liberty, Routledge, London and New York, 1999, p. 234.

SUSPICIONS ABOUT CONSTITUTIONALITY AND LEGALITY OF THE SPECIAL PUBLIC PROSECUTION AND ITS WORK

In attempts to obstruct the efforts of the democratic forces and of the international community to restore democracy, the rule of law and the freedoms and rights of citizens, the ruling government, immediately after the enactment of the Law on Special Public Prosecution, began to spread rumors about his alleged unconstitutionality. An initiative to the Constitutional Court for assessment of its constitutionality was submitted.[11] In this connection here is what the Constitution says: "In The Republic of Macedonia is free all which is not prohibited by the Constitution and the law." Articles 106 and 107 of the Constitution which regulate the constitutional-legal status of the Public Prosecution, do not contain an explicit ban on the establishment of a separate Public Prosecution to prosecute perpetrators of certain crimes as it is the case with Article 98, paragraph 5, which expressly prohibits the establishment extraordinary courts. In this connection, it is necessary to point out that in the public- prosecutorial system of the Republic of Macedonia already there is a Public Prosecution for Organized Crime and Corruption, whose jurisdiction is regulated by the Law on the Public Prosecution.

The Law on Special Public Prosecutor is lex specialis in relation to the Law on Public Prosecution and it does not go beyond the single public prosecution system of the Republic of Macedonia, because article 1, paragraph 2, of this Law stipulates that on everything which is not regulated with it, will be applied the Law on Public Prosecution and other positive legislation in the Republic of Macedonia.

According to the provision of Article 2, paragraph 1, of the Constitution of the Republic of Macedonia, sovereignty derives from the citizens and belongs to the citizens. This provision is based on the natural right of the citizens to decide for their fate, especially in conditions when the Government cheated on their intention, their ideals and goals that they want to achieve with the Constitution of the Republic of Macedonia as a sovereign, independent, democratic and social state. Through the prism of this provision should be interpreted all other provisions of the Constitution of the Republic. In light of this provision, no provision of the Law on Special Prosecution which is in contrary to the Constitution, especially when one takes into consideration that in the Constitution there is no explicit ban on the establishment of a special prosecutor.

Besides the issue of the constitutionality of the Law on Special Public Prosecution, in conjunction with the constitutional and legal status of the Special Public Prosecutor, the question about the usefulness of the formation of the prosecution is put on, having in mind the provision of Article 12, paragraph 2, of the Code of Criminal Procedure which stipulates that evidence obtained in an illegal way or in violation of freedoms and rights determined by the Constitution, Law and international treaties, as well as evidence derived from them, can not be used and on it can not be based court decision.

We think that this provision should not be interpreted restrictively, but rather extensively, because it is aimed at strengthening the interests and positions of the autocratic government and against the natural interest of citizens to determine the truth in the cases indicating illegal monitoring the communications by the government. Restrictive interpretation of this provision is contrary to the interests of citizens and in order to satisfy the interests of the ruling government which has long violated the constitutional principle of the sovereignty of citizens,[12] according to which it should be their service, not their master. In addition to

11 The initiative was submitted by an attorney from Sveti Nikole, no doubt, close to the government, and the Public Prosecutor of the Republic of Macedonia announced the submission of such initiative. The Constitutional Court, to date of writing these lines, has not decided on the initiative.

12 Shkaric S .: Comparative and Macedonian Constitutional Law, Matica Makedonska, Skopje, 2004, p. 287-288.

this, comes the fact that the illegal recording of communications is made by the persons employed in the Security Counterinteligence Administration of the Ministry of Interior, which means by persons from the government and within the performance of their regular duties prescribed by the Law on Internal Affairs and the Regulations on Organization and Systematization of Jobs in the Ministry. Employees in the Ministry which submitted the recorded materials to the opposition SDSM, acted in accordance with Article 16, paragraph 3 of the Constitution that guarantees to the citizens of the Republic of Macedonia the freedom of access to information, receive and impart information, of course, having in mind the limitations related to information classified as state, official or business secret. In this particular case there is no question about such information. Unlawful acts everybody who unauthorized eavesdrops, but someone who informe others about the unauthorized eavesdropping by the first, acts legally because hi does his civic duty.

Given the fact that in this case the question is about recorded telephone conversations and their transcripts, their application as proves is possible after it will be commited by necessary expertise on the authenticity of the voice, of course, combined with other provided evidence, they are available.

Natural interests of the citizens is the government to provide them higher personal and social standard. That means a high rate of employment, income that will enable them to live a life that suits human dignity, higher pensions, income from social protection which will enable them to satisfy their natural human needs, much better health, education and other services etc.

Natural needs and interests of citizens have priority over the criminal interests of a group of, extremely alienated from them, members of the ruling government against whom criminal charges were filed for crimes about whose prosecution Special Prosecution was established.

THE SOCIAL ENVIRONMENT IN REPUBLIC OF MACEDONIA AND THE PERSPECTIVES OF SPECIAL PUBLIC PROSECUTION

The Special Public Prosecution is located in the turbulent environment that basically consists of a divided and confused public, mostly composed of an inactive and at bad conditions in society adapted citizens, ruling garnish composed of members of several political parties coalition led by VMRO-DPMNE and DUI (Democratic Union for Integration - Albanian party) from whose ranks are recruited people from the first and second echelon of government involved in the crime for which Special Prosecution is established and the opposition led by the Social Democratic Alliance which is most interested to prosecute the crime, and the crime perpetrators to be founded under hand of justice.

Opposition is supported by seventy civic associations (NGOs), which are also interested Special Prosecution to be provideed by conditions for undisturbed work against perpetrators of crimes for which it was established.

In addition, a significant factor in the environment represent a international community in whose name featured representatives from the European Commission, OSCE, ambassadors of major European countries - members of the European Union and the US ambassador. The embassies of European countries and of the US is particularly interested for the success of the Special Public Prosecutor, because the conversations of members of the diplomatic corps, accredited in Macedonia are eavesdropped.

No doubt the government is hostile to the Special Prosecution. Immediately, after the adoption, the Law on Special Public Prosecution came under attack of the ruling government and intellectuals who, for various, primarily personal interests, supported it. As already seen, they disputed its constitutionality and its applicability.

Much stronger blows suffered Special Public Prosecutor - the lawyer Katica Janeva who vas elected by the Council of Public Prosecutors, in September 15, 2015. Shortly after the election it was contested her expertise and professional experience. Come to the high and honorable duty from the Basic Public Prosecution in the small Macedonian town of Gevgelija, where she menages with Prosecution, she became the subject of assessments of many members of jurist, journalistic, political and other felli. Evaluations included a high degree of skepticism which was based primarily on the fact that she, in the provincial Public Prosecution, had not opportunity to gain experience in the prosecution of perpetrators of crimes of organized crime and crimes of power abuse and corruption.[13] Skepticism somewhat alleviated by the fact that she has completed several training courses, including higher training to fight the mafia, corruption and organized crime in Italy. In 2013, she was on a study tour in the US on training for law on criminal procedure. As a member of the administrative bodies of the Association of Public Prosecutors she participated in several activities, including the preparation of the Law on Public Prosecution. In 2014. Her project entitled "Alternatives to prison condemned, community service and other measures" was accepted by the US Embassy in Skopje. She was a lecturer at the Academy of Judges and Prosecutors in Skopje, where she lectures Criminal Material Law and Criminal Procedural Law. But, the notorious fact is that in such cases, management skills are decisive. The lack of professional skills from the field of professional experience can be compensated by embedding the team of people who possess such experience. There is no doubt that in the team of the Special Public Prosecutor, there are such persons.

After forming a team of Special Public Prosecution followed the first obstruction of its work by the government. It is a notorious fact that the Special Public Prosecution must be completed with the necessary administrative and technical staff who are organized in the prosecutorial service. Special Public Prosecutor has long sought to pass a law for, on the base of it, such service to be formed. Parliament, whose absolute majority is consisted by a members from the ruling parties, has long kept postponing the enactment of that law.[14]

The government reluctantly, with numerous tension and with some delay, accepted the proposal of the budget of the Special Prosecution for Budget 2016.

Council of Public Prosecutors tried to call the Special Public Prosecutor Janeva on responsibility because it is not done a data proceedings when recorded materials from the opposition were handed to the Prosecution, which is a direct interference in the work of the government in its work.

On January 24, 2016, at the annual conference of the Union of Women of VMRO-DPMNE, party leader Nikola Gruevski, fiercely attacked the special public prosecutor Katica Janeva,[15] after which she had to turn to the Ministry of Interior requesting enhanced security her and her co-workers by the police due to the high risk to life and personal integrity.

The propaganda machinery of government, comprised of more than 80% of the media in the country, bitterly attacked the Prosecution and the Special Prosecutor Janeva with numer-

13 The competence of the Public Prosecutor's Office in Gevgelija covers prosecution of minor criminal offenses that entail imprisonment of up to ten years.
14 The law was finally adopted on 30 December 2015, almost two months after stalling by Parliament.
15 Gruevski attacking the opposition and its leader said "no politician in a long time will not fall to the memory of trying to come to power by massive fraud, in cooperation with foreign intelligence services, in collaboration with the criminals, counterfeiters, the mummer, with Vanhoyters (Van Hoyt is representative of the European Commission and facilitator of negotiations between the government and the opposition - TR), Katicas and sellers of fog ... "(www.meta.mk of 25. 01. 2016).

ous accusation for alleged, biased and unprofessional work. The Prosecution therefore had to issue a statement to the public.[16]

The cooperation between the Special Prosecution and organs of administration, courts and Public Prosecution of the Republic of Macedonia (which are under governmental control) is difficult.[17]

The opposition led by the SDSM, gives a strong support to the Special Prosecution. It is coupled with the support of the citizens' associations and by the international community. But, given the high degree of control over social institutions established by the executive power, it seems that their support is not sufficient to achieve unobstructed functioning of the Prosecution.

The Special Public Prosecution, in this environment wolud have difficult days to early parliamentary elections scheduled in June, 2016.

It is expected early parliamentary elections to make changes in the environment. An important role for these changes can play the Special Public Prosecution if it would begin to process the cases for the prosecution of crimes perpetrators of power abuse. From the materials of illegal eavesdropping published to the the Macedonian public by SDSM within the project "The Truth About Macedonia" can be seen that there are grounds of suspicion of numerous serious crimes committed by senior government officials headed by former prime minister Gruevski. In case of submission of accusatioons for existence of reasonable suspicion of committing such acts, it will hardly shake their reputation in the public and their political positions that, of course, will lead to the current ruling parties lose elections. In this case, with the newly established ruling garnish, the prosecution will get a stimulating environment. In such environment it would be able to carry out its legal obligations. This is, without doubt, the best variant of environment that will enable him to effectively procececutes all criminal cases from its cimpetence and the culprits get their deserved sanction. That in future wil have preventive impact for holders of high offices in government bodies not to get into crimes of abuse of power.

In connection with this statement encouraging acts the statement of ambassadors of the European Union and the United States accredited in Skopje given in their outreach to the public on 29 January this year which reads: "Reliable allegations of pressure and intimidation must be promptly and thoroughly investigated and there where appropriate, perpetrators to be prosecuted by the relevant authorities."

In conditions for Macedonia, an enormous number of public administration employees (about 180,000), who are mostly politicized and dependent on the government, a large number of pensioners (about 300,000) who are satisfied with modest, but regular pensions and that government easily bribes with modest increases in pensions of a ten euros per year, a number of semi-literate farmers whose average education is between six and seven completed primary school years, that the government also easy bribes with modest subsidies, many lumpenproleterized workers who are happy with the fact that they have some kind of work for a monthly salary of 150 to 200 euros, a significant number of poor and terrified citizens living on social assistance to them given by the government and, a number of lackeyized intellectuals, with strong and well planned, organized and conducted campaign in a fair and democtarically conducted elections, it may occur current ruling parties to win elections. Any

16 The statement, inter alia, states: "We appeal to all media and individuals to refrain from stating untruths about the work of this Public Prosecution and to refrain from its labeling and putting into operation for political gains. We stress that, as a professional institution, our sole focus is the fight against crime, and our mission is the implementation of justice and ensure equal treatment of all before the law "(www.plusinfo.mk from 29.01.2016).

17 The Court does not cooperate with the Special Prosecution, Focus, from January 15, 2016.

chance they to win an absolute majority in Parliament is excluded, because they realized that majority in the outgoing elections with enormous pressures, blackmail, threats, electoral falsifications. In this case the work of the Special Public Prosecution will be made more difficult because it will face numerous obstructions by the government. But its work can not be disabled because the key issues related to the work of the Special Prosecutor and his associates, the Parliament of the Republic and the Council of Prosecutors, decide by a two-third majority vote from the total number of members, wheraby must to obtain the consent of the four parties that have the largest number of members in the Parliament.

In case of such developments of events, it can not expect to be processed criminal cases against top government officials. Government, to show a some degree of democracy and the rule of law, will enable to process a number of criminal cases against persons of its lower echelons.

There is a possibility the opposition to boycott the elections, in case of untreated electoral register and failure to implement laws in public information for equal treatment of all participants in the election campaign, by the media. In such case, the government which has shown a high degree of arrogance, will conduct the elections without the participation of the opposition and, of course, the parties making up the current ruling parties will win an absolute majority in Parliament. In that case the fate of the Special Public Prosecution will be sealed. Government, as soon as possible, will order the Constitutional Court, upen whom she has complete control, to reverse the Law on Special Public Prosecution as unconstitutional and the Prosecution will be canceled. Criminals from the ranks of government will remain unpunished.

INSTEAD OF CONCLUSION

Taking into consideration the fact that in Macedonia there is the Public Prosecution for Organized Crime and Corruption, which is actually a kind of special Public Prosecution, Special Public Prosecution for prosecuting criminal offenses related from content and deriving from the illegal eavesdropping of communications, is a second specially prosecution in the public prosecutional system of the Republic. This prosecution, without suspicion, is intended to prosecute crimes of abuse of power. These crimes are mostly crimes of organized crime. This means that Special Public Prosecution is more specifically from the Public Prosecution for Prosecution of Criminal Acts of Organized Crime, ie that it is a kind of subspecial prosecution, which is a novelty in public prosecutional systems. Limited mandate of the Special Public Prosecution of five years from the adoption of the law for its establishment, despite the possibility of prolongation of its validity, gives to this public prosecution character of extraordinary public prosecution. That, no doubt, is the basis for claims of somes theorists and practitioners that it is unconstitutional institution. But, as we have seen, these allegations are unfounded.

There is no doubt that criminal abuse of power are the frequent occurrence, not only in Macedonia, but also in other countries. Those in Macedonia, perhaps reached a culmination, which necessitated the formation of this prosecution. But, considering the fact that the abuses of power by the current government are present in other countries, we mean that the macedonian experience should be followed and, if there is need, to be accepted.

As for the limited mandate of the Special Public Prosecution, we are at standpoint that it should be observed transformed in Public Prosecution for Prosecuting the Criminal of Abuse of Power, without restriction of the limitation of the mandate.

Taking into consideration that the perpetrators of crimes for whose prosecution the Special Public Prosecution has established, are persons from the ranks of the ruling government, for that government, apparently, not in the interests the Prosecution efficiently and effectively perform the task for which it was established. Therefore, the ruling government, from the outset, obstructed the implementation of the law for its formation. Obstruction started by denying the constitutionality of the law, by denying appropriateness of the formation of Prosecution and then by further ado the performance of obligations deriving from the Law. Thus, the Special Public Prosecutor was elected in the last hours of the deadline for his election, maximally kept postponing the election of the team of prosecutors in the prosecution, postponing the passing of Law on Public Prosecutor Office, as well as postponing in providing the necessary budgetary resources for the work of the Prosecution. The ruling government was not satisfied with that, so it launched a kind of harangue against the Special Public Prosecutor and his associates for alleged errors and omissions in their work. The harangue went so far as leader of the ruling party VMRO-DPMNE, in his speech at the annual conference of the Union of Women of his party, fiercely attacked the Special Public Prosecutor, treating her as an associate of the opposition.

Smear campaign took over and continued the pro-government media. Therefore, the Special Prosecution appealed to the public with an appeal for them to refrain from stating untruths about his work and to refrain from its labeling and putting into operation of political gains.

The ambassadors of European Union and the United States accredited in Skopje reacted by the diplomatic way with call to political leaders: "Not to attack public persons whose task is to create the conditions for credible elections ...."

Bearing this in mind, the Special Public Prosecution will have tough days to early parliamentary elections, scheduled in June, 2016.

The perspectives and possibilities of the Special Public Prosecution after June, 2016, depend on the election outcome.

The most favorable variant of social environment of the Special Prosecution after the elections in June 2016, would have occurred if the opposition wins. In this case for the Prosecution will be provided optimal conditions that will enable him to effectively process all criminal cases from its competence and the culprits get deserved sanction.

More unfavorable variation would occur, if the current ruling parties win elections. In this case, the work of the Special Public Prosecution will be made more difficult, because it will face numerous obstructions by the government. But, its work can not be disabled, because for the key issues related to its work the Parliament of the Republic and the Council of Prosecutors, decide by a two-third majority votes of the total number of members, and must to obtain the consent of the four parties that have the largest number in the Parliament.

In case the opposition decide to boycott the elections, the ruling government will secure an absolute majority in Parliament. The government as soon as possible will order the Constitutional Court over who it has complete control, to reverse the Law on Special Public Prosecution as unconstitutional. After that the Prosecution will be repealed.

REFERENCES

1. Announcement of Special Public Prosecutor (www.plusinfo.mk od 29.01.2016).
2. Constitution of the Republic of Macedonia ("Official Gazette of RM", number 51/92)
3. Criminal Code of the Republic of Macedonia ("Official Gazette of RM", number 37/96)

4. Fuler L.: The Morality of Law, Faculty of Law of University in Belgrade, 2011.
5. Gruevski N .: Speech at the Annual Conference of the Union of Women of VMRO DPMNE "(www.meta.mk of 25. 01. 2016).
6. Hayek F.: The Constitution of Liberty, Routledge, London and New York, 1999.
7. Kambovski V.: Organized crime, Skopje, 2005
8. Mitevski M .: System 2014, Skopje, 2015.
9. Law on Criminal Procedure ("Official Gazette of RM", number 150/10)
10. Law on Public Prosecution ("Official Gazette of RM", number 150/07)
11. Law on Public Prosecutor Office ("Official Gazette of RM", number 62/15)
12. Law on the Public Prosecution for Crimes Related and which Arise from the Content of the Illegal Eavesdropping of Communications ("Official Gazette of RM", number 159/15)
13. Report of the Expert Group of the European Commission (Report Priebe) www.vesti.mk)
14. Statement of the Special Public Prosecutor Katica Janeva, weekly Focus, from January 15, 2016.
15. Shkaric S .: Comparative and Macedonian constitutional law, Matica Makedonska, Skopje, 2004.
16. "The Truth about Macedonia" - www.sdsm.org.mk

UDC: 340.134:351.761.1(476)
343.572(476)

COMBATING CRIMES COMMITTED WHILE UNDER THE INFLUENCE OF ALCOHOL: THE REPUBLIC OF BELARUS

Ivan Fedchuk, PhD[1]
Sergei Dobriyan, PhD
Academy of the Ministry of the Interior of the Republic of Belarus

Abstract: The paper discusses the current state of the legal means of counteraction to offenses committed while intoxicated in Belarus. Analysis of the Belarusian legislation regulating the fight against offenses committed while intoxicated leads to the conclusion that at present the legal basis for combating this negative social phenomenon does exist. Results of the study suggest that in Belarus there is a comprehensive state anti-alcohol policy, the implementation of which has allowed significant reduction of the unregistered consumption of alcohol over the past decade, as well as lowering of the overall level of alcohol consumption. However, the overall level of alcohol consumption in the country continues to remain high, resulting in the need for further action within the framework of state anti-alcohol policy aimed at reducing the supply and demand for alcohol. This paper proposes measures aimed at decreasing the abuse of alcoholic products and the prevention of alcoholism among the population, as well as measures aimed at improving the legislation regulating the counteraction to offences committed while intoxicated.

Keywords: alcohol abuse, alcoholism, legislation, countering, regulation, prevention.

INTRODUCTION

Since the proclamation of the sovereignty, the Republic of Belarus has been faced with some of the negative demographic trends – population decline and aging. Lack of awareness of the value of life, indifference to health and ecological problems are at the heart of the complex demographic situation in Belarus. Trends in the development of the demographic situation in the country indicate that the problem of population stabilization and creation of prerequisites for subsequent growth remain sharp and require further regulation. As shown by forecast calculations, while maintaining the current level of birth rates and mortality, country's population could shrink by half within 50 years, i.e. Belarus may get to the point of no return, after which the negative demographic processes will become irreversible.

The high level of morbidity and mortality in Belarus is due, among others, to the abuse of alcohol and tobacco, and other unhealthy habits. The spectrum of the negative consequences of alcohol abuse and alcoholism is increasing every year. The detrimental impact of excessive alcohol consumption is evident in almost all spheres of human activity. Alcoholic beverages became a necessary component of everyday life, their use is becoming one of the integral parts of leisure activities. Growth in the number of alcohol consumers has a direct impact on the pace of development of the state, the condition of its intellectual and spiritual spheres, economic and military power.

1 E-mail: vanyafedchuk@yandex.ru.

In Belarus there is still a high level of alcohol sales per capita, the level of consumption looks even more menacing. Alcoholism is one of the most common causes of child abandonment and the deprivation of parental rights. Inmates of orphanages are often showing signs of foetal alcohol syndrome. High levels of alcohol abuse lead to an upward trend in the number of divorces and "rejuvenation" of alcoholism. A significant amount of adolescents consumes alcoholic products. Early initiation of children and young people into alcohol increases several times the risk of alcoholism and violent death in the future. Studies show that drinking alcoholic beverages by teenagers reduces their intellectual abilities, impairs brain function, and affects the academic performance. Young drinkers cause damage not only to their education, but to their careers, professional future, and the whole national economy.

The ongoing alcohol intoxication of population is directly related to the criminogenic situation. One crime out of four in Belarus is committed in a state of intoxication, and this proportion is going up to 70-80% for murders, intentional infliction of grievous bodily harm, robbery, armed assaults, vandalism. Consumption of alcohol is the root of the absolute majority of cases of violence in the family.

Direct and indirect economic losses due to alcohol abuse cause significant damage to the social and economic development of the country. The economic losses include increased mortality, reduction in the duration of healthy life, disability, decline in labour productivity, costs of treatment of diseases associated with the consumption of alcoholic beverages, state social benefits to disabled and orphans, damage from fires, traffic accidents, government spending on the maintenance of the prisoners, the fight against crime and homelessness.

Abuse of alcohol products causes particularly high mortality among men of 40-60 years old, which at this age have the most valuable professional skills. Their premature death damages the professional workforce, reduces the amount of investment in human capital.

Official statistics show that the proportion of people suffering from alcoholism, in the country is gradually decreasing[2]. However, from our point of view, this kind of data should be treated with a certain degree of conditionality, as these figures reflect only the number of people who are registered. The actual number of alcoholics and those suffering from problems associated with alcohol abuse, is much greater. After all, next to the chronically drinking person are his/her relatives (spouses, children, parents). They also live with the problem and, according to experts, they are not only victims of the disease of their loved ones, but also passive alcoholics or co-dependent. Co-dependency is characterized by justifying the position in relation to a person suffering from addiction, and reflects a strong absorption, a high degree of dependence on another person while reducing self-care.

Thus, alcohol abuse is one of the reasons for the rapid accumulation of demographic and social problems in Belarus since the mid-1960s, a nationwide threat to the individual, society, to the state and, therefore, a threat to the national security.

The world practice is based on the priority role of public authorities in the field of health and social protection of the population in the development of a unified state policy in the sphere of production, trafficking and consumption of alcohol (state alcohol policy).

By now, considerable experience allowed us to determine what steps the state alcohol policy can make in order to effectively reduce the burden of the heavy alcohol damage and adequately use the economic potential of the market of alcoholic beverages in the national interest. It is clear that raising measures alone cannot solve the problem of alcohol abuse, as well as efforts aimed at the treatment of alcohol dependence.

2 Статистический ежегодник Республики Беларусь : 2015 / редкол.: И.В. Медведева [и др.]. – Минск, 2015. – 524 с. – С. 188.

State alcohol policy should be aimed primarily at the protection of national interests, life and health of the citizens, social stability, and not on the protection and promotion of private business interests.

In Belarus, the production and turnover of alcohol and alcohol products is regulated by the Law of the Republic of Belarus of 27 August, 2008, № 429-3: "On state regulation production and turnover of alcohol, non-food alcohol containing products and non-food ethyl alcohol."

World's standard is that the Ministry of Health and the parliamentary committees on health that are able to objectively assess the situation, should prevent damage, effectively use revenue from alcohol, solve social problems, and act as key regulators of the market of alcoholic beverages. In Belarus, economic and agricultural departments and committees, which are traditionally more prone to the alcohol industry lobbying, are involved in the alcohol regulation. The currently existing high human and socio-economic costs of alcohol abuse are largely attributable to the actions of the alcohol industry lobby, dictated by the desire for super-profits, large-scale criminalization of the production of ethyl alcohol and spirits, and the emergence of transnational alcohol business in the country[3].

In Belarus, at the state level, a lot of attention is paid to the development of measures to combat offences committed while intoxicated. The government is taking a considerable number of measures to prevent and combat this negative social phenomenon: improving the normative legal base in the field of state regulation production and turnover of alcohol products, prevention and treatment of alcoholism (including minors); monitoring the implementation of the legislation, protection of economic interests of the state in the production and sale of alcoholic beverages; the Ministry of Internal Affairs is taking organizational and practical measures aimed at maintaining public order, reducing criminal acts committed in a state of intoxication. And it is not a complete list of activities undertaken by the state to prevent and overcome alcohol abuse and alcoholism, and offences committed while intoxicated.

The success of combating crime depends primarily on the eradication of alcoholism's success. Therefore, internal affairs agencies, considering their task of the crime prevention, are also forced to focus on alcoholism prevention, and neutralization of its harmful effects.

In the alcoholism prevention, it is of paramount importance to raise intolerance among the population to its manifestations based on the awareness of the social danger of alcoholism, understanding of the harm that it causes to social and family relationships, production, public health.

In practical work with people with alcohol abuse problem, the following forms of individual prevention are used:

1. The preventive conversation, in accordance with the Article 24 of the Law of the Republic of Belarus of 01/04/2014 № 122-3, "On the principles of activities on crime prevention", is used, as a rule, at the stage of early alcoholism prevention in respect of persons who, despite the antisocial lifestyle, did not have chronic alcoholism yet. The content and form of the conversation is determined by taking into account the individual psychological characteristics of the individual and his/her behaviour. If possible, the conversation should be held in the presence of family members, relatives, physician-psychiatrist.

2. The official warning. In accordance with the Article 26 of the Act of the Republic of Belarus of 01/04/2014 № 122-3 "On the principles of crime prevention activities", the official warning is issued to a citizen who was brought to an administrative responsibility second time

3 Злоупотребление алкоголем в Российской Федерации: социально-экономические последствия и меры противодействия : доклад : утв. Советом Общест. палаты Рос. Федерации 13 мая 2009 г. – М., 2009. – С. 30.

during the year for an offence committed in a state of intoxication, caused by the consumption of alcohol, drugs, psychotropic substances, toxic or other intoxicating substances.

3. The preventive registration. In accordance with Article 28 of the Act of the Republic of Belarus of 01/04/2014 № 122-3 "On the principles of crime prevention activities", the preventative registration is performed over a citizen who was brought to an administrative responsibility for an offence committed in a state of intoxication, caused by the consumption of alcohol, drugs, psychotropic substances, toxic or other intoxicating substances, during one year after an official warning for an offence committed in a state of intoxication, caused by the consumption of alcohol, drugs, psychotropic substances, toxic or other intoxicating substances.

In combating crimes committed while intoxicated, legal sanctions such as placement in a specialized detention facility, limitation in capacity, referral to activity therapy centres, are also applied.

An effective measure of preventing and combating offences committed while intoxicated, is to place individuals who have committed them in specialized detention centres. This is done when administrative detention is applied for appearing in a public place in a drunken state that offend human dignity and morality, as well as for committing administrative offences while intoxicated, for which an administrative penalty in the form of administrative arrest to sober up may be imposed.

The Article 30 of the Civil Code stipulates the possibility of limiting the competence of a citizen, who, as a result of alcohol or drug abuse, puts the family in a difficult financial situation. This civil and legal measure to combat alcoholism is not new, but with proper organization of work, in combination with other methods of influence on people who abuse alcohol, it is quite effective.

It is of particular importance to promptly identify the situations where there is a need to limit the competence. To do so, the information contained in the criminal and civil cases, and appeals of citizens, are used. The role of police inspectors in identifying families in which one spouse is abusing alcohol is also important.

Family members of people who abuse alcohol are explained their rights and the procedure to appeal to the court with the petition of legal capacity limit and legal consequences of court decision for applicants and persons recognized as a capacity limited. When the relatives do not wish to apply personally, the issue should be initiated by the prosecutor. Experience shows that positive results in the fight against alcoholism are achieved mainly where this work is being done comprehensively, consistently and purposefully[4].

According to the Article 375 of the Civil Procedure Code of the Republic of Belarus and the Article 150 of the Family Code, the Court shall inform the guardianship authority of the place of residence of the person to be placed under guardianship within three days from the date of entry into force of the decision on recognition of the person partially incompetent. In accordance with the Article 151 Part 1 of the Family Code, the trustee shall be appointed within one month from the date when the guardianship authorities became aware of the necessity to establish guardianship and custody.

For the purposes of compulsory isolation and medical and social rehabilitation with compulsory labour of citizens, patients with chronic alcoholism, drug or toxic addictions, and citizens obligated to reimburse the costs incurred by the State on the maintenance of children in public care in the event of systematic violations of labour discipline due to their consumption of alcohol and drugs, there are 9 medical labour dispensaries in Belarus.

4 Лях, Г. Ограничение дееспособности – эффективная мера борьбы с пьянством / Г. Лях // Законность и правопорядок. – 2007. – № 2. – С. 29–30.

The legislation of the Republic of Belarus on the placement of individuals in the medical labour dispensaries consists of the Law of the Republic of Belarus of 4 January 4 2010, № 104-3 "On procedure and conditions of medical labour dispensaries' placement", normative legal acts of the President of the Republic of Belarus, the Internal Regulations of medical-labour dispensaries, approved by the Ministry of Internal Affairs in coordination with the Ministry of Health and other legislative acts.

The medical labour dispensary is an organization – part of the system of internal affairs agencies of the Republic of Belarus – created for the compulsory isolation and medical and social rehabilitation with compulsory labour of citizens, patients with chronic alcoholism, drug or toxic addictions, and citizens obligated to reimburse the costs incurred by the State on the maintenance of children in public care in the event of systematic violations of labour discipline due to their consumption of alcohol, drugs, toxic or other intoxicating substances.

Thus, the objectives of the dispensary placement are:

- compulsory isolation;
- medical and social rehabilitation with compulsory labour.

According to the paragraph 93 of the medical-labour dispensaries' Internal Regulations approved by the Resolution of the Ministry of Interior of the Republic of Belarus, on 9 October 2007, providing treatment of persons from alcoholism and drug addiction is carried out in the manner prescribed by the law. According to the law, the treatment of patients with alcoholism is based on their voluntary consent, as indicated in the Law of the Republic of Belarus of 7 January 2012, № 349-3 "On the provision of mental health care". Only the Court of Justice can take the decision on the compulsory treatment from alcoholism by applying coercive measures of security and treatment on the grounds stipulated by the Criminal Code of the Republic of Belarus.

The medical and social rehabilitation is a restrictive measure, carried out in accordance with the "Law on procedure and conditions of medical labour dispensaries placement", Internal Regulations of the medical-labour dispensaries of the Ministry of Internal Affairs of the Republic of Belarus and other legislative acts of the Republic of Belarus regarding citizens who are in therapy centres, aimed at overcoming their alcohol, drug or toxic addiction, preparing them for the normal social life.

The forced isolation is a restrictive measure, concerning citizens who are in medical-labour dispensaries, in accordance with the "Law on procedure and conditions of medical labour dispensaries placement", Internal Regulations of the medical-labour dispensaries of the Ministry of Internal Affairs of the Republic of Belarus and other legislative acts of the Republic of Belarus.

Individuals who should be placed to the medical-labour dispensaries are as follows:

citizens with chronic alcoholism, drug or toxic addiction, who for three or more times during the year have been brought to justice for administrative offences while intoxicated or in a condition caused by the consumption of narcotic drugs, psychotropic substances, their analogues, toxic or other intoxicating substances, have been warned in accordance with the Law on the possibility of placement into the medical and labour dispensaries, and within a year after this warning, have been brought to justice for administrative offenses while intoxicated or in a condition caused by the consumption of narcotic drugs, psychotropic substances, their analogues, toxic or other intoxicating substances;

citizens, obliged to reimburse the costs incurred by the State for the maintenance of children in public care in the event of systematic violations of labour discipline caused by their the consumption of narcotic drugs, psychotropic substances, their analogues, toxic or other intoxicating substances.

The medical-labour dispensaries primarily are for chronic alcoholics who:

- have been convicted;
- have committed domestic offences;

are, in accordance with the Presidential Decree of 24/11/2006 № 18, liable persons due to their systematic violations of labour discipline caused by their the consumption of narcotic drugs, psychotropic substances, their analogues, toxic or other intoxicating substances.

Individuals who cannot be sent to the medical and labour dispensaries are as follows:

- minors;
- men over the age of sixty;
- women over the age of fifty-five;
- pregnant women;
- women with children under the age of one;
- disabled (I and II groups);
- citizens with diseases incompatible with their placement into dispensaries.

The list of diseases incompatible with the placement into dispensaries is approved by the Ministry of Health of the Republic of Belarus.

Cases of placement on compulsory treatment from alcoholism into medical-labour dispensaries are discussed in a special procedure in accordance with the Article 393^{9}-393^{12} of the Civil Procedure Code, providing the procedure for considering cases of involuntary admission and treatment of citizens. The internal affairs agencies are the applicants of this category of cases according to the current judicial practice. In some cases, the application to initiate proceedings in the interests of district police department are filed be the prosecutor. In accordance with the Part 1 of the Article 362 of the Civil Procedure Code, the cases of special proceedings are heard by the courts according to the rules of the lawsuit proceedings.

When developing new and improving existing measures for preventing offences committed in an intoxicated state, it is necessary to take into account the existing problems in law enforcement. For example, illegal trafficking of alcohol-containing, alcohol and tobacco products continues to be the problem these past few years. This is evidenced by a significant seizure of illicit trafficking of these products in recent years.

Over the past five years the growth of the total number of alcohol products seized by the law enforcement agencies from illegal turnover has become clearly visible. A special feature of the dynamics of changes in the last five years is the gradual decrease in the amount of high-proof distilled spirits seized by the law enforcement agencies. This trend should be interpreted not as a decrease in activity of the law enforcement agencies combating illicit alcohol trafficking, but as a reduction of turnover, of production and consumption of illicitly produced high-proof distilled spirits in particular. Partly, this decline is due to a change of tactics of the individuals involved in its production. So if in previous years the vast majority of illegal distilling acts were revealed by the law enforcement officers in the forests, where it was produced on the mini-mills, now more than 70% of cases are detected in private houses and buildings.

In recent years, the amount of alcoholic products seized by the customs authorities of the Republic of Belarus smuggled into the territory of the Customs Union has increased significantly. The law enforcement authorities are implementing a set of practical measures aimed at combating the illicit trafficking of alcohol products. During 2014 and 2015, due to a rise in price of alcoholic products in the trading network of the Republic, there was an increase of the alcohol smuggling from the Russian Federation to the Belarusian territory for its further illegal sale to the public. A significant devaluation of the rouble in the Russian Federation in

the second half of the last year has aggravated the situation in the shadow alcohol market in Belarus. The low cost of alcohol and alcoholic products in the Russian Federation led to their massive importation to the Republic of Belarus for the further illegal sale to the public. It should be noted that the imported alcoholic beverages are falsified and have never been in the legal turnover in Russia (Russian excise stamps are faked).

Falsified (unregistered) alcoholic products include alcoholic beverages, which are not produced by state enterprises and are therefore not reflected in the official statistics of sales. Since the production and distribution of unregistered alcohol are not controlled by the state, it is, first, not taxable and, secondly, does not undergo the quality control. This is followed by two important points: 1) an unregistered alcohol is much cheaper, allowing it to compete successfully on the market of alcoholic beverages, 2) an unregistered alcohol often does not correspond to quality standards and contains contaminants harmful to the health of consumers. Surrogates are a group of different chemical composition of liquids that are consumed for the purpose of intoxication, instead of licensed alcohol. The genuine surrogates are liquids made on the basis of ethyl alcohol (industrial alcohol of varying purity, denatured alcohol, polish, cologne, aftershave, alcohol-based medicines). The false surrogates include liquids which do not contain ethanol but cause psychotropic effects similar to intoxication (methanol, propanol, butanol, amyl alcohol, ethylene glycol). Illegal alcohol production also includes a counterfeit alcohol, which is produced under a foreign trademark in violation of property rights[5].

The study showed that the main sources of the counterfeit alcohol products are: 1) legally or illegally home-made alcohol, 2) imported alcohol, including legally imported alcohol for personal use, as well as smuggled alcohol.

The legislation of the Republic of Belarus regulating the procedure of placement into medical labour dispensaries has some gaps that do not allow proper regulating of social relations considered.

Thus, the Article 107 of the Criminal Code (use of coercive measures of security and treatment of individuals suffering from chronic alcoholism, drug addiction or substance abuse) is not applicable to the categories of citizens who committed crimes while intoxicated and fall under the "Law on Amnesty" at the pre-trial stage, as they are exempt from criminal responsibility before the court decision, so that the treatment does not take place at the penitentiaries. At the same time, it is impossible to consider this fact as a reason for the placement of individuals into the medical labour dispensaries, because the Law of the Republic of Belarus of 4 January 2010, № 104-3 "On procedure and conditions of medical labour dispensaries placement" (in its version of 15 July 2015, № 294-3) points out that it cannot be applied to citizens who have committed a crime.

Especially important is the absence of a mechanism for the implementation of the Article 107 of the Criminal Code in respect of individuals who committed crimes while intoxicated, with assignment of a punishment without their direction to the places of detention and restriction on freedom. There is no legal and other, fixed on the legislative level, order of execution of the Article 107 of the Criminal Code of the Republic of Belarus. This fact minimizes the regulatory impact of the corrective measure for those who committed a crime in a state of intoxication. For example, a person who was convicted according to the Article 107 of the Criminal Code, without placing him/her to the prison, is taken to the medical-labour dispensary on a general order, which excludes the timely usage of legal measures that can lead to recidivism. Placing of such person into the medical-labour dispensary in a special order, by the analogy as it is done with obligated persons, would increase the preventive effect and help prevent the possible negative social consequences of the offences committed while intoxicated.

5 Разводовский, Ю.Е. Алкогольная политика в Республике Беларусь на современном этапе / Ю.Е. Разводовский // Вопр. орг. и информатизации здравоохранения. – 2011. – № 3. – С. 40.

Legislative response measures are not fixed in respect of persons who commit administrative offences while intoxicated, and are not suitable for the placement into the medical labour dispensaries due to their age or state of health.

Results of the study suggest that there is a comprehensive state alcohol policy in Belarus, the implementation of which over the past decade has allowed significant reducing of unregistered consumption of alcohol, as well as slight lowering of the overall level of alcohol consumption. However, the overall level of alcohol consumption in the country continues to remain high, determining the need for further action within the framework of state alcohol policy aimed at reducing the demand for alcohol and the decline in supply.

In order to reduce the alcohol abuse and to prevent alcoholism among the population, the following measures are needed:

1. high availability of treatment and prevention programs targeted at families;

2. improvement and development of the organization of medical assistance to abusers of alcohol and patients with alcoholism;

3. creation of rehabilitation and psychological centres for the prevention of alcoholism including training centres for psychologists, to work with the population, especially young people;

4. development and implementation of alcohol policies at the working place, based on education, prevention, early detection and treatment of alcohol dependence;

5. implementation of pricing policies, ensuring the price for an alcoholic product is based on its content of ethyl alcohol;

6. development and adoption of technical regulations on the safety requirements for non-food alcohol containing products;

7. reducing the availability of alcoholic beverages by limiting their retail sales by time and place;

8. restriction (up to a total ban) of a hidden advertising of alcoholic beverages, particularly attracting the attention of children and young people;

9. ban on the use of information on the availability of biologically active substances, including vitamins, in alcoholic beverages in order to advertise products such as having medical and other healing properties;

10. limitation of the events aimed at promoting the consumption of alcoholic beverages, including wine, beer festivals and competitions;

11. creation of conditions for the development of original alcoholic products and the continuous improvement of their quality in order to build a culture of alcohol consumption;

12. strengthening of the administrative responsibility for violations in the field of production and turnover of alcohol products, including restrictions on the retail sale of alcoholic beverages to minors, as well as criminal liability for repeatedly committing these acts;

13. development and implementation of measures to counter the realization of illegally produced alcohol products, to strengthen the state control over production and turnover of alcohol products;

14. adoption of measures to support social and religious organizations in promoting and implementing initiatives aimed at combating the abuse of alcoholic beverages;

15. improving the monitoring of alcohol consumption and evaluation of the implementation of public policies to reduce the abuse of alcoholic beverages.

An inventory of legislation, governing the counteraction to offences committed while intoxicated, demonstrates the need of improvement in the following areas:

1. focus on the tightening of liability for acts related to illicit alcohol production;

2. tightening of liability for selling alcoholic beverages by individuals, including the self-made; differentiated responsibility for the repetition of the same offence, which indicates a greater degree of social harm of the act, because after the imposition of administrative sanctions for the first time the goal of preventing this person from further committing administrative violations has not been achieved;

3. consolidation at the legislative level of the mechanism for implementation of the Article 107 of the Criminal Code in respect of persons to whom the amnesty act was applied at a pre-trial stage, as well as individuals sentenced without direction to places of deprivation or restriction of liberty, to whom the Article 107 of the Criminal Code was applied, but who continued to commit administrative violations in the state of alcoholic intoxication;

4. introduction of coercive measures of treatment for the individuals suffering from chronic alcoholism, drug addiction or substance abuse, who systematically commit administrative offences while intoxicated.

REFERENCES

1. Злоупотребление алкоголем в Российской Федерации: социально-экономические последствия и меры противодействия : доклад : утв. Советом Общест. палаты Рос. Федерации 13 мая 2009 г. – М., 2009. – 80 с.

2. Лях, Г. Ограничение дееспособности – эффективная мера борьбы с пьянством / Г. Лях // Законность и правопорядок. – 2007. – № 2. – С. 29–30.

3. Разводовский, Ю.Е. Алкогольная политика в Республике Беларусь на современном этапе / Ю.Е. Разводовский // Вопр. орг. и информатизации здравоохранения. – 2011. – № 3. – С. 38–45.

4. Статистический ежегодник Республики Беларусь : 2015 / редкол.: И.В. Медведева [и др.]. – Минск, 2015. – 524 с.

UDC: 343.232(497.6)
343.241:343.221-053.6(497.6)

SANCTIONS FOR MINORS IN MINOR OFFENCE LEGISLATION OF THE REPUBLIC OF SRPSKA

Ljubinko Mitrovic, PhD[1]
Ombudsman for Human Rights of Bosnia and Herzegovina
Nikolina Grbic Pavlovic, PhD[2]
Police College, Banja Luka

Abstract: According to the new Law on Minor Offences of the Republic of Srpska[3], provisions on minor offenders, provisions on sanctions that may be imposed to minor offenders and provisions on minor offence procedure conducted against this category of perpetrators are special and have been systematized in a special chapter of the Law on Minor Offences of the Republic of Srpska (Chapter VI titled "Provisions against minors"). In this paper, the authors discuss all the provisions of this chapter, and point out to possible differences to the previously applicable provisions of minor offence legislation in the Republic of Srpska. The paper will also provide the statistical data for minor offences in the field of public peace and order carried out in the Republic of Srpska by minors in a period from 2009 to 2014.

Keywords: minor offences, sanctions, minor offence procedure, minors.

INTRODUCTORY REMARKS

Juvenile delinquency is a part of general crime, but as a socially negative phenomenon it can and should be the subject of a separate study. Numerous are causes of this phenomenon.[4] Juveniles are the most sensitive category of the human population, which are most severely affected by the crisis of a transition society, and therefore their reaction to this situation is reflected in their antisocial behaviour and them committing minor and criminal offences.

As a part of general crime, juvenile delinquency contains many elements of adult crimes, but due to a series of bio-psychological, sociological and legal features of young persons, juvenile crime has many specific features that put it aside from general crime in a separate category. These specificities refer to the extent, structure, and dynamics of the juvenile delinquency, as well as to the manner and tools used by society to react to this phenomenon.

---

1 E-mail: ljubinko58@gmail.com.
2, E-mail: nikolinagrbic@blic.net.
3 Law on Minor Offences of the Republic of Srpska ("Official Gazette of the Republic of Srpska", No. 63/14). Hereinafter: the Law.
4 For causes of juvenile delinquency see more: Matijević, Mile; Bujanović, Tamara: *Uzroci, uslovi i fenomen maloljetničke delinkvencije*, "Maloljetnička delinkvencija u Republici Srpskoj – stanje i perspektive suzbijanja, sprečavanja i sankcionisanja", zbornik radova, Visoka škola unutrašnjih poslova, Banja Luka, 2008, p. 61; English, H.: *Prevention of Juvenile Crime, Research and Methodology*, British Journal Criminology, July 1963; 4, pp. 6873; Edward P. Mulvey, Michael W. Arthur, & N. Dickon Reppucci: *The Prevention of Juvenile Delinquency: A Review of the Research, The Prevention Researcher*, Volume 4, Number 2, 1997, pp. 1–4.

Juvenile delinquency includes a wide range of different types of behaviour of juveniles – from those referring to their maladjusted behaviour to the ones prescribed by criminal legislation. Due to complexity of this phenomenon, there are different understandings of the concept of juvenile delinquency. Nevertheless, predominant are two of them – a broad one and a narrow one. The first, broad understanding extends the concept of juvenile delinquency to the types of behaviour of young people, which can be understood as social maladjustment in the broadest sense of the word (those are types of the behaviour that are inconsistent with normal or prescribed forms of behaviour in a society). The second, narrow understanding includes only those types of behaviour that are criminalized under existing criminal laws of individual countries.[5]

The concept of juvenile delinquency in this paper will refer to the behaviour of juveniles in relation to offences of public order and peace, according to the legislation of the Republic of Srpska.[6]

THE STRUCTURE AND DYNAMICS OF THE REPORTED MINOR OFFENCES OF JUVENILES (2009–2014)

Given the fact that almost all minor offences committed by juveniles are public-order-and-peace-related, this paper analyses the participation of juveniles in minor offences against public peace and order, based on the official statistics of the Ministry of the Interior of the Republic of Srpska for a period from 2009 to 2014. Statistical data in tables are presented for the purpose of this study.

Table 1: *Public law and order – Data on minor offenses from 2009 to 2014*

Number	Public law and order	Year						Total (2009–2014)
		2009	2010	2011	2012	2013	2014	
1.	Number of minor offences	5574	4994	10719	9841	8755	7255	47138
2.	Requests to initiate a minor offence procedure	3392	3108	2931	3127	2553	2478	17589
3.	Minor offence warrants	4523	4671	5424	4474	4463	3257	26812
4.	Reported persons – total	5416	4993	10314	9411	8562	7173	45869
5.	Reported juvenile offenders	351	320	353	302	308	219	1853
6.	Reported juvenile offenders %	6,48	6,40	3,42	3,20	3,59	3,09	4,04

Table 1. presents data on committed minor offences in the field of public peace and order for the period from 2009 to 2014 in the Republic of Srpska. Public peace and order, in terms of the Law on Public Order and Peace, is defined as "a harmonized environment of mutual relations among citizens resulting from their behaviour in a public place and from the work of bodies and services in public life, in order to ensure equal conditions for the exercise of citizens' rights to personal security, peace and serenity, privacy, freedom of movement, protection of human dignity and rights of minors and other persons".[7]

5 Mitrović, Ljubinko: *Komentar Zakona o prekršajima Republike Srpske*, PPGP "Comesgrafika" d.o.o, Banja Luka, 2006, p. 41.

6 There is no specific law relating to offences committed by juveniles in the minor offence legislation of the Republic of Srpska, but the provisions related to juvenile offenders are made a part of the Law on Minor Offences.

7 For more on public order and peace see: Mitrović, Ljubinko: *Policijsko pravo – pravo unutrašnjih poslova*, Defendologija centar za bezbjednosna, sociološka i kriminološka istraživanja, Banja Luka, 2008.

The data on public order and peace for the last five years show that the number of juveniles reported to have committed minor offences in the field of public order and peace has been decreasing. In 2009, juveniles accounted for 6.48% of total number of reported persons for minor offences, while that number was significantly lower in 2014 and accounted for 3.09%.

Although there has been a decrease in juveniles taking part in committing minor offences, it is considered that the total number of juveniles committing offences of public order and peace and their participation in disturbing public order and peace deserves an adequate and increased attention, not only of the police, but also of the other relevant structures of a society. It is evident that the situation in this area is being stabilized, meaning that the smaller number of sanctioned minor offences is recorded and therefore a smaller number of people reported in total.

In addition to a decrease in the number of reported persons, as well as in the number of juveniles subjected to the minor offence procedure, a large difference between the number of reported persons and the number of juveniles subjected to the minor offence procedure can be noted, which is a significant result of the amendment of the minor offence legislation. The new Law on Minor Offences lays out that the only way to initiate a minor offence procedure against a juvenile is to file a request for initiation of minor offence procedure, while minor offence warrant, as another way to initiate minor offence procedure against a juvenile, is prohibited.

THE POSITION OF JUVENILE OFFENDERS

Since the creation of the Republic of Srpska, the Republic of Srpska's minor offence legislation has been based on the specificities of juveniles and sets out their position in a special way. According to the Law on Minor Offences of the Republic of Srpska, the provisions of minor offence sanctions imposed to juvenile offenders, as well as the provisions on minor offence procedure against juveniles, are special and systematized in a separate chapter of this Law, derogating the provisions of the General Part of the Law on Minor Offences.[8] That is why the provisions of the General Part of the Law apply to juveniles only if they are not in contradiction with the provisions of the chapter relating to juvenile offenders.

Minor offence liability of a person assumes that minor offence sanctions are imposed against him/her. Minor offence liability, as a special type of legal liability, is a responsibility of a person to fulfil their obligations prescribed by legal norm or otherwise, to suffer the consequences (legal sanctions) due to their behaviour which is not in accordance with legal norms. Juveniles from 14 to 18 are subject to minor offence liability.

A juvenile under the age of 14 cannot be subjected to the minor offence procedure. The novelty in comparison to the previous legal provisions is that if a juvenile under the age of 14 commits a minor offence due to a lack of mandatory control by his/her legal representatives who were able to carry out such control, the legal representatives will be punished for the offence committed as if they did it by themselves.

Minor offences committed by juveniles, as a rule, are not the result of a mature thinking and strong will for the execution of a minor offence. Therefore, their guilt and accountability are manifested in a special form, different from the accountability and culpability of adults.

8 Mitrović, Ljubinko; Grbić, Nikolina: *Prekršajne sankcije koje se izriču maloljetnim učiniocima prekršaja*, Maloljetnička delinkvencija kao oblik društveno neprihvatljivog ponašanja – Zbornik radova, Visoka škola unutrašnjih poslova, Banja Luka, 19-20 November 2008, p. 319.

THE CHARACTERISTICS OF MINOR OFFENCE PROCEDURE AGAINST JUVENILES

Minor offence procedure against juveniles can be initiated only by filing a request to initiate a minor offence procedure. Issuing a minor offence warrant, as a way to initiate a minor offence procedure against a juvenile, is not possible.[9] Minor offence procedure can be carried out only against a person and only for the offences which have been indicated by the authorized body in a request for initiation of minor offence procedure, since the court does not carry out minor offence procedures *ex officio*.[10] When undertaking minor offence actions against a juvenile offender in his/her presence, especially when he/she is being interviewed, persons participating in the procedure are obliged to act cautiously. Therefore, the procedure against juveniles is a special minor offence procedure characterized by a number of specific features. There is no specific minor offence authority that would be competent to carry out procedures against juveniles.[11]

The role of the guardianship is very important in procedures against juvenile offenders. The guardianship body is a specific entity of a minor offence procedure against juvenile offenders, which has very significant powers and procedural opportunities, and thus, by taking active participation, gives its full contribution to finding quality solutions. The rights of a guardianship body in minor offence procedures are exercised by the competent social welfare centres. Guardianship bodies, parents or guardians of juveniles have the following basic procedural rights in a minor offence procedure against a juvenile offender: to familiarize themselves with the course of a minor offence procedure, to make proposals in the course of the procedure and to point out to the facts and evidence relevant for the decision which would be the most suitable, under the given conditions.

The judge, conducting a minor offence procedure against a juvenile, needs to obtain data on juvenile's personality from a guardianship body and needs to invite a guardianship body to the oral hearing. The judge conducting a minor offence procedure is obliged to inform a guardianship body, parents or guardians that a minor offence procedure has been initiated against a juvenile offender. An appeal against the decision made in minor offence procedure against a juvenile offender finding a juvenile offender guilty of a minor offence, may be made by a guardian, brother, sister and foster parent of a juvenile, even if he/she is expressly against it.

Other features of a minor offence procedure against juveniles, being at the same time the specifics in comparison to an ordinary offense procedure, are:

- the principle of opportunity – the court may decide not to initiate a minor offence procedure against a juvenile, although there is evidence that he/she had committed the offence, if it considers that it would not be appropriate to conduct the procedure with regard to the nature of the offence and the circumstances under which the offence was committed, the previous life of a juvenile and his/her personal characteristics (Article 77 of the Law);

- special skills – all persons who officially participate in a minor offence procedure against juveniles must have special knowledge in the field of child rights and juvenile delinquency (Article 78 of the Law);

- the composition of the court – in the first instance procedure the decisions are made by

9 Mitrović, Ljubinko, *op. cit*., (footnote 4), p. 46.
10 Ćurković, Slaviša: *Komentar Zakona o prekršajima Republike Srpske*, ART print d.o.o, Banja Luka, 2007, p. 58.
11 Grbić, Nikolina: *Maloljetnici u prekršajnom postupku na području grada Banje Luke*, časopis Bezbjednost, policija, građani Ministarstva unutrašnjih poslova Republike Srpske, No. 2/06, p. 837.

a single judge, while in the second instance procedure, the decisions are made by a panel of judges composed of three judges (at least one must have special knowledge and judges of the panel must be of different sexes) (Article 79 of the Law);

- prohibition of trial in absentia – a juvenile may not be tried in absentia (Article 80 of the Law);

- obligation to testify – no one can be exempted from the duty to testify in procedures against juveniles, except for a religious official and defence attorney (Article 81 of the Law);

- separation and merging of a minor offence procedure – when a juvenile committed a minor offence together with an adult, the procedure against him/her will be separated from the procedure against an adult and conducted under the provisions of the juvenile legislation; it can be conducted together with the procedure against adults, but according to the rules that apply to juveniles (Article 82 of the Act);

- the right of a guardianship body and legal representatives – the legal representatives and guardianship bodies must be informed on a procedure against a juvenile by the court (Article 83 of the Law);

- invocation of the juveniles and delivery of the decisions and pleadings – generally, juveniles are invocated via a legal representative, and they are brought by the judicial police in civilian clothes in a particularly unobtrusive manner (Article 84 of the Law);

- exclusion of the public – unlike a general minor offence procedure or a procedure against adult perpetrators of minor offences, procedures against juvenile offenders require for the public to be always excluded from the trial (Article 85 of the Law);

- obligation to urgency – the minor offence procedure against a juvenile offender is urgent, and, therefore, the trial judge has an obligation to act with urgency, quickly and efficiently and not to prolong the minor offence procedure; all agencies and institutions involved in the minor offence procedure against a juvenile offender are obliged to act urgently in order for the procedure to be completed as soon as possible (Article 86 of the Act).

POLICE WARNING

Another novelty of the new Law is the introduction of the measure of police warning. This was logical given the fact that the police warning has already being imposed on juvenile offenders of "minor" criminal offences. Namely, the police warning is imposed on a juvenile offender if he/she has committed an offence punishable by a fine of up to 300 BAM, if that is in accordance with the personal characteristics, conditions and environment in which a juvenile lives, and the circumstances and severity of the offence. The conditions that must be met in order for a police warning to be imposed on a juvenile are: the juvenile must confess the minor offence, the confession must be given freely and voluntarily, there must be sufficient evidence that the juvenile committed a minor offence and the juvenile must not be previously imposed a police warning or corrective measures in a minor offence procedure.

Police warning is imposed by police officers with special knowledge in the field of child rights and juvenile delinquency, with previously acquired social history of the guardianship body. When imposing a police warning, a juvenile is warned about a social unacceptability and harm of his/her behaviour, the consequences of such behaviour, as well as about the possibility of conducting a minor offence procedure against him/her and imposing sanctions in case of repeated commission of a minor offence.

The purpose of the police warning is to avoid a minor offence procedure against a juvenile, and to influence the proper development of the juvenile and strengthening of his/her personal responsibility not to make offences in the future. Records on imposed police warnings are kept by police authorities and cannot be used in any way that would harm the juvenile.

MINOR OFFENCE SANCTIONS

Earlier legislative provisions set out that juveniles could be imposed the following minor offence sanctions: fine, reprimand, probation and protective measures. In addition to these, minor offences were punishable by the following measures: confiscation of the proceeds, compensation of the damage, penalty points and deprivation of liberty for the collection of fines. In the new Law on Minor Offences, the system of sanctions for juveniles who commit a minor offence is prescribed by Articles 87 and 88 of the Law. Thus, a juvenile may be imposed corrective measures of warning or intensified supervision. Also, a minor, along with a corrective measure, may be imposed a protective measure (if it is necessary due to the nature of the offence).

Corrective measures are the basic type of minor offence sanctions imposed against juvenile offenders. Those are law-prescribed measures which ensure that protection of public order from committing minor offences is accomplished by correction and re-correction of juveniles. They are imposed by the court and include the restriction of offender's freedoms and rights.[12] Corrective measures are imposed only to the accountable juvenile offenders. Those are juvenile offenders who, at the time when the offence was committed, could have understood the significance of their actions and could have controlled their behaviour.

The significance of these special measures is to provide, as a priority, re-education/correction of a juvenile offender (i.e. socialization), with the smallest possible use of elements of coercion. Therefore, corrective measures have distinctively special-preventive function. By use of corrective measures one seeks to achieve, as a priority, the goals of special prevention, through the correction of juveniles and their rehabilitation.[13]

Corrective measures are specified in the Law, so there is no possibility of imposing other corrective measure to a juvenile offender.

According to Article 88 of the Law, the juvenile may be imposed the following corrective measures:

1. the measure of warning – the court reprimand, and

2. the measures of intensified supervision by: parents, adoptive parents or guardians and by the competent guardianship authority.

By imposing these corrective measures it is ensured that the requirements of modern minor offence and criminal science are fully taken into account, as well as the need to have a different way of punishment or sanctioning of juveniles for committed offences, having in mind the subjective nature of many circumstances relating to juveniles. In imposing a corrective measure to a juvenile offender, the court needs particularly to take into account the age of the juvenile, the degree of his/her mental development, his/her mental condition or psychological characteristics, motives and initiatives for committing the offence, the juvenile's affinities, the previous education of a juvenile, the environment and conditions under which

12 Dimitrijević, Predrag; Jovašević, Dragan: *Prekršajno pravo*, Javno preduzeće Službeni list SCG, Beograd, 2005, p. 128.
13 Mrvić-Petrović, Nataša; Mitrović, Ljubinko: *Prekršajno pravo*, Visoka škola unutrašnjih poslova, Banja Luka, 2007, p. 67.

he/she lived, family relations, severity of the offence, the previous punishments, as well as all other circumstances that influence the choice of corrective measures that will be used to the purpose of punishment in the best way.[14]

The corrective measures exclusively have educational and rehabilitative character and are used to make a positive impact on a juvenile offender in order for him/her not to make further offences in the future. The selection and use of corrective measures is conducted in cooperation with the parents or guardians of a juvenile offender and the social welfare authorities.[15]

Before imposing a corrective measure, the trial judge needs to obtain the opinion of the competent guardianship authority, which influences the choice of a minor offence sanction. The judge conducting a minor offence procedure is required to avoid unsuitable posture and utterances in a procedure, frivolity, inappropriate jokes, and excessive rigor against a juvenile offender. A special attention in the procedure against a juvenile offender should be paid to the level of mental development of a juvenile, his/her health condition, personal circumstances, his/her behaviour and preferences, personal and family circumstances, learning and behaviour in school, etc. When selecting the corrective measure, the judge conducting a minor offence procedure cooperates with parents or guardians of a juvenile offender.

The corrective measure called the court reprimand is specific and, as a rule, the mildest corrective measure, which implies imposing a reprimand to a juvenile offender, pointing out to the harmfulness of his/her actions[16], both to him/herself, and to the society, as well as presenting a juvenile offender to the fact that if he/she re-offends, a more severe corrective measures or minor offence sanctions may be imposed against him/her. The reprimand to a juvenile offender on behalf of the society is imposed by the court (the trial judge) in all those situations where it is not required to impose more severe corrective measures, especially when a minor offence was made recklessly or thoughtlessly. This measure is imposed in cases when such measure may affect the personality of a juvenile and his/her behaviour, and when it is not necessary to take more permanent corrective measures, and especially when it can be concluded based on the juvenile's attitude towards the offence and his/her willingness not to offend further that the corrective measures will achieve its purpose.

The intensified supervision by parents, adoptive parents or guardians is imposed by the court if these specified categories of persons have failed to take care of and exercise supervision of a juvenile but were able to take such care and exercise such supervision. When imposing this measure, the court may give necessary instructions and orders regarding the measures that these persons should undertake in order to educate juveniles, treat them or eliminate harmful impacts that juveniles may be exposed to. The competent guardianship authority, by the court order, checks if this measure is being implemented and provides assistance to the parents, adoptive parents or guardians. If the guardianship authority identifies that the measure is not implemented properly, it must notify the court. The measure may be implemented at least six months, but not longer than one year. The court may subsequently decide on the termination of the measure.

Intensified supervision of the competent guardianship authority is imposed if a parent, adoptive parent or guardian is not able to carry out intensified supervision. During the implementation of the measure, the juvenile remains with the people who take care of him/her, but the intensified supervision is exercised by a person determined by the competent guardianship authority. Taking care is mainly related to the education of juveniles, their employment, providing necessary medical treatment and the improvement of their life conditions. If the

14 Mitrović, Ljubinko, *op. cit*., (footnote 4), pp. 43–44.
15 Mitrović, Ljubinko; Grbić, Nikolina, *op. cit*., (footnote 7), p. 319.
16 Đorđević, Đorđe: *Prekršajno pravo*, treće izdanje, Kriminalističko-policijska akademija, Beograd, 2010, p. 68.

guardianship authority determines that a parent does not act on the instructions of this authority, it must notify the court. The measure may be implemented at least six months, but not longer than one year. The court may subsequently decide on the termination of the measure.

The guardianship authority of the permanent or temporary place of residence of a juvenile, at the time when the decision ordering the measure became enforceable, is in charge of the implementation of the corrective measure of intensified supervision. Upon receiving the executive decision, the guardianship authority identifies an official that will implement the measure and informs the court about it. Judges and court advisers monitor the implementation of the imposed corrective measure.

Records on imposed corrective measures are kept by the competent guardianship authorities. This information can be given only to the court, internal affairs authorities and guardianship bodies with respect to a minor offence procedure conducted against a person who has been imposed a corrective measure. The data on an imposed corrective measure are deleted after three years from the date when the measure was ended, and in any case when the recorded person reaches the age of 23.

REFERENCES

1. Ćurković, Slaviša: *Komentar Zakona o prekršajima Republike Srpske*, ART print d.o.o, Banja Luka.
2. Dimitrijević, Predrag; Jovašević, Dragan: *Prekršajno pravo*, Javno preduzeće Službeni list SCG, Beograd, 2005.
3. Đorđević, Đorđe: *Prekršajno pravo*, treće izdanje, Kriminalističko-policijska akademija, Beograd, 2010.
4. Edward P. Mulvey, Michael W. Arthur, & N. Dickon Reppucci: *The Prevention of Juvenile Delinquency: A Review of the Research, The Prevention Researcher*, Volume 4, Number 2, 1997.
5. English, H.: *Prevention of Juvenile Crime, Research and Methodology*, British Journal Criminology, July 1963; 4.
6. Grbić, Nikolina: *Maloljetnici u prekršajnom postupku na području grada Banje Luke*, časopis Bezbjednost, policija, građani Ministarstva unutrašnjih poslova Republike Srpske, No. 2/06.
7. Matijević, Mile; Bujanović, Tamara: *Uzroci, uslovi i fenomen maloljetničke delinkvencije*, "Maloljetnička delinkvencija u Republici Srpskoj – stanje i perspektive suzbijanja, sprečavanja i sankcionisanja", zbornik radova, Visoka škola unutrašnjih poslova, Banja Luka, 2008.
8. Mitrović, Ljubinko: *Komentar Zakona o prekršajima Republike Srpske*, PPGP "Comesgrafika" d.o.o, Banja Luka, 2006, p. 41.
9. Mitrović, Ljubinko: *Policijsko pravo – pravo unutrašnjih poslova*, Defendologija centar za bezbjednosna, sociološka i kriminološka istraživanja, Banja Luka, 2008.
10. Mitrović, Ljubinko; Grbić, Nikolina: *Prekršajne sankcije koje se izriču maloljetnim učiniocima prekršaja*, Maloljetnička delinkvencija kao oblik društveno neprihvatljivog ponašanja – Zbornik radova, Visoka škola unutrašnjih poslova, Banja Luka, 19-20 November 2008.
11. Mrvić-Petrović, Nataša; Mitrović, Ljubinko: *Prekršajno pravo*, Visoka škola unutrašnjih poslova, Banja Luka, 2007.
12. Law on Minor Offences of the Republic of Srpska ("Official Gazette of the Republic of Srpska", No. 63/14).

UDC: 94(497.11)"1914/1918"
341.322.5(=163.41)(497.11)"1914/1918"

SERBIA IN THE GREAT WAR THROUGH THE EYES OF ARCHIBALD REISS

Ivana Krstić-Mistridželović, PhD[1]
Academy of Criminalistic and Police Studies, Belgrade
Radomir Zekavica, PhD
Academy of Criminalistic and Police Studies, Belgrade

Abstract: The Austro-Hungarian troops committed mass crimes against the Serbian people at the very beginning of the Great War. The reaction by governments of allied and neutral countries to the suffering of the Serbian people was practically absent, lost in the media blockade in which Serbia had found itself due to the aggressive propaganda of the Dual monarchy. A lucky circumstance in such an adverse situation was the fact that Archibald Reiss, a renowned Swiss expert in criminology, came to Serbia upon the invitation of the Serbian government. He was successful in changing the image of Serbia and its people through his objective research about the situation in the country and through communication of the results of his research in prominent European papers. Consequently, Reiss also managed to turn part of the European public toward Serbia. In addition to reports and memos about participation on Serbian fronts with the Serbian Army and Serbian people in the Great War, Reiss also created diary notes which were published in 1928. Reiss presented the state of mind of the Serbian people during the First World War in his memoires. He did this in a perspicacious way and with a necessary dose of criticism typical of a scientist. His assessment of the character and morals of not only individuals but entire social classes and groups such as the military, farmers, citizens, intellectuals and politicians, especially in the context of comparison with the post-war era, are a valuable testimony of the Serbian people in the Great War. Considering himself the sincere friend of the nation which he loved so much that he became part of it, Reiss will, before his passing, remind Serbs in his covenant writings about their virtues and their imperfections. His assessment of the characteristics of the Serbian people, although over a century old, are still very relevant and it is therefore justified to express them in this paper.

Keywords: Reiss, Serbia, Serbian people, the Great War

INTRODUCTION

The term 'the Great War' denotes WWI which, according to all criteria, is considered the biggest conflict in the history of mankind until the outbreak of the Second World War.[2] Leaving aside questions about the inevitability of WWI and the causes that led to it, it is a fact that the assassination of Archduke Franz Ferdinand in Sarajevo was just a pretext for the Austro-Hungarian declaration of war on Serbia which launched a great conflict that rapidly spread to the rest of the European continent and beyond.

1 E-mail: ivana.km@kpa.edu.rs.
2 See: Н. Б. Поповић, *Европски рат 1914*, Београд 2014.

The countries at war were divided into two big major alliances (Entente and the Central Powers), and their public believed in a speedy victory, completely unaware that the conflict was of a global magnitude.[3] It was soon evident that the technical advancements in the production of weapons in the decades prior to the Great War, did not suit the offensive strategy of the conflict, so already at the end of the first year of the war the armies opted for the long-term, exhausting trench battle which entailed enormous spending on military equipment.[4] The war took place on an unprecedented scale not only on the war front but also in political, social and economic fields. During WWI there was also a propaganda war of the opposed sides[5] which did not cease even when the language of belligerence was replaced with the language of diplomacy at the peace conference in Paris during which the responsibility for the outbreak of the war was ascribed to Central Powers.[6]

In the Great War there were over 70 million armed people of which 60 million were mobilised in Europe. Of this number approximately 15 million people perished, 20 million were wounded and maimed, and participating states suffered enormous material destruction. Individual and collective traumas caused by the experiences in the war were present in all participating countries. The losses and the suffering during WWI were devastating for the Serbian people. According to the data presented at the peace conference in Paris, Serbia lost 1,247.435 inhabitants (28% of the total population since the last census of 1914); the greatest losses were among men aged 18-65 years (57%). There was also a large number of people who were left handicapped and almost half a million children who became orphans in this tragic conflict. The Serbian society felt the consequences of this demographic shock throughout the entire XX century.[7]

The Austro-Hungarian declaration of war on Serbia on 28 July 2014 which allegedly ensued due to the 'unsatisfactory' response of the Serbian government to the ultimatum issued by Dual Monarchy, launched a chain of events that led to this global conflict. The Austro-Hungarian military command intended the war against Serbia as a punitive action in order to punish and humiliate the Serbs, and, at the same time, hoped to remove the prestige that the Kingdom of Serbia had enjoyed among the Southern Slavs since the Balkan wars. The Serbian Army withstood the significantly superior enemy and celebrated two important victories on Cer and Kolubara. While retiring from Serbia, Austro-Hungarian troops committed horrific crimes in retaliation against Serbian civilians in Jadar and Mačva.[8] It appeared that reprisals

3 „Large-scale events that encourage patriotic feelings were organized, and the soldiers went to war singing" Ђ. Ђурић, *Србија у Првом светском рату. Илустрована хронологија*, Нови Сад – Београд 2014, 22-24.

4 „ The Great War was a collision of 20th century tehnology and 19th century military strategy." Д. Бранковић, *Први свјетски рат – водећа тема свјетске историјске науке*, у: „Први свјетски рат – узроци и посљедице", Бања Лука 2014, 24.

5 When at the end of January 1914 several German zeppelin penetrated the airspace of Paris, journalist Leon Daudet used a term „total war", while Erich Friedrich Ludendorff, head of the operational headquarters of the German imperial army named his retrospective of war events published two decades later „Total war". E. Ludendorf, *Der totale Krieg*, Минхен 1935. Definition of total war exceeded even what a hundred years earlier German military theorist, general Carl von Clausewitz described as "absolute war", implying underneath combat operations that lead to the total destruction of the opponent, but not the militarization of the entire social life as a tactic. О. Јанц, *14. Велики рат*, Нови Сад – Београд 2014, 289-290.

6 Commission set to establish the guilt for the war (head R. Lensing) in its Report of 29 March 1919 concluded: "The war was planned by the Central Powers and their allies, Bulgaria and Turkey, and was the result of intentional action and in order to make it inevitable." Н. Б. Поповић, *Европски рат 1914*, VII.

7 „By the number of missing soldiers and civilians killed in relation to the entire population, the Kingdom of Serbia was without equal in the Great War". Т. Искруљев, *Распеће сепског народа у Срему 1914. године и Мађари*, Нови Сад-Београд 2014, 4.

8 The Viennese professor of contemporary history Hans Hautman claims that the brutal war against the civilian population in which about 4,000 people were killed was planned and approved at the highest

against civilians were not typical only for the Balkan nations and the Turks, as believed by contemporaries in Western Europe before the war, but also for the soldiers of cultured nations that the Germanic race was considered to be.

Serbian government endeavoured to overcome the information blockade in which its country found itself due to the Austro-Hungarian propaganda, and it tried to inform the European and global public about these crimes. Consequently, it turned to Archibald Reiss, Professor of Criminology at the University of Lausanne and a world-renowned expert, and asked him to come to Serbia to visit areas where the crimes were committed. They also wanted him to perform an objective analysis and inform the world about the results. Reiss accepted the invitation and arrived in Serbia in September 1914 not expecting that his fate will forever 'be connected to the misfortunes of this country'.[9]

REISS ON SERBIA IN THE GREAT WAR

When Reiss came to Serbia he thought that he would conduct 'a short or a long survey' and inform the world about the events during the war. After some time Reiss concluded: "I could not predict that all those soldiers I saw for the first time would become my war comrades, and that the country itself would also become as dear to me as my own county – Switzerland". Already on the way from Djevdjelija to Niš, Reiss questioned his previous ideas about Macedonia. As was the case with most "Westerners", Reiss' opinion on Macedonia was formed predominantly on the basis of newspaper articles derived mainly from the German media.[10]

In Niš, Reiss received instructions for further work from the Serbian Prime Minister, Nikola Pašić, and was appointed an official, neutral investigator of the Serbian government and the Serbian Army.[11] He remained there until the end of the war. Although he became a Swiss volunteer of the Serbian Army, 'a friend of magnificent warriors of Šumadija, Danube, Morava, Drina, Timok and Vardar', Reiss kept the objectivity of an expert judicial investigator at all times. Before going to Valjevo, where the main headquarters of the Serbian Army was situated, Reiss visited Austro-Hungarian prisoners in Niš (approximately 1600 soldiers and 80 officers), and from conversations with them concluded that they were satisfied with the treatment they received, particularly because they were told that 'Serbs were savages who cut off ears, noses etc.[12] to prisoners', and yet they found themselves in a situation where, although imprisoned, they were cared for as if they were part of the Serbian Army. Reiss learned from them about the 'gruesome details' regarding murders of Serbian civilians in Šabac and hinted

military level. Х. Хаутман, *Аустроугарска армија на Балкану*, Хамбург-Берлин-Бон 2002.

9 Р. А. Рајс, *Шта сам видео и проживео у великим данима*, Београд 1928, 22.

10 From the train stopped in Udovo fellow traveller showed him Duke Babunski, who did not fit into the picture of komitas created "an ill-informed Westerner". P. A. Pajc, *Шта сам видео и проживео у великим данима*, 24. Untill Balkan Wars Macedonia was a Turkish province where the Christian population was continuously discriminated, and where the attempts of European powers to bring order were unsuccessful. General insecurity magnified fights of komitas troop thrown from the neighboring countries interested to annex this territory in the final resolution of the Eastern Question. Д. Ђорђевић, *Србија и Балкан на почетку XX века*, у: Југословенски народи пред Први светски рат", Посебна издања САНУ, књ. 61, Београд 1967, 207-230.

11 When asked what he could do for Serbia, Pasic answered to Reiss: "We need a true friend who knows how to observe. Go to the front. Open your eyes and ears, and then tell the world what you have seen and heard." P. A. Pajc, *Шта сам видео и проживео у великим данима*, 26.

12 See in: В. Ћоровић, *Црна књига: Патње Срба Босне и Херцеговине за време Светског рата 1914-1918*, Београд, 1989, 22. In the aforementioned Instruction states: "Brothers soldiers, we will soon be in a country whose people is worse than the undermost barbarian ... your noses and ears will be cut off, eyes gouged out ... Therefore I command you to this gang do not have any mercy, but to destroy everything that is Serbian and mercilessly shoot anyone who speaks Serbian." В. Казимировић, *Нема платна за црне барјаке*, Историјске свеске, бр. 11, новембар 1998, 49.

that some senior Austrian officers ordered their soldiers not to spare anything or anyone. In accordance with the deeply-rooted principle of objectivity during any scientific research, Reiss refrained from expressing accusations prior to conducting personal investigations at the scene, and he stated that there were officers (e.g. General Trolman from 18th Division and Captain Wolfzetel from 94th Infantry Regiment) who strictly forbade their soldiers to behave contrary to the existing rules and customs of war.[13] Reiss' letter from this visit is titled *Among the Austrian Prisoners*, was published in Gazette de Lausanne, whose war correspondent from Serbia Reiss remained until the end of the Great War.[14]

Reiss sent a letter to Gazette de Lausanne titled *The State of Mind in Serbia* which, at the same time, signified a symbol of a propaganda battle against falsities published in the European press by Austrian correspondents which had a significant resonance in Switzerland, as well as other neutral, European countries. Reiss said that he quoted the dispatches from Vienna in which it was written about the uprising of the Serbian Army and Serbian rebels who were motivated by "a desire to reveal lies at any cost about the strength of the morale of its opponent", and claimed they were false. German and Austrian newspapers, Reiss noted, had been attempting for some years to "reduce the reputation of the Serbian people in the eyes of the world" by not missing any opportunity "to publish atrocities allegedly committed by this small nation who wished nothing but to live in freedom". If the readers of these newspapers were to see the Serbian nation at that time, stated Reiss, they would see a county "which remained courageous despite the number of victims it suffered", and "a nation which had come to terms with its fate but continues to believe in itself". Despite the economic exhaustion Serbia was not at the end of its tether and the courage had not left its people. Reiss believed that Serbia would emerge victorious from this war especially because "Serbia is in the war for its freedom which it had been denied for such a long time, just like our Swiss ancestors were fighting for the freedom of their country".[15]

In the article called *Austrian Explosive Bullets*, Reiss confirmed that the Austrians were using explosive bullets which they called 'bullets for aiming'. Aware of the gravity of this blame, Reiss stated that he had seen the samples of those bullets and he had witnessed the injuries they inflicted. Reiss rejected the explanation by the Austrians who claimed that those bullets were used in order to correct the precision of shooting, and that due to their generally excellent characteristics the bullets were used only for hunting of large animals. However, they had found their use "against the enemy", and the injuries they caused were "terrifying". According to a survey given to Austrian prisoners, Reiss concluded that the soldiers had not heard about these bullets before the war, that they were given only to lieutenants and excellent shooters "relatively recently", that they were not owned by all divisions (they were certainly owned by 78th, 96th and 28th infantry division), and that they were produced in a government-run factory in Belesdorf, near Vienna. Reiss rightfully questioned the purpose of the advancement of civilisation when it was possible to use this kind of military equipment in the XX century.[16]

13 In: Т. Шурлан, *Злочини у Првом светском рату – међународноправни аспект*, у: „Први свјетски рат – узроци и посљедице", Бања Лука 2014, 363-382. and И. Крстић-Мистрицеловић и Т. Шурлан, *Рајсов Извештај о злочинима аустроугарске војске у Србији у Првом светском рату*, у: „Сто година од почетка Првог светског рата – историјске и правне студије", Београд 2014, 473-489.

14 *Gazzete de Lausanne* од 16. октобра 1914. Reiss's articles and letters will be also published in *Le petit Parisien* and *De Telegraaf*. Some of them are published in Serbian in: *Аустро-бугаро-немачке повреде ратних закона и правила* (1918), *Писма са српско-македонског фронта* (1924), *Шта сам видео и проживео у великим данима* (1928), and in 2014 Živko Marković and Milan Starcevic have prepared the most comprehensive edition of Reiss texts from *Gazzete de Lausanne* entitled *Ратни извештаји из Србије и са Солунског фронта*.

15 *Ратни извештаји из Србије и са Солунског фронта*, пр. Ж. Марковић и М. Старчевић, Београд 2014, 13-15.

16 *Ратни извештаји из Србије и са Солунског фронта*, 18-19.

From his daily contact with numerous officers, soldiers, the wounded and the civilians, Reiss applied his skills of a trained observer and an experienced technical policeman to draw conclusions about the character of the Serbian people. Consequently, he wrote: "these people are quiet, serious and from their bright eyes it is clear that they are determined to defend the independence of their country, and are not afraid to sacrifice their lives for that independence".[17] "Soldiers of the second call, wrote Reiss, who went to the front in their own peasant clothes and shoes and whose only military possessions consisted of a rifle, a belt with a pouch and a bayonet and traditional Serbian headwear of a greenish colour were mercilessly massacred if they were wounded and caught. The wounded and the doctors were real heroes on the Serbian front because they maintained fantastic morale in improvised hospitals which were under-equipped".[18]

There was a significant number of Austrian prisoners in Valjevo who were able to move freely. That way the Serbian government indicated their trust in them due to declared affiliation with the Serbian people, and Reiss wondered "if that had backfired very badly at times".[19] Head of the main Headquarters, Duke Radomir Putnik left the impression on Reiss as "an old and very ill professor", but he changed his mind during their next meeting just prior to the tragic unfolding of the situation in autumn 1915. Reiss was convinced of Putnik's great value stating that he was "the man who gained unconditional strength from his patriotism and that way was able to invest all his knowledge and his incredible talent in the service of his country in order to save it".[20] Reiss instinctively felt that General Živojin Mišić was someone of "first-class qualities", which was confirmed in the battles of Kolubara and Dobro Polje. Professor Slobodan Jovanović, Head of Press, Reiss' old friend, was "a very intelligent and a wonderful man, who at times could be angrier than a wolf but always kept his smile".[21] Valjevo also had a "school for Chetniks" which educated young men from Bosnia.[22] Finally, King Aleksandar Karadjordjevic lived in a small house in town, and aside from the Belgian King Albert he was the only sovereign "who during the entire duration of the war never wanted to leave his soldiers, sharing with them all suffering all fame".[23]

On the way from Valjevo to Belgrade Reiss noticed a considerable number of monuments sculptured out of stone and placed along the road, and found them to be "very touching and testimonial of the nation's pride".[24] Reiss' wrote an article *A Visit to Belgrade under Siege* where he expressed his observations of the peaceful capital of Serbia, bombed for 36 consecutive days until the day of his visit. The consequences of the destruction of the city on which the enemy launched all kinds of missiles were enormous – 700 houses (60 of those were state-owned) were damaged, the University was completely destroyed, state-owned tobacco factory completely burned down as well as the National Lottery building, the Old Palace, railway station, Russian and Austrian Missions all underwent serious damages, and the worst damages were suffered by the Belgrade fortress. Such heavy bombing of a completely open and unprepared town was even contrary to the laws of war. In Reiss' opinion the reasons for the bombing could not be the existing fortress which not only was completely separated

17 P. A. Pajc, *Шта сам видео и проживео у великим данима*, 30.
18 "Serbia has nothing to nurse their wounded. Instead of aseptic cotton, wounds are covered with straw cooked. ... In some weeks 59 wounded daily died and there was no enough priests to follow these poor wretches to their last eternal dwelling. Funerals were so frequent that almost always in front of the church stood the entire rows of coffins." P. A. Pajc, *Шта сам видео и проживео у великим данима*, 31-32.
19 Reiss suspected that some Austro-Hungarian soldiers declare themselves as Serbs for better conditions in captivity, but in "soul remain black and yellow." P. A. Pajc, *Шта сам видео и проживео у великим данима*, 35.
20 P. A. Pajc, *Шта сам видео и проживео у великим данима*, 35.
21 P. A. Pajc, *Шта сам видео и проживео у великим данима*, 36.
22 P. A. Pajc, *Шта сам видео и проживео у великим данима*, 38.
23 P. A. Pajc, *Шта сам видео и проживео у великим данима*, 39
24 P. A. Pajc, *Шта сам видео и проживео у великим данима*, 41.

from the city but was also so old that it should be considered "an historical monument rather than a modern defence facility". Even if one assumed that it posed a threat to Austria, the bombing could have been limited only to the fortress, which the Austrians have not done but have bombed the entire, undefended town, where most of the destroyed private houses were not near government buildings. Reiss added that hospitals were also not spared and said that General State Hospital was shelled four times, and that the bombes used were usually designed to decimate the enemy. Therefore, Reiss concluded that the Austrians "wanted to destroy the town as much as possible" and that they deliberately bombed civilians.[25] "Austro-Hungary is leading an "integral war"… It wants to exterminate the Serbian people and not only its soldiers!", warned Reiss with a caustic remark: "It seems to be the last word of that 'Kultur' with a capital 'K' in German."[26] General Pavle Jurisic-Strum, a Serbian Commander of the Third Army who was of a Prussian descent also confirmed this conclusion made by Reiss when he was talking about Austro-Hungarian atrocities against Serbs: "If my old friends from 1870 knew what their sons and grandsons were doing, they would turn in their graves."[27]

Reiss met "nice, old-fashioned hospitality of the Serbian people which they maintained even in the most difficult of circumstances" during his stay in Obrenovac.[28] Stunned by the cruel outrages and mass crimes by the Austro-Hungarian on the Serbian soil, Reiss published two articles in the Gazette de Lausanne in order to inform the Swiss public about it. The article titled *The Instructions to Austrian Troops* commenced with very effective words which deserve a literal translation "We, the ordinary citizens of Central Europe, were so proud of our civilisation. We thought that, if by some misfortune a war breaks out, it will be led with the means of new inventions and with respect for humanitarian law that was adopted in 1871: human bullets which pierce the fabric and don't inflict much damage, the protection of the entire art heritage and scientific achievements, strict respect for private property and the rest.[29] But alas!", exclaimed Reiss, "one must possess more awareness! In today's war, or at least in the one that I am able to follow personally, there is nothing humane, and to make matters stranger, out of the two opponents, the more ruthless was the one who liked to call itself 'champion of culture' during peacetime". Reiss said that Austro-Hungary led a "real war of extermination" against small Serbia, giving orders for "murder of civilians, burning of villages, the use of grain explosion, the bombing of open cities such as Belgrade, Sabac, shooting shrapnel on civilians and so on." Reiss collected evidence of all this personally during the survey conducted at the time of these events, during the questioning of Austrian prisoners of war and on the basis of tangible evidence and documents that they had. Reiss cited the most interesting paragraphs from *Instructions Regarding Treatment of Civilians in Serbia*, published by Imperial and Royal Command of the 9th Corps. It was distributed to the Austrian soldiers by their superiors. The soldiers were ordered not to demonstrate "the slightest mercy and humanity" because

25 *Ратни извештаји из Србије и са Солунског фронта*, 21-23.
26 P. A. Pajc, *Шта сам видео и проживео у великим данима*, 45. Reiss will express the same conclusion in the Report submitted in April 1915 to the President of the Serbian government Pasic: "In short, the massacres against the civilian population as well as looting, were systematically organized by the heads of conquering armies, and entire responsibility lies on the Command, as well as the shame that in future times will follow this army, the army of a people who claimed to be at the forefront of civilization, people who want to impose their "CULTURE" to others who did not want it." *Извештај поднесен српској влади о зверствима која је аустроугарска војска починила за време првог упада у Србију*, R. A. Reiss, D. Sc. професор Универзитета у Лозани, Београд–Горњи Милановац 1995, 177.
27 P. A. Pajc: *Преко Савског и Дринског фронта*, у: „Голгота и васкрс Србије 1914-1915, Београд 1986, 223.
28 P. A. Pajc, *Шта сам видео и проживео у великим данима*, 47.
29 Reiss was aware of the fact that at the time of the Great War the war was considered a regulated legal relationship, that there were customs and rules he was regulated by. The second half of the 19th and beginning of the 20th century was marked by a strong pacifist movement in many countries and raising awareness about the necessity of establishing international justice as a dam wars. Џ. М. Робертс, *Европа 1880-1945*, Београд 2002, 280-281.

such considerations "that one can at times have during war" would impose dangers for them. The order that as long as the military operations were in progress "all should be treated in the strictest and the most brutal manner" included: a ban on capturing uniformed armed persons ("they must be executed at any cost"),mandatory taking of hostages when entering or passing through towns (they should be executed if "they shoot a single bullet at the Austrian soldiers"), mandatory searches of houses and the destruction of those where weapons were found, an assumption that each person found outside of a town was a member of a gang (and in case of" the slightest doubt" they should be executed).[30]

In the article *Austrians in Serbia*, Reiss presented the data obtained from his own survey about the behaviour of the Austro-Hungarian troops. The result of their passage thorough Sabac district was 1,148 killed civilians whose bodies were found and identified, and 2,280 missing civilians. Knowing "the way the enemy operated", Reiss assumes that at least a half of the missing people were killed. Reiss said that it was difficult to confirm the exact number of the dead because part of the Sabac district was still in the hands of Austrians, and as Reiss did not visit all municipalities that also underwent brutal violence, it can comfortably be concluded that 3000-4000 civilians were killed. The age of the victims was anywhere between two months and 92 years of age; the majority of them was aged between 4 and 65, and the largest number were boys between 10 and 18 years of age. A lot of victims were taken away as prisoners and killed upon arrival to neighbouring villages. Many of them were killed in houses and often in groups, and the most frequent methods of the "punishing expedition" were burning of houses and barns. Reiss estimated that the number of burnt houses in areas that he visited was at least 8000. Finally, the bombing of open cities and multiple robberies were also part of the program of Pocorek's expedition.[31] Upon arrival in Thessaloniki toward the end of 1914, Reiss responded to the article *One Old Austrian Man* published in Gazette de Lausanne with another article titled *About Serbia*. Having expressed understanding and empathy for the pain of a patriot because of what he presented in his articles, Reiss said that he did not get the published facts from Serbian officials "as the old Austrian imagined or wanted to believe" but that he gathered them on the battlefield. In addition, Reiss brought a few of explosive bullets to Lausanne and showed them to "experts in the field of shooting and military skills", and said that "the old Austrian man" did not know that Russia had filed complaints in relation to these bullets because he read none of the Russian, French or other newspaper. The courage of the Serbian people, Reiss argued, was instigated by the need to refute the lies that the Serbian people were discouraged and outraged at their government that forced them into war, as was published in Austrian and German newspapers. Reiss explained that the reason for a large number of prisoners of war of Slavic descent was due to the decision of the military leadership of the Austro-Hungarian Army to deliberately send into battles Austrian soldiers of Serbian descent to fight their Serbian compatriots. Reiss rejected the claim that the orders given to the Austro-Hungarian troops were natural and inevitable, and those who claimed that they were justified it by using John Fisher as a sign of authority and deliberately misinterpreted his reference that the most important thing in a war is violence and that moderation is for suckers. Reiss said that "Mr John Fisher would blush with shame if he were to know that his words were understood as a call for massacre of children, women and old people". Reiss also challenged the possibility that Serbs committed horrific crimes against their own soldiers and officers by saying sarcastically that "that must have been claimed by the Austro-Hungarian authorities, those same authorities that never wanted to admit the defeats in famous battles in Jadar and Cer..., and that explained the hasty retreat of their armies from the Serbian territory as a lack of further need to deal with Serbs as they were punished sufficiently!"[32]

30 *Ратни извештаји из Србије и са Солунског фронта*, 30-33.
31 *Ратни извештаји из Србије и са Солунског фронта*, 33-37.
32 *Ратни извештаји из Србије и са Солунског фронта*, 42-46.

In his correspondence with *Gazette de Lausanne*, Reiss persistently emphasised a humane behaviour of Serbian soldiers as opposed to the criminal behaviour of Austro-Hungarian troops. He thus noted, for example, that Serbian soldiers buried their slain opponents in the vicinity of churches and marked their graves, and that Serbian military leaders forbade shooting of houses that were not marked with a flag of a red cross but which they knew served as hospitals and had found that out from Austrian prisoners. Having passed the active Serbo-Austrian front, Reiss concluded: "the Serbian army was poorly dressed but its morale and its endurance were impeccable", while "the Austro-Hungarian army was disgraced forever because it did not lead a fair war against its opponent, but it tried to exterminate the entire nation."[33]

Reiss then spend five weeks in the south of Serbia mostly along the Bulgarian border where, on the instructions of the Serbian government, he inspected the merit of the charges given to the allies from Sofia at the expense of Serbia. Having convinced himself of the untruthfulness of the atrocities for which Serbs and Greeks were blamed by people "without any moral principles", in his article "A letter from Macedonia", Reiss presented proofs of atrocities committed by the Bulgarians in Macedonia, so horrific that he was amazed about their absence from the famous Carnegie Commission.[34] In brief, Reiss said that "it would be better if Bulgaria would be more concerned about what is happening in its own backyard, and put an end to the atrocities committed by its people who were killing shepherds, stealing cattle, shooting at Serbian guards with machine guns and exploding bridges with pyrite and other explosives rather than accuse others of ferocity and cruelty".[35]

While in Loznica, Reiss made a report on crimes of the Austro-Hungarian Army in Serbia, he led a propaganda battle with the opponents of the allies and tirelessly produced the evidence about the crimes of the enemies of Serbia to those who were Serbia's allies or those who took a more neutral stance.[36] Reiss then went to Paris, and held a conference at the University of Sorbonne about behaviour of Austro-Hungarians in Serbia. He began the conference with the following words: "In the wake of crime neutrality is impossible!" This famous statement was cited repeatedly throughout the duration of the war. Reiss returned to Serbia at the beginning of April in 1915. He went to Kragujevac to where the General Headquarters of the Serbian Army was moved, and where apart from a multitude of civil and military staff there was a number of various allied missions. "Now that the Serbs endured a big, hostile blow, the allies started to demonstrate interest in them", Reiss remarked with a dose of irony. Thanks to the measures taken to stabilise viruses, the epidemic of typhus was in decline, and the death rate dropped from 60 % to 15%. Based on the observations of allied military medical missions in Kragujevac, astute Reiss noticed that "London has been playing a role during the entire duration of the war of a protector of Serbia. A protector who, truth be known, wanted to protect but also to command", while the French, who had put their doctors at full disposal of the Serbian Headquarters "were considered allies with the same rights in the land of Karadjordje, and not as protectors who were doing deeds out of mercy." Reiss concluded from that that "the French were the only allies who understood the Serbian people, its soul and its aspirations."[37] There was a number of "intelligence missions" in Kragujevac

33 P. A. Pajc, *Шта сам видео и проживео у великим данима*, 68

34 The task of the Carnegie commission was to investigate the violence and abuse that in the Balkan wars were allegedly committed by Serbian and Greek authorities. The Commission has compiled its report without visiting Serbian and Greek Macedonia (except for a short stay in Thessaloniki), and its president, who was in Ser where he could personally assured of the massacres and the destruction of a city committed by Bulgarians, left this out of the report apparently based in favor of Bulgaria.

35 *Ратни извештаји из Србије и са Солунског фронта*, 38-42.

36 See e. g. „Рат у Србији" (12. јануар 1915.) and „Аустроугарска војска у Србији" (17. март 1915.).

37 P. A. Pajc, *Шта сам видео и проживео у великим данима*, 72-73. О британској политици према Србији видети: Д. Живојиновић, *Надмени савезник и занемарено српство – британско-српски односи 1875-1941*, Београд 2011.

that consisted of allied and neutral journalists who, as Reiss said, "swept through the country like the wind, without understanding its language, its mentality, but also without hesitating to give favourable and unfavourable accounts about it, depending on the political colour of the paper they represented."[38]

Although life in Kragujevac flowed in a somewhat normal manner due to a lull on the front in spring and summer of 1915, the "spiritual atmosphere" completely differed to the one in Valjevo. The inactivity on the front, said Reiss, led to a kind of apathy and resignation. The allies expected from Serbia that with one offensive against Austro-Hungary would ease the situation on the French and Russian fronts. Serbia could not achieve this because its troops were severely weakened and it did not possess sufficient equipment necessary to undertake such a task while leaving the border with Bulgaria which, according to Reiss "was only waiting for an appropriate moment to attack us."[39] There was no doubt in Serbia then that it would be attacked by Bulgaria as it was in 1913, which Reiss persistently reiterated. He also criticised the allied diplomatic representatives for their lack of "the endurance in fatal Bulgarian hypnosis."[40] The allies, in their diplomatic battle, promised neutral Romania and Italy territorial compensation at the expense of Serbia in order to win their support.[41] Reiss was disappointed with the behaviour by some of the biggest allies toward Serbia which was "fighting the same enemy", and which always rejected separate peace while remaining loyal to its allies by fulfilling responsibilities to which it committed.[42] Reiss did not fail to blame Serbian members of parliament who "voted in the law that exempt elected members from joining the army" and who moved the parliament outside of Belgrade (to Nis) and then continued to complicate the situation in which Serbia found itself by futile arguments of its party."Is it too much to ask of members of parliament to serve as an example of harmony among people", asked Reiss, "at the time when thousands of their compatriots were sacrificing their lives for their Fatherland?"[43]

Reiss visited the Danube front in summer 1915 and informed readers of *Gazette de Lausanne* in the article "One Trip to the Front" about the state of the morale of the Serbian units that were guarding the banks of the Danube from Belgrade to Prahovo. The article was published on 1 July 1915. Reiss acknowledged that despite the three-year long war and significant losses Serbian officers were not discouraged. "One of the characteristics of a Serbian officer was a great desire for life slightly tempered with the Slovenian sentimentality (romanticism).Same was with an ordinary soldier who might die tomorrow but "was not overly concerned about that" because he would "die as a hero." "An old-fashioned understanding of loyalty toward the fatherland" is reflected in such a stance, which, according to Reiss, is not surprising when one considers that the Serbian Army "truly national and democratic." All units were eager for war action and they impatiently awaited the order "Forward!", and when that would take place, "a Serbian soldier would act in the same way as he did in Jadar, Cer, Rudnik and Kolubara",

38 P. A. Pajc, *Шта сам видео и проживео у великим данима*, 74.
39 P. A. Pajc, *Шта сам видео и проживео у великим данима*, 82-83.
40 P. A. Pajc, *Шта сам видео и проживео у великим данима*, 113. Allied offers to Bulgaria dealing Serbian territory in compensation for its joining the bloc of the Entente did not meet the ambitious pretensions of Bulgaria, whose ruler and the military leadership in the fall of 1915 step into the war on the side of the Central Powers.
41 Although Serbia announced its Yugoslav program in Declaration from the December 1914, the Allies ignored prominent war aims and offered the whole Banat to Romania and a part of Dalmatia to Italy.Ђ. Ђурић, *Србија у Првом светском рату*, 129-130. In article "Dalmatian question" Reiss expressed the hope that "Italian sanity will not allow meritorious unfair distribution and violations Serbian feelings." *Ратни извештаји из Србије и са Солунског фронта*, 71-75.
42 P. A. Pajc, *Шта сам видео и проживео у великим данима*, 84. Alfred Kraus, Chief of Headquarters of the Austro-Hungarian Balkan army also claimed that its troops most trouble afflicted Serbian army although its military allies were far outnumbered (Russian, German, British). А. Краус, *Узроци нашег пораза: Успомене и расуђивања из светског рата*, Београд 1938.
43 P. A. Pajc, *Шта сам видео и проживео у великим данима*, 87.

concluded Reiss and added also that when a Serbian solider "entered a country of its enemy he would always keep in mind that he is at war against the opponent and not the elderly, women and children."[44]

Attacked by the Austro-German forces which were "equipped with all the modern military tools and which were twice as strong", and "stabbed in the back by Bulgarian prevaricators", Reiss stated that Serbia was occupied and "its army, joined by many civilians, retreated through cold and hostile Albania." In the article "Masks Have Fallen", Reiss highlighted the dichotomy that he deemed existed in Bulgaria between the leaders of the country and ordinary people who "loved peace and Russia". Reiss expressed fear that "the independence of the Bulgarian people who, considering this dichotomy, did not deserve to be completely crushed would be compromised due to egoism of its imported King and several of his associates with a passion for belligerence.[45] "When Reiss arrived to the island of Corfu with the Serbian Army through Albanian 'Golgotha', Reiss went to Switzerland where he received many Serbian refugees and informed the public about "The Great Serbian Cavalry".[46] He organised numerous campaigns for all kinds of assistance to Serbia. The inhabitants of Corfu, "provoked by the German propaganda", welcomed the Serbian Army "rather badly, as Reiss said, but the behaviour of the Serbian Army was flawless and so its departure for the front left "unanimous regrets among those same inhabitants." Reiss worked tirelessly for the benefit of Serbia, and he highlighted Serbia's "enormous vital strength" and the ability to make a "new base" even in a foreign country, "in its provisional capital and outside of its regular borders." When Reiss returned to Corfu at the end of the summer of 1916, he stated that it was exactly that attitude of the Serbian Army that "lifted the spirit",[47] and that it was through that ability that the Kingdom of Serbia succeeded to establish the proper function of all government institutions even outside of its country's territory, and in that way maintained the continuity of statehood until the end of the war.

Reiss went to the Salonika front with the Serbian Army where he observed military operations, conducted investigations about crimes committed by enemies in the occupied Serbia,[48] and he joined the Serbian Army on their victorious return to the fatherland.[49] Although it would take another two years[50] until the liberation of Serbia would finally be

44 *Ратни извештаји из Србије и са Солунског фронта*, 78-81

45 *Ратни извештаји из Србије и са Солунског фронта*, 131-135. Reiss will realize the error in this estimate later. When the occupying Bulgarian administration in Serbia (the area "Morava" and "Macedonia") that included a very reputable Bulgarian citizens revealed the ability to mass terror against the Serbian civilian population, Reiss will take a much tougher posture towards the Bulgarian people as a collectivity. See in: И. Крстић-Мистрицеловић, *Рајсова анкета о злочинима Бугара у окупираној Србији (1915-1918)*, у: „Први свјетски рат – узроци и посљедице", Бања Лука 2014, 437-463.

46 P. A. Pajc, *Шта сам видео и проживео у великим данима*, 114.

47 P. A. Pajc, *Шта сам видео и проживео у великим данима*, 116-118.

48 See articles: „Српске жртве", "У окупираној Србији", „Ка српском фронту", „Савезници у Монастиру (Битољу)", „Са српском победничком војском", „Једна посета ослобођеним селима", „Бугари у Битољу (Монастиру)", „У 'Грчкој' Македонији", „Шта причају бугарски заробљеници", „Срби и тријализам", „Будућа српско-хрватско-словеначка држава", „Бугарска пропаганда", „Бугаро-Немци у окупираној Србији", „Повреде ратног права које су починили противници Србије", „Морал у српској армији", „Српски устанак из 1917.", „Писмо са македонског фронта", „Марш са српском армијом ка победи" и „Повратак у Србију са српском војском". Results of Reiss investigations on Bulgarian crimes will be a basis for Inter-allied Commission established after the end of the Great War to investigate violations of the law committed by the Bulgarians in occupied Serbia. See in: И. Крстић-Мистрицеловић, М. Радојичић: *Repport of the Inter-allied Commission on crimes committed by the Bulgarians in occupied Serbia (1915-1918)*, у: „Archibald Reiss Days", vol. II, Београд 2015, 341-348.

49 As a honorary captain of the Serbian Army Reiss was among the first to enter the liberated Belgrade on 1 November 1918. The soldiers of the Morava Division even considered him "their mascot", believing that his presence brings good fortune to them. P. A. Pajc, *Шта сам видео и проживео у великим данима*, 211.

50 Serbian Government and the Supreme Command insisted on a major offensive on the Salonika front

achieved due to the deceleration of the military operations by the allied command on the Salonika front, a strong belief in victory did not leave the Serbian Army. "What I admire the most", noted Reiss in his war diary, "is the morale of the Serbs which was unbeatable. Hope, or better still, the ability to hope must be one of the biggest virtues of these courageous people."[51]

Out of all parts of Serbia that Reiss visited (and he visited them all), the strongest impression on him was by Macedonia, especially Kajmakcalan, "a thief of 'kajmak', the key of the Serbian Macedonia", which Serbian army finally won after persistent battles aided by a strong Serb-French artillery. This is how Reiss described the tragic scene from this battlefield: "At 2525m above sea level, on this bare terrain sown with rocks, lied hundreds of frozen corpses. Their covers were clouds of mist, forced to move by the wind. Big hawks and ravens cruised above them to satisfy their insatiable hunger with their rotting flesh."[52] It is exactly this place, where a Serbian soldier set foot again on the soil of the Fatherland, that Reiss chose as the eternal resting place of his heart that he gifted to Serbia. His covenant desire to bury him in Kajmakcalan was fulfilled by his war comrades, and Vojistav Ilic Junior wrote a poem about it.[53]

CONCLUSION

Many volunteers joined the Serbian Army at the beginning of WWI. There was a significant number of foreign citizens among them. The most well-known was Archibald Reiss whose stay in Serbia during and after the Great War represents an unusual example of sacrifice of a world-renowned expert from his comfortable life in a country which was a symbol of democracy and the rule of law for the sake of helping a small Balkan country he did not even know during the time of the war. In addition, Reiss' continuous stay in Belgrade in an effort to extend his contribution in the post-war period in a new state ridden by the party treacheries of the political elite and national conflicts in the undeveloped civil society, is also a great testament of his self-sacrifice. This and the fact that he was the only foreigner who gave his heart to Serbia is what makes Archibald Reiss stand out from other foreign friends of our country of this time.

Archibald Reiss, who soon after arriving to war-torn Serbia, became a loyal friend of our ancestors, and remains one of the most loyal friends that that country ever had. Reiss' first contact with the Serbian people was a contact with innocent sufferers which must have left such a strong impression on him that it brought him closer to Serbia forever. In the basis of his great love of Serbia, there must have been a great love toward a Serbian peasant and a Serbian soldier with whom he learned to identify during the war years. A testimony of this lies in his writings where he called Serbia during the reign of King Petar "the land of peasants and soldiers." What Reiss lived during the four years of his time with soldiers who also con-

yet in April 1917, but the Allied Command's took it into serious consideration only in the summer 1918th.. Ђ. Ђурић, *Србија у Првом светском рату*, 326.

51 Р. А. Рајс, *Шта сам видео и проживео у великим данима*, 187

52 Р. А. Рајс, *Шта сам видео и проживео у великим данима*, 127.

53 Ilic song *Заветна жеља др Рајса* as follow:

"When here, in the country Serbian,
Ends the trail of my vitality days
I want my heart to rest
High above the Kajmakcalan.
So he felt asleep with this warm wish
And forever closed his beautiful eyes,
After he had given to his dear Serbia:
Dreams and youth and life of the whole."

tributed to his tighter emotional connection with the Serbian people, soldiers and farmers. In Serbia, which became his second homeland, Reiss held in the highest esteem soldier-peasants, the healthiest core of the Serbian society, who have led people through the war and ensured peace. Upon the end of the war, Reiss resigned from his position as a Professor in Lausanne and permanently moved into a small house in Belgrade. Putting his knowledge and experience at disposal of the government of the newly-formed Kingdom of Serbs, Croats and Slovenians(Slovenes), Reiss took part in a conference in Neuilly as an expert which led to a peace agreement between Serbia and Bulgaria. He simultaneously worked on reorganisation and modernisation of the police, and established the first institution of higher education for police. Due to plots of politicians he soon withdrew himself from the public life and remained a part-time adviser to the National Bank in the area of counterfeit banknotes. Reiss withdrew into seclusion when he got disillusioned by the corruption, nepotism, careerism, injustice and moral degradation that became the most prominent characteristics of the higher echelons of the post-war Serbian society which completely suppressed those most deserving for the survival of the Serbian and the creation of the Yugoslav state. In some kind of a voluntary isolation, Reiss does the last favour to the Serbian people – he writes his last book called "Listen Serbs, Beware of Yourselves."[54] In this covenant manuscript Reiss, as a loyal friend, highlighted the virtues of the Serbian people, and at the same time pointed to its (many) flaws and warned that only overcoming of those flaws would make way for the survival of its society and its development into the future.

After the death of this great humanist who gave his best years to the Serbian people and for whom he sacrificed his entire fortune, recognising in them that same love toward a human being that he also felt, Serbia was let without a man who loved it devotedly and sincerely. He never spoke about the reasons for his great love toward the Serbian people, not even to his closest friends, and the motive for this love remained a secret that Reiss took to his grave. If there was a question as to who was more deserving of this friendship – Reiss alone or our ancestors, the truthful and objective answer that we, as descendants of the famous Salonika front warriors would have to give to the 'Swiss man' from Kajmakcalan would be that they are both equally deserving of it. The additional testimony of this conclusion are the works of the Professor of Criminology from the University of Lausanne who, after having met the Serbian people at the time of great suffering, was so impressed by its virtues that he wanted to become part of it. This is what motivated the authors to analyse Reiss' view of Serbia in this paper to an extent that its scope permitted.

REFERENCES

1. Бранковић, Д.: (2014). *Први свјетски рат – водећа тема свјетске историјске науке*, у: „Први свјетски рат – узроци и посљедице", Бања Лука .
2. Ђорђевић, Д.: (1967). *Србија и Балкан на почетку XX века*, у: Југословенски народи пред Први светски рат", Посебна издања САНУ, књ. 61, Београд, 207-230.
3. Ђурић, Ђ.: (2014). *Србија у Првом светском рату. Илустрована хронологија*, Нови Сад – Београд.
4. Живојиновић, Д.: (2011). *Надмени савезник и занемарено српство – британско-српски односи 1875-1941*, Београд.

54 Archibald Reiss died in Belgrade on August 8, 1929. The manuscript named *Чујте Срби, чувајте се себе!* which by his wish was to be made public only after his death, was published for the first time only in 1997! Original Reiss manuscript typed on a typewriter in 1928 is now kept in Reiss memorial room at the Police Academy in Belgrade.

5. Извештај поднесен српској влади о зверствима која је аустроугарска војска починила за време првог упада у Србију, R. A. Reiss, D. Sc. професор Универзитета у Лозани, Београд–Горњи Милановац 1995.

6. Искруљев, Т.: (2014). *Распеће сепског народа у Срему 1914. године и Мађари*, Нови Сад-Београд.

7. Јанц, О.: (2014). *14. Велики рат*, Нови Сад – Београд 2014.

8. Казимировић, В.: (1998). *Нема платна за црне барјаке*, Историјске свеске, бр. 11, новембар 1998.

9. Краус, А.: (1938). *Узроци нашег пораза: Успомене и расуђивања из светског рата*, Београд.

10. Крстић-Мистрицеловић, И.: (2014). *Рајсова анкета о злочинима Бугара у окупираној Србији (1915-1918)*, у: „Први свјетски рат – узроци и посљедице", Бања Лука, 437-463.

11. Крстић-Мистрицеловић, И. и Радојичић, М.: (2015). *Repport of the Inter-allied Commission on crimes committed by the Bulgarians in occupied Serbia (1915-1918)*, у: „Archibald Reiss Days", vol. II, Београд, 341-348.

12. Крстић-Мистрицеловић, И. и Шурлан, Т.: (2014). *Рајсов Извештај о злочинима аустроугарске војске у Србији у Првом светском рату*, у: „Сто година од почетка Првог светског рата – историјске и правне студије", Београд, 473-489.

13. Ludendorf, E.: (1935). *Der totale Krieg*, Минхен.

14. Поповић, Н. Б.: (2014). *Европски рат 1914*, Београд.

15. Рајс, Р. А.: (1986). *Преко Савског и Дринског фронта*, у: „Голгота и васкрс Србије 1914-1915, Београд.

16. Рајс, Р. А.: (1928). *Шта сам видео и проживео у великим данима*, Београд 1928.

17. Ратни извештаји из Србије и са Солунског фронта.: (2014). Прир. Ж. Марковић и М. Старчевић, Београд.

18. Робертс, Ц. М.: (2002). *Европа 1880-1945*, Београд,

19. Ћоровић, В.: (1989). *Црна књига: Патње Срба Босне и Херцеговине за време Светског рата 1914-1918*, Београд.

20. Хаутман, Х.: (2002). *Аустроугарска армија на Балкану*, Хамбург-Берлин-Бон.

21. Шурлан, *Злочини у Првом светском рату – међународноправни аспект*, у: „Први свјетски рат – узроци и посљедице", Бања Лука 2014, 363-382.

22. Шурлан, Т.: (2014). *Рајсов Извештај о злочинима аустроугарске војске у Србији у Првом светском рату*, у: „Сто година од почетка Првог светског рата – историјске и правне студије", Београд, 473-489.

UDC: 340.142:343.575(497.11)
351.761.3(497.11)

PROBLEMS IN COURT PRACTICE WITH DETERMINING CERTAIN ELEMENTS OF THE OFFENSES UNDER THE ARTICLE 246 AND 246a OF THE CRIMINAL CODE OF SERBIA[1]

Saša Marković, MSc[2]
Ministry of the Interior of the Republic of Serbia,
Police Department in Valjevo

Abstract: Unauthorized production and trafficking of narcotic drugs is a criminal offense the Police and the Public Prosecution Office separate significant material and human resources for its prevention.This work is primarly about crime analysis, i.e. problems in collecting the evidence and difficulty in determining the elements of the offense. In this particular prosecutorial and police work in practice, a large number of problems are diagnosed. The offenses related to abuse of narcotic drugs due to imprecise law formulations often provide inadequate qualification and application of the provision of the Criminal Code favourable for the perpetrator. As we shall see, very often it is proved that they committed the criminal offense under Article 246 or its qualification into 246a as a lump term of these provisions provide relatively simple qualification of use of narcotic drugs for personal use, without any drug dealing. In practice we have a large number of cases where "drug dealers" are convicted in a short time for possession of various narcotic drugs (cocaine, heroin, amphetamines, marijuana, etc.) for "personal use". A number of questions can be asked. Did the police and other criminal authorities use all possible ways to prove the unauthorized sale of narcotics? Is it necessary to make changes and amendments of the specified Criminal Code provisions to make them more precise? Does the number of different kinds of addicts (drug addicts) who consume more types of narcotic drugs increase? We will try to answers these questions and through examples from Court practice show the work of the police, public prosecutors and judges in detecting and proving the illicit traffic of narcotic drugs.

Keywords: narcotic drugs, illicit trafficking, illegal possession, criminal offense, the police, public prosecutors, court.

INTRODUCTION

The abuse of narcotic drugs and psychotropic substances is one of the most serious global threats and all the countries of the world are interested in finding a way to stop it. The period we live in, as well as following years and decades are characterized by the process of globalization and internationalization, which carry the risk of criminal expansionism. We can see a

1This work is the result of the research on the project: „*Kriminalitet u Srbiji i instrumenti državne reakcije*", financed and realized by the Police Academy in Belgrade, cycle of scientific research in the period 2015-2019.
2 sasamarkovic975@gmail.com

large number of measures and activities taken in suppressing illegal trafficking of drugs at a regional and international level that necessarily affect the internal national legislation. Also, globalization has enabled simple and easy crossing the borders, which contributes a lot to the increase of abuse. The removal of barriers along the entire North American free trade zone and the EU made the flow of both good and bad easy. At the very beginning we can notice that globalization and internationalization on the one hand, and Criminal Code expansionism, on the other hand, are in cause-and-consequential relation .[3]

But we should not forget that the begining of the use of narcotic is connected with positive effects of these substances, primarily in medicine. They were used for medical treatment, reducing pain, eliminating fatigue and similar. Their use was limited and strictly controlled. However, the development of mankind led to uncontrolled use of narcotic drugs, without medical supervision, which pointed out its harmful effects and led to a continuous increase in the abuse of narcotic drugs. "According to some data of drug use, the year 1950 was taken as the year of drug use explosion in the United States, and 1960 is the year of the enormous increase of drug abuse in the most developed countries of Europe, while 1970 marks the expansion of drug use in the former Yugoslavia."[4]

As a way of trying to prevent abuses in using narcotic drugs, in the second half of the 20th century a series of legal acts were adopted by the United Nations. In the period between 1961 to 1972 the following sources were adopted: the Unique Convention about narcotic drugs[5] from 1961, the Convention on psychotropic substances from 1971[6] the Protocol from 1972 of amended Unique Convention on narcotic drugs from 1961.[7] It was necessary to change measures specified by those international acts in order to intensify fighting against the growth of illegal traffic of narcotics and its serious consequences and to strengthen the legal basis for international cooperation. In order to make a comprehensive, efficient and operative international convention aimed directly against illicit traffic considering different aspects of this problem (especially those who haven't been treated with existing conventions for narcotic drugs and psychotropic substances), the United Nations Convention against illicit traffic in narcotic drugs and psychotropic substances[8] was adopted in Vienna, on the 19th of December 1988.

The negative effects of the abuse of narcotic drugs are primarily reflected in more cases of criminal offenses. Crime associated with drug abuse can be divided into primary, secondary and tertiary. Primary criminality refers to commission of criminal offenses relating to the illicit production and trafficking of drugs. Secondary criminality refers to criminal offenses committed in order to obtain narcotic drugs or money and other resources for the purchase of drugs, and offenses committed under the influence of narcotics. When it comes to offenses committed under the influence of narcotics it primarily refers to crimes which occured as a result of consumption of narcotic drugs. However, the abuse of narcotic drugs consumption can be aimed to intentionally bring user into a condition that occurs after the use of narcotic drugs,

3 Marković, S.; „*Kriminalistička i krivično-pravna analiza krivičnog dela nedozvoljene proizvodnje i stavljanja u promet opojnih droga*", Zbornik radova: „*Suprostavljanje savremenim oblicima kriminaliteta – analiza stanja, evropski standardi i mere za unapređenje*", Tom 1, Criminal-police Academy, Belgrade, 2015, page 437

4 Konstantinović, Vilić, S; Nikolić, Ristanović, V; Kostić, M; „*Kriminologija*", Niš, 2009, page 397.

5 The United Nations Conference for the Adoption of a *Single Convention on narcotic drugs* met at United Nations Headquarters from 24 January to 25 March 1961.

6 The United Nations Conference for the Adoption of a Protocol on psychotropic substances met in Vienna from 1 1 January to 21 February 1971.

7 The Protocol was adopted on 24 March 1972 by the United Nations Conference to consider amendments to the Single Convention on narcotic drugs, 1961, held at Geneva from 6 to 25 March 1972.

8 Our country ratified this Convention and adopted the Law on Ratification of the United Nations Convention against illicit traffic in narcotic drugs and psychotropic substances *("Sl.list SFRJ – Međunarodni ugovori", no.14/90)*

so that the user can make a specific criminal offense in the changed state of mind. And finally, tertiary criminality is the one directly linked to international criminal organizations involved in the illegal production of narcotic drugs and their wholesale at the international level.[9]

Drug abuse is a problem that needs a multidisciplinary approach. It is, among other things, social-pathological phenomenon that follows historical development of mankind, and it reached alarming figures in modern society. In contemporary science (considering ways of preventing drug abuse) it is accepted that positive results can be achieved only by a complex interaction of coordinated operation of a number of social factors. In fighting against abuse of narcotic drugs, priority should be given to its prevention. Yet in modern society repression remains the primary way of trying to stop unauthorized production and sale of narcotics and in that way preventing their misuse.[10]

PREVENTION AND SUPPRESSION OF ABUSES RELATED TO NARCOTICS IN OUR LEGAL SYSTEM

In 2009 the Criminal Code was changed[11] and the criminal act of unauthorized production, possession and trafficking of narcotics was divided into two offenses: illicit production and trafficking of narcotic drugs and illegal possession of narcotics.[12]

Basic form of the offense under Article 246 is done by anyone who is not authorized to produce, process, sell or offer for sale, or who purchases for resale, holds or transfers, or who mediates in sale or purchase or in any other way without authorization distributes substances or preparations that are classified as narcotic drugs. Penalty for the execution of basic form of the offense is imprisonment from three to twelve years. The perpetrator can be acquitted from sentence if he reveals whom he purchased narcotics from. That can be used as a reason for being free from the sentence.

The one who, for their personal use, illegally possess a small quantity of substances or preparations declared as narcotic drugs commits criminal offense under Article 246a. For this criminal offense sentence can be imprisonment for up to three years and defendant can be acquitted from the penalty.

The biggest problem in Court practice is the application of Article 246a in order to determine the exact meaning of "small quantities" of narcotics and "personal use" of narcotics. The legislator has not specified what „small amount" means. Court practice still did not give a unified definition of what is considered as a small amount. In fact, in each case the Court makes a decision according to the circumstances of that case, whether the amount of found narcotic drugs, temporarily confiscated from the defendant, is considered as small amount or not. This moot issue makes the work of police and authority proceedings (Public Prosecution Office and Court) more difficult. While the analysis of judgements of High Court in Valjevo was being done, different attitudes of the Court were found. In one case 31 grams of heroin was found at the defendant and it was considered as a smaller amount intended for personal use (because it wasn't packaged in several plastic sachets, just in one, and the defendant, according to his statement, consumed up to 2 grams of heroin a day, so from his aspect it

9 Delibašić, V.; „*Suzbijanje zloupotreba opojnih droga sa stanovišta krivičnog prava*", Official Gazette, Belgrade, 2014, page 34.
10 Stojanović, Z., Delić, N; „*Krivično pravo-posebni deo*", Faculty of law, Belgrade, 2013, page 196.
11 "Sl.glasnik RS", no. 72/2009.
12 See the Articles 246 and 246a of Criminal Code, "Sl.glasnik RS", no. 85/2005, 88/2005 - revision 107/2005 - revision 72/2009, 111/2009, 121/2012, 104/2013 and 108/2014.

could be considered as a small amount)[13]. In other case 611 grams of marijuana, found at the defendant, was also considered as a smaller amount, because the defendant cooked tea from it for his personal use and consumed 20-30 grams of marijuana (he was active sportsman for 20 years exposed to great physical effort so the tea helped him to relax) [14]. So in both cases judgements where given according to Article 246a by the same Court because it wasn't proven there was an intention of selling narcotics (if the intention was proved then judgement could be acording to Article 246(1) of the Criminal Code).

Objects in both offenses were substances and preparations declared as narcotic. Narcotic drugs are classified into four groups: 1. central nervous system depressants with opium as the main representative, 2. stimulants, with cocaine as the most important representative, 3. hallucinogens with LSD as the most famous and 4. cannabis. In Article 112(15) of the Criminal Code an authentic interpretation is given which points out that narcotics are substances and preparations which are declared as narcotics and other psychoactive controlled substances by law or other regulations based on the law.

The list of narcotic drugs and other psychoactive controlled substances is an integral part of the Law on psychoactive controlled substances.[15] The minister of health defines the List, suggested by the Commission. The List contains psychoactive controlled substances according to the ratified conventions of the United Nations which regulate that specific area, as well as psychoactive controlled substances determined on a proposal given by the competent authority. The List is published in the "Official Gazette of the Republic of Serbia".[16] Psychoactive controlled substances from the List are classified in seven lists (from 1 to 7), according to the ratified conventions of the United Nations.[17] Narcotic drug is any substance of biological or synthetic origin, from the List, in accordance with the Unified Convention on narcotic drugs ("Official Gazette of SFRJ" no. 2/64), or a substance that primarily affects on the central nervous system by reducing pain, causing drowsiness or alertness, hallucinations, irregular motor functions, as well as other pathological or functional changes in central nervous system.[18] According to the Law on psychoactive controlled substances, Article 112(15), narcotic drugs also include other psychoactive controlled substance such as: a) psychotropic substances, involving any substance of biological or synthetic origin from the List, in accordance with the Convention on psychotropic substances, meaning substances that primarily affects the central nervous system and brain function, and changes the perception, mood, consciousness and behavior, b) the products of biological origin that have a psychoactive effect; and c) other psychoactive controlled substance.

However, before changing Criminal Code from 2012[19], the authentic interpretation of narcotics, under Article 112 of the Code, made huge problems in Court practice. Criminal Code as narcotic drugs considers substances and preparations declared as narcotics by law and other regulations based on the law. Therefore, if someone was illegally producing and distributing psychotropic substances it sometimes happened that Court acquitted the accused because of the inadequate interpretation of Article 112 of Criminal Code. Defendant M.B., previously convicted twice for illegal possession of narcotic drugs (2008 and 2011) to suspended sentences, was acquitted of the charges by the Higher Court in Valjevo case no. 30/12, from 30/05/2012. High Public Prosecutor's Office in Valjevo issued an indictment against

13 Judgement of the High Court in Valjevo*, K.no.92/12, on 28/03/2013.*
14 Judgement of the High Court in Valjevo*, K.no. 39/12, on 27/05/ 2012., and of the Court of Appeal in Belgrade kž 1 4493/2013., on 14/11/ 2013.*
15 "Sl.glasnik RS", no. 99/2010
16 *Ibid*, Article 8
17 *Ibid,* Article 10
18 *Ibid,* Article 3 (1) (1)
19 „*Zakon o izmenama i dopunama Krivičnog zakonika*", "Službeni Glasnik RS", 121/2012, on 24/12/2012

M.B. for the crime of illegal drug trade in the period from the end of July 2011 till 05/08/2011. The police searched M.B.'s apartment and other premises and found 37.33 grams of psychotropic substances "amphetamine". M.B. was in custody (from 05/08/2011 to 30/05/2012) until he was acquitted by the Court. In Court proceedings, after the main hearing was over, the Court made a decision that the defendant purchased and sold "amphetamine" for obtaining necessary funds for further procurement of the psychotropic substances for personal use and further selling. The Court ordered the expert witness, specialist in clinical pharmacology, to give an opinion on this matter. In his report expert witness gave an opinion that "amphetamine" is psychotropic substances with psycho stimulating effect with almost no difference compared to "cocaine" as a narcotic drug. The report of expert witness was accepted as professional and given according to the rules of science and profession, and the same was included as evidence. However, based on the evidence in this case and according to the following acts:

- The Law on psychoactive controlled substances (which distinguishes narcotic drugs and psychotropic substances),

- The Decision on the determination of narcotic drugs and psychotropic substances[20] issued by the Ministry of Health (Decision classifies "amphetamine" as psychotropic substances not as narcotic drugs),

- The Convention on psychotropic substances[21] ("amphetamine" classified as psychotropic substances[22])

- The Criminal Code[23] (object acts Article 246 is a substance or preparation proclaimed a narcotic drug)

- the Court acquitted the accused of charges, based on the Article 355(1) of the Criminal Code.

On 8/11/2012, considering the appeal of High Public Prosecutor's Office from Valjevo, the Court of Appeal in Belgrade rendered the judgement Kž1 4120/12, changing with it the first-instance the judgement of the Higher Court in Valjevo, and found the defendant M. B. guilty. According to the Court of Appeal M.B. "in the period from late July 2011 to 05/08/2011, in Valjevo, M.B. was capable to completely understand and control his actions and was aware that his actions were not allowed. For his personal use and further selling M.B., unauthorized, purchased and held "amphetamine" which is declared as narcotic drugs according to the Law on psychoactive controlled substances ("Official Gazette of the Republic of Serbia", no. 99/2010) and the Convention on psychotropic substances, "Official Gazette of SFRJ", no. 40/73). M.B., in Belgrade, bought 60 grams of narcotic drugs, for 150 euros, from his acquaintance for the propose of further selling of the narcotic in Valjevo and his personal use. On 05/08/2011 the authorized police officers found and confiscated 33,7 grams (quantity remained from 60grams) which M.B. held unauthorized in his apartment. Police officers made an official report." The Court of Appeal sentenced him to imprisonment of three (3) years.

20 "Sl.glasnik RS", no. 24/2005, on 15/03/2005., Remark: ceased to be valid when new regulations were adopted „*Pravilnik o utvrđivanju Spiska psihoaktivnih kontrolisanih supstanci*", "Sl.glasnik RS", no. 28/2013 on 26/03/2013., replaced with new one "Sl.glasnik RS", no. 126/2014, on 19/11/ 2014., replaced with new one "Sl.glasnik RS", no. 27/2015, on 18/03/2015., replaced with new and still valid „*Pravilnik o utvrđivanju Spiska psihoaktivnih kontrolisanih supstanci*", „Sl.glasnik RS" no.111/2015,on 29/12/2015.
21 "*Konvencija o psihotropnim supstancama*", "Službeni list SFRJ", no.40/73, SFRJ ratified this Convention on 15/10/1973.
22 See: *Ibid.,* Article 1. table II. Article 1. of this Convention „psychotropic substance" referes to any substance, natural or synthetics, or any natural product from the table I, II, III, IV, and AMPHETAMINE is classified in table II.
23 „*Krivični zakonik Srbije*", „Sl.glasnike RS" , no. 85/2005, 88/2005 - revision, 107/2005 - revision., 72/2009, 111/2009.

The Court of Appeal explained in judgement that its decision was based on the Article 1(1)(j) of The Unique Convention on narcotic drugs from 1961 (which our country ratified in 1978), the Convention on psychotropic substances from 1971 (our country ratified in 1973), the United Nations Convention against illicit trafficking of narcotic drugs and psychotropic substances (our country ratified in 1990) and the provisions of the Law on psychoactive controlled substances, which clearly point that production of both narcotic drugs and psychotropic substances is prohibited and punishable and both are treated by the same regulations for that kind of offenses. As stated in the explanation "the fact that provision of Article 246 of Criminal Code doesn't explicitly indicate that anyone who produces psychotropic substances without authorization is making the same offense as the one who produces and distributes narcotic drugs, cannot have influence on the fact the criminal act exists and cannot support the attitude that the person involved in unauthorized production of psychotropic substances is not committing criminal offense according to Article 246 of Criminal Code." The decision Court passed was also based on the fact that provision of Article 16 and 194 of Constitution of Republic of Serbia strictly indicates that all the laws and acts in the Republic of Serbia must be in compliance with the Constitution and also that all ratified international treaties and generally accepted rules of the international law represent constitutional part of the legal order of Republic of Serbia. Court also concluded that Criminal Code, as act that regulates offenses, in this case, is not inconsistent with ratified Conventions.

It should be pointed out that this attitude was taken by one council of the Court of Appeal, and that it was legally possible to confirm first instance acquittal judgement (in our opinion with proper interpretation of Criminal Code). Although the ratified international treaties are part of the legal order of the Republic of Serbia, they are not easily applicable for many reasons. Therefore it was necessary to change provision on Article 112 of the Criminal Code.

The Law on Amendments to the Criminal Code in 2009 presented new provisions (Article 57(2)) that punishment for certain offenses, including illegal production and trafficking of narcotic drugs, cannot be reduced (Article 246 (1) and (3)). That way, the reduction of punishment ceased to be a general institute in our Criminal Code and started to apply in some (still very small number) offenses.[24] That way, the legislator primarily intended to limit possibilities the Court had in reducing punishments for some serious offenses. However, the professional public is very critical of this legal solution. The question is how to defend a solution which excludes the application of reducing the sentence in listed crimes on legal bases (which equates sentence for attempted and committed offense and does not consider significantly reduced mental responsibility etc.)[25].

Also the defendants with issued indictment they committed the above offenses are often young people with no previous convictions, whose personal and other circumstances suggest that in the absence of prohibition in Article 57(2) of Criminal Code, prison sentences would be less than legal minimum (which are often inappropriately high) and in such cases penalties imposed with absence of the prohibition of migration would be more adequate than sentences of prison imposed in accordance with the prohibition. From the perspective of special prevention, in order to prevent the return, especially for young, first time convicted, the length of stay in prison could affect their future behavior. For example practical application of Article 246 of Criminal Code made a lot of problems when it comes to small quantities of narcotic drugs or soft drugs because it is rated that the sentence of three years imprisonment for possession of single joint with intention of selling it is too high.[26]

24 Delić, N; „ *Zabrana (isključenje) ublažavanja kazne u određenim slučajevima*", Crimen, no. 2, Faculty of law in Belgrade and Institute of comparative law in Belgrade, 2010, page 238.
25 Stojanović, Z.; „*Krivično pravo-opšti deo*", Belgrade, 2013, page 325.
26 Kolarić, D..; „*Krivičnopravni instrumenti državne reakcije na kriminalitet i predstojeće izmene u oblasti krivičnih sankcija*", „*Optuženje i drugi krivično pravni instrumenti državne reakcije na kriminalitete*", LIV

Is that really so? To answer this question we have to "take a look" in Court practice. First we have to know what evidence need to be collected so that Public Prosecutor's Office could prove intention for unauthorized sale of narcotic drugs, because the illegal possession represents quite another – offense of minor significance. The existence (or not) of intention of selling makes a significant difference between the basic offense 246(1) and the offense 246a of the Criminal Code of the Republic of Serbia. The possession of one joint is not a criminal offense under Article 246(1), unless the joint is held with intention of selling. We could agree that in such case (although with minimal possibility of happening in the Court practic) penalty of three years imprisonment would be too high. Even if qualification under Article 246(1) existed, if that person (without previous criminal history) revealed from whom the joint was bought, that person could be (in Court practice would be) acquitted from punishment under Article 246(5), of the Criminal Code of Republic of Serbia.[27]

Considering the opinions in criminal legal doctrine, we advocate that the institute of mitigating penalties in some form should exist in the Criminal Code. Why? We will point out one observation interesting for the police. The number of cases where, after first selling, unauthorized seller of narcotic drugs, even the „soft" ones, was arrested and criminal proceeding against him was initiated, can be measured in permillage (maybe even that can be given as a hypothetical example). Number of "drug dealers" who sold huge amounts of drugs and were convicted with condition sentence or a minimum sentence is large. Therefore, as a compromise solution „*de lege ferenda*" it should be considered to ban the Court to mitigate penalties for certain serious crimes that won't be randomly selected. After well-conducted analysis, primarily of Court practice (for all serious crimes) in our opinion new changings of the Criminal Code should be done in a way to give such solutions which would cause less controversy than present. The prohibition of Court's mitigating of sentences is a better way of directing Court practice towards more moderate use of mitigation of sentences.[28]

PENALTIES POLICY OF THE HIGHER COURT IN VALJEVO FOR THE CRIME OF "ILLICIT PRODUCTION AND TRAFFICKING OF NARCOTIC DRUGS"

In the table below we can see penalties policy of the Higher Court in Valjevo in the period between 2010 and 2014 for the crime of illicit production and trafficking of narcotic drugs according to the Article 246 (1) and (3) of Criminal Code.[29]

	Indictment	Suspects	Final judgements	Convicted	Penalties up to 3 years and suspended ones	Penalties longer than 3 years	Acquitted	Acquitted + dismissed charges	Corrective measures
246(1)	64	92	39	56	10 + 1	36	3	2+1	3
246(3)	5	11	2	2	-------	-------	2	-------	---
246(5)	----	-----	3	3	-------	-------	3	-------	---
246a	----	-----	13	13	10 + 3	-------	-------	-------	---
In total:	69	103	57	74	21 + 4	36	5	3	3

Conference of the Serbian Association for criminal law theory and practice, Zlatibor, 2014, page 502.
27 Marković, S.; „*Zloupotreba opojnih droga i institut (zabrane) ublažavanja kazne u praksi Višeg suda u Valjevu*", Zbornik: „*Suđenje u razumnom roku i drugi krivičnopravni instrumenti adekvatnosti državne reakcije na kriminalitet*", Zlatibor-Beograd, 2015, page 215
28 *Ibid.*, page 229.
29 Note: The table refers to the issued indictment and final judgements in the period 2010-2014.

By analyzing data from the table we can conclude that the most of convicted for the crime according to Article 246 got the sentence of imprisonment between the special legal minimum and maximum (58 finally convicted to 36). Five people were found guilty and acquitted from the penalty, of which three in accordance with Article 246(5), and two in accordance with Article 31 of the Criminal Code. Charges were dismissed against one person and two persons were finally acquitted of charges. Three persons committed offenses as younger adults so they were sentenced to corrective measures. It is interesting to analyze judgements of eleven persons who were sentenced under the special legal minimum. How was that possible when, for this kind of offense, there is a prohibition of mitigation sentence below the legal minimum?

We can see from the table that in the period between 2010 and 2014 sixty four indictments were issued because of reasonable doubt that ninety two persons committed an offense under Article 246(1), and the Higher Court in Valjevo found only thirteen (13) of defendants guilty for having committed an offense under the Article 246a. If we consider there is a large number of convictions for this crime which indictment, given by the Public Prosecutor, were overqualified, even 20% or 1/5, question can be asked whether Public Prosecutor makes wrong decisions when issuing indictment or Court avoids the application of Article 57(2), of the Criminal Code, avoiding that way legal provision on prohibiting the mitigation especialy minimum punishments?

As it was expected, most of the defendants had been convicted for criminal offense between legal minimum and maximum, according to Article 246(1). Thirty six of fifty six finally convicted, were sentenced to imprisonment for more than three (3) years. That was certainly helped by the provision of the Criminal Code that prohibits mitigation of sentence.

In the following part of this work we will analyze and compare judgements of persons convicted for offenses related to abuse of narcotic drugs in various criminal sanctions and prison sentences of different length, and we will try to explain the reasons for this, keeping in mind that we analyize similar charges and different judgments which questions the legal security of citizens.

DETERMINATION OF THE ELEMENTS OF THE OFFENSES UNDER THE ARTICLE 246 AND 246A -JUDICAL PRACTICE OF THE HIGHER COURT IN VALJEVO-

First, we'll analyze eight judgments in the offenses related to narcotic drugs to point out the attitude of the Court in questioning what amount of narcotics is considered to be a small amount and why there are no elements of criminal offenses under the Article 246 of the Criminal Code. We will then analyze the following seven judgments in which Court takes the opposite staindpoint, and for a certain amount of narcotic drug the offense is related to, indicates that it's not a small amount and there is an intention of selling.

Example 1: By the indictment of High Public Prosecution's Office in Valjevo Kt. no. 137/12, on 04/06/2013, AA was charged for possesion of 12gr of narcotic drug "marijuana". AA bought the drug on 28/11/2012 from an unknown person. The part of that quantity he used for his own purposes and the part of it he sold to BB for 500 RSD on 29/11/2012. He measured the remaining amount (6,36gr) and packed it in eleven different packages weighing between 0.38 to 0,76gr for further sale. All of it was found in his pocket and confiscated from the police officers (also on 29/11/2012) when they found and searched him in one cafe in Valjevo. AA was convicted for committing an offense under the Article 246(1) of the Criminal Code. On 03/03/2014 judgement K. no.5/14 was rendered and the defendant AA was convict-

ed to a single sentence of imprisonment of ten months for criminal offense under Article 246 altogether with offense accoridng to Article 247(2). The sentence will be executed in a way AA may not leave the premises he lives in, except in cases defined by the law regulating the execution of criminal sanctions (hereinafter: "house arrest"). The Court accepted the defense of the accused that he hadn't sold narcotic drugs to BB, but had given him about 1 gram so that he could enjoy in it. The explanation of this judgment had just one sentence: "After the judgment was published the parties waived their right to appeal and did not request a written copy of the judgement, so this judgment in accordance with Article 428(1) of the Criminal procedure code does not contain an explanation."

Example 2: By the indictment of High Public Procesution's Office in Valjevo Kt. no. 31/12, on 09/05/2012, PP was charged for committing an offense under Article 246(1) and (2) of Criminal Code. The police found 357.55 grams of narcotic drug marijuana at the same person, produced from the seventeen plants of Indian cannabis trees, PP was breeding in his household in village Miličinca, Municipality of Valjevo. The police also found five plastic sachets of total net weight 253.72 grams of narcotic drug marijuana which according to his statement he had bought from an unknown person in Novi Sad. At the main hearing the defendant claimed that he had used found marijuana for himself (611 grams ???) and had consumed 20-30 grams of the same for cooking the tea, which he consumed during the day. According to the judgement of the High Court in Valjevo K.no.39/121 on 27/05/2013 PP was convicted for criminal offense under Article 246(2) of the Criminal Code altogether with the criminal offense of unauthorized possession of narcotic drugs, Article 246a of the Criminal Code, to a sentence of imprisonment of one year and three months.

It was stated in the judgement that High Public Prosecution's Office didn't submit to the Court or provide any evidence that the defendant had intended to sell narcotic drug that was taken away from him. In any criminal offense the intention, including the intention of selling narcotic drugs is a legal concept that cannot be assumed, it must be unambiguously proven in Court proceeding. The Court gave an opinion if the intention was assumed the presumption of innocence of the suspect would be breached and that would violate one of the fundamental principles on which modern criminal proceedings are based. In its opinion the Court also added data obtained from the proceedings that defendant used a 20-30 grams of marijuana for making tea, and considering the long-standing dependence of PP the amount of marijuana that was found in his possession could have been used for his own needs.

Both parties appealed on the first instance judgement. The appeal of the High Public Prosecution's Office was rejected, and the appeal of the defense attorney was partially adopted. On 14/11/2013, case no. Kž 1 4493/2013, the Court of Appeal in Belgrade changed the first instance judgement and PP was convicted for criminal offenses 246(2) altogether with 246a and sentenced to prison for eight months.

***Example 3*:** By the indictment of High Public Prosecutor's Office in Valjevo Kt.no. 122/11, on 02/02/2012, LL was charged for committing an offense under Article 246(1) of the Criminal Code. On 28/11/2011, police searched the LL's apartment and found thirty three plastic small packages of marijuana and electronic scales for precise measurement. The total weight of all packages was 27.98 grams. The defendant was charged for the criminal offense (so it was written in the indictment) because during the investigation it was indisputably established that the defendant had bought 30 grams of the narcotic drug "marijuana" in Belgrade three days before his aparman was searched. He brought it to Valjevo by train. Then he divided it using electrical scales for precise measurement to thirty three small packages and hid it under the mattress in his bed. Altogether this indicates the intention of resale. At the main hearing the defendant stated that he had bought 30 grams of marijuana in Belgrade for his own use and when he arrived in Valjevo, he used electronic scales to divide the quantity he

had bought into thirty three small packages, which he placed under the mattress of his bed to hide them from his family. The Court gave an explanation in the judgement K. no. 10/12 from 02/11/2012 in which it stated that the amount found at LL was small and there were no elements of crime according to Article 246(1) of the Criminal Code (intention of selling was not proven), but there were some according to Article 246a. All the parties from the proceeding made an appealed against the judgement but Court of Appeal in Belgrade rejected them and confirmed the first instance judgement (Kž1 6989/12 from 28/01/2013)

Example 4: By the indictment of High Public Prosecution's Office in Valjevo Kt.no.199/09, on 18/02/2010, ĐĐ was charged for commiting a criminal offense under the Article 246(1) of Criminal Code. In mid-May in 2009 the defendant bought 20 grams of marijuana in Belgrade for the amount of 5,000.00 RSD and 10 grams of narcotic drug *speed* for the amount of 6,000.00 RSD and brought drugs to Valjevo. After that, according to his statement, he gave 5 grams of marijuana to XX for the amount of 1750,00 RSD. XX gave him 1500,00 RSD and owed him 250,00 RSD more. ĐĐ claimed that he had not sold the drug but had bought it in advance for XX. The police first found narcotic drugs at XX and he told the police that he had bought it from ĐĐ. Afterwards the police searched ĐĐ's house and found certain amount of narcotic drug. On 11/08/2010, judgement K. no.114/10, Court convicted ĐĐ with suspended sentence for committing crime under the Article 247(1) of the Criminal Code, altogether with criminal offense of illegal possession of narcotics from Article 246a.

In judgement's explanation, the Court indicated (considering already established facts) that defendant had not sold narcotic drug marijuana, but had purchased it and had used for its own needs and the part of narcotic drugs, according to previous agreement, he had purchased for the witness XX and gave it him. The Court stated that allegations of the prosecution that ĐĐ was selling narcotic drugs marijuana and amphetamine have not been proved. *It is interesting that although the explanation given in the judgement had a lot of deficiencies in explaining of why the elements of the offense under the Article 246(1) of the Criminal Code where not fulfilled, High Public Prosecutor's Office as well as the other party in proceeding waived the right to appeal, so the judgement has become final the moment when pronounced.*

***Example 5*:** By the indictment of High Public Prosecution's Office in Valjevo Kt. no. 56/13, on 05/08/2013, VV was charged for committing criminal offense according to the Article 246(1) of the Criminal Code. VV was convicted three times for criminal offenses related to narcotic drugs, including conviction under Article 246(1) (three years of imprisonment) and he had just served his last sentence when he got arrested in this case. On 09/06/2013 police officers found and confiscated from VV 8.45 grams of narcotic drugs amphetamine packed in two bags which contained thirteen small sachets of that drug. The search was conducted at the time when VV took the narcotic drugs from the place where he had hidden it, under a bench in a public place, near the basketball Court in Valjevo, and when he tried to sit on the motorcycle which was assumed to be used for distribution and selling of narcotic. When he saw the police he threw away the drugs and at first denied it was his but when the police found narcotics he admitted it was his (narcotic drug was secured and exempted during the investigation due to taking of DNA sample).

By judgement K.no. 46/13 from 26/09/2013 VV was convicted for a criminal offense according to the Article 246a and sentenced to one year of imprisonment. The Court found that the defendant was consuming narcotic drugs, and when rendering the judgement Court indicated that 8.45gr of amphetamines could be considered as a small amount from defendant's point of view. Even the fact that VV measured and packed narcotic drugs in thirteen small plastic sachets as well as the fact of his previous convictions for unauthorized sale of narcotic drugs, was not enough for Court to convict the defendant for committing the criminal offense under Article 246(1) of the Criminal Code. High Public Prosecutor appealed to the

judgement, but the The Court of Appeal in Belgrade confirmed the same. (KZ1 no.6660/13 from 25/12/2013).

Example 6: By the Indictment of the High Public Prosecution's Office in Valjevo Kt. no.116/12, on 29/11/2012, MM was charged for committing the criminal offense under Article 246(1) of the Criminal Code. On 19/10/2012 the defendant bought 31gr of narcotic drug heroin in Belgrade, and put it in his underwear to transfer it. On his way back to Valjevo, the police searched his vehicle and found and confiscated 30.93 grams of narcotic drug heroin. With the judgement K.no. 92/12 from 28/03/2013 the Court convicted MM for the criminal offense under Article 246a and pronounced him a suspended sentence (it means sentence of ten months shall not be executed if within three years after the final judgement MM does not commit another offense). When rendering the judgement the Court indicated that 30.93 gram of narcotic drug heroin found in MM's vehicle represented a smaller amount intended for personal use (because it was not packed in more plastic sachets but just one and the defendant stated that he had consumed up to 2 grams of heroin daily so according to his subjective aspects that could be considered as a smaller amount). The High Public Prosecutor's Office appealed on the first instance judgement but the Court of Appeal confirmed it (KZ1 2821/13 on 27/05/2013).

Example 7: By the Indictment of High Public Prosecution's Office in Valjevo Kt. no. 71/11, on 13/12/2011, CC was convicted for committing the criminal offense under Article 246(1) of the Criminal Code. During the search of CC's house net weight of 15.82 grams of narcotic drug amphetamines was found packed into three large and seven small plastic packages. By the indictment the defendant was charged for this criminal offense considering the found quantity, way of packing and the fact that defendant does not have permanent employment and source of income. By the judgement of the Higher Court in Valjevo K.no.76/12, on 09/11/2012, CC was sentenced to "house arrest" of 10 months for committing a criminal offense under Article 246a. In his defense CC stated that two weeks before his arrest he bought 25 grams of narcotics in Belgrade and used it for his own purposes.

Explaining the judgement, the Court pointed out that it was a case of smaller quantity of narcotic drugs in accordance with Article 246a of the Criminal Code, keeping in mind the fact that defendant has been a longtime consumer of psychotropic substance amphetamine and that he was on the treatment of drug addiction since 2009 and didn't stop consuming amphetamine during the treatment period and he purchased the same in Belgrade for two to three month's needs. Due to the previously stated, the amount that was found was in proportion to his needs for the period of how often he purchased the substance. Both parties appealled and the Court of Appeal in Belgrade, by judgement Kž1-6988/2012, on 27/06/2013, confirmed the first instance judgement.

Example 8: By the Indictment of High Public Prosecution's Office in Valjevo Kt.no. 16/12, on 9/04/2012, SS, twice finally convicted for criminal offenses associated with unauthorized possession of narcotics (245(3) of Criminal Code), was charged for committing the criminal offense under Article 246(1) of the Criminal Code. On 22/02/2012 police officers searched the defendant when he was leaving his vehicle in front of his home in Valjevo. SS had just returned from Belgrade where he bought 10 grams of heroin from an unknown person. Heroin was packed in two plastic bags which he had hid in his sock during the transport. SS stated that he was going to Belgrade once a week to purchase the narcotic drugs for personal use. Narcotic drug that was found was temporarily revoked.

By the judgement of the Higher Court in Valjevo K.no. 25/12, on 13/06/2012, SS was convicted for committing the criminal offense according to 246a to imprisonment of six months. It was stated in the explanation of the judgement that intention of selling was not proven and that quantity of ten grams of heroin could be considered a small amount because the defen-

dant, according to his statement, used between 1 gram and 1.5 grams per day. According to the Court, it didn't make sense to go every day from Valjevo to Belgrade to buy daily necessities of heroin, when there were financial possibilities for purchasing necessities for the period of seven to ten days.

All participants of the proceeding appealled against the judgement. The public prosecutor asked for conviction according to Article 246(1), stating that the defense was focused on the avoidance of responsibility for committing a criminal offense and that frequent purchases of heroin (weekly) in an amount of 10 grams and the way how transport from Beograd toValjevo was done indicated that purchase was in the purpose of further sale. By judgement, KŽ1-4119/2012, the Court of Appeal in Belgrade denied public prosecutor's appeal and partially accepted the one from defense counsel and reduced the sentence to five months of imprisonment.

Example 9: By the judgement of the Higher Court in Valjevo K.no.186/10, on 23/02/2011, the defendant A.V. (previously convicted for possesion of narcotic drugs to suspended sentence) was found guilty because he was illegally producing plant Indian cannabis in the period from April to 17/09/2010 in the village M., Municipality M. In April A.V. planted approximately ten seeds of the plant in the backyard of his family house. From the seeds A.V. grew more stalks of Indian cannabis which he cut in September, picked flowers, leaves and twigs, dried all and produced 1683.12 grams of narcotic drug marijuana. He kept the drug in the bedroom on the upper floor, in the bath and at the attic of the house. On 17/10/2010 the authorized police officers, while searching the house, found and confiscated the drug (with official report made) as well as the three more stalks of the plant which still were in the phase of growth. A.V. was convicted for criminal offence under Article 246(1) of the Criminal Code, to imprisonment of three (3) years and six (6) months. In this case question can be asked whether the amount of narcotic drug could have been considered as small one and for personal use, as A.V. defended himself during the trial. According to the Court, amount of narcotics that was found was not only sufficient for several months of use but for several years, so the defense of A.V. could not have been accepted. According to the Court **"small amount of drug is a quantity of one to two doses that can be used. Everything more than that cannot represent smaller amount, because drug addicts always think of obtaining just dose they need at that moment (maybe one more) and while under the influence of drug they do not think about new one."** After defense counsel appealed to the judgement, Court of Appeal in Belgrade has confirmed the same.

Example 10: By the the judgement of the Higher Court in Valjevo K.no. 46/11, on 26/01/2011, the accused O.J. was found guilty because in V., on 18/03/2011, authorized pollice officers searched his parents apartment and found dried parts of plant Indian cannabis. O.J. kept marijuana unauthorised for his personal use and further selling and he had 499.82 grams in one bag, 1.88 grams packed in a metal box and 0.57 grams in a plastic bag. Police confiscated all of it. O.J. was convicted for criminal offense under the Article 246(1) of the Criminal Code, to imprisonment of three (3) years. In this case the question can be asked whether the amount of narcotic drug could have been considered as small one and for personal use. The Court stated in the explanation of the judgement that "considering larger quantity of narcotic drugs was found, that defendant certainly didn't need for personal use because he wasn't using narcotics constantly, it can be concluded there was an intenion of selling. The defendant didn't have permanent income, worked from time to time, and how his father-witness M. stated he was supporting all the family with his pension of 15,000 RSD. It was obvious that the defendant bought narcotic drug without authorization on an unknown day and kept it hidden in his room and his backpack, for the purpose of sale." The defense counsel appealed to the Court of Appeal which confirmed the first instance judgement.

Example 11: By the judgement of the Higher Court in Valjevo, K.no.197/10, on 10/03/2011, defendant L.N. (previously finally charged for robbery, aggravated theft and violent behavior) was found guilty because on 10/11/2010, completely in control of his actions, aware of the fact what he intended to do was prohibited, but still wanted to perform it, he bought 50 grams of "marijuana", in the city B. for 200 euros, for the propose of his personal use and further unauthorized selling on the territory of municipality LJ. After he had purchased the narcotic he measured it and packed it in small plastic bags with the intention of illegal selling to narcotics addicts and for his own use. He kept it in his apartment until 07/11/2010 when the authorized police officers searched the apartment and found four sachets of marijuana in his clothes and one bag with forty small packages of the same drug in the courtyard (which L.N. had thrown out of the window). All the narcotics, total weight of 34.85 grams, were confiscated and official report was made. He was convicted according to Article 246(1) of Criminal Code, to imprisonment of 3 (three) years. In this case question can be asked whether the amount of narcotic drug could have been considered as small one and for personal use. Explaining the judgement, the Court stated: "It doesn't make sense that defendant who is unemployed and supported by his parents purchased for his own use large amount of marijuana for period of two months, that he paid 200 euros, and in his own testimony he declared he used two to three (sometimes even less) small packages of marijuana daily, which he mixed with tobacco and then smoked."

Example 12: By the judgement of the Higher Court in Valjevo, K.no.14/10, on 13/07/2010, the defendant V.Đ. was found guilty because of the unauthorized possession of dried parts of the plant cannabis, known as marijuana, packed in six small plastic bags and one plastic bag, total amount of 57.43 grams, he kept in his parents' apartment. On 31/10/2009, in V., authorized police officers searched the apartment where V.Đ. was in a state of significantly reduced mental capacity, as effect of drug use, and during the search he voluntarily surrendered the narcotics to police officers who confiscated the drug and made an official report about it. V.Đ. purchased narcotic drugs on the territory O., from the person he knew, for the purpose of unauthorized selling and then sold the same on the territory V. He was convicted according to Article 246(1) of Criminal Code, to the imprisonment of three (3) years. In this case the question can be asked whether the amount of narcotic drug could have been considered as small one and for the personal use, as A.V. defended himself during the trial. Explaining the judgement, the Court concluded that the amount of found narcotics was large, even though the light narcotics were involved. Also, from the way it was packed (in several small sachets and one large) it can be concluded the defendant had the intention of selling narcotic drugs, so although the defense of the accused stated that he packed the narcotics that way in order to control himself in drug consumption, the Court found that illogical considering the fact that total amount of the drug was available to V.Đ. all the time, and the Court didn't find how packing of narcotics into smaller bags could help the defendant to control himself in using the drug. The defense counsel appealed to the Court of Appeal which confirmed the first instance judgement.

Example 13: By the judgement of the Higher Court in Valjevo G.no.63/12, on 25/10/2012, the defendant S.M. (previously finally convicted for criminal offenses related to narcotic drugs) was found guilty because on 10/06/2012 he bought 5.55 grams of "heroin" for 8000 RSD, from the person he knew, for his personal use and further unauthorized selling. Due to prolonged use of narcotic drugs his consciousness was significantly reduced, but he was aware of the fact what he intended to do was prohibited and he still performed it. He measured the drug he purchased and packed it in twenty two plastic sachets in order to do unauthorized selling to drug users and for his personal use. He kept the drugs in his apartment, one sachet in the pocket of his shorts and twenty one sachets in bottle of glass in the fridge in the kitchen, until the 11/06/2012 when the drug was found and confiscated from authorized police

officers. He was convicted according to Article 246 (1) of Criminal Code, to imprisonment of 3 (three) years. In this case the question can be asked whether the amount of narcotic drug could have been considered as small one and for personal use. In its judgement the Court explained that "one or two doses of narcotic drugs can be considered as a small amount, a person can enjoy, and everything more than that can't be treated as smaller amount of drugs. That's because drug users always think of buying a new dose in time they need it and want to use it, sometimes maybe of buying one dose more, and while drugged they don't think of getting a new one". The Court also pointed out that twenty-two welded plastic sachets were found at defendant, which contained a total of 5.55 grams of heroin, or less than a quarter of a gram of narcotic drugs per sachet." The Court did not accept the defense of the accused that he measured and packed the drugs for easier use as illogical, because the long-term narcotic drug addict must have the experience to take his consumption dose without previous measurement. The defense counsel appealed to the Court of Appeal which confirmed the first instance judgement.

Example 14: By the judgement of the Higher Court in Valjevo K.no.17/12, on 28/09/2012, the accused V.M. was found guilty because he had kept, for use and sale in the city V., 197.52 grams of dried parts of the plant cannabis - marijuana without authorization in several sachets and foil and 14.79 grams of "amphetamine", in a rented apartment in V. On 01/04/2010 authorized police officers, during the search of the apartment confiscated the narcotic drugs. He was convicted according to Article 246(1) of Criminal Code, to imprisonment of 3 (three) years. In this case question can be asked whether the amount of narcotic drug could have been considered as small one and for personal use. In its judgement the Court explained that "The accused in his own defense, pointed out that he had purchased narcotic drug marijuana and amphetamine, which in the criminal sense is treated as narcotic drugs, for personal use with no intention of selling it. Solving this problem, which is the question only of a legal nature, is of importance especially for the legal qualification of the acts of the defendant. If taken as indisputable that the accused at the time of the relevant event consumed marijuana and amphetamine in quantities stated in his defense (for six days he allegedly consumed 4.2 grams of amphetamine and 42 grams of marijuana) and that at the critical time in his rented apartment specified quantity of narcotic drugs was found, enough for several days, even weeks for the accused, the Court had no doubt that this case couldn't be treated as the case of smaller quantity of narcotic drugs kept just for personal use of the defendant. One or two doses of narcotic drugs a person enjoys can be considered as a small amount and everything more than that can't be treated as smaller amount of drugs. That's because drug users always think of buying a new dose in time they need it and want to use it, sometimes maybe one dose more, and while drugged they don't think of getting a new one". The defense counsel appealed to the Court of Appeal which confirmed the first instance judgement on 26/03/2013.

Example 15: By the judgement of the Higher Court in Valjevo K.no.158/10, on 02/11/2010, the defendant V.M. (previously finally convicted for criminal offenses related to narcotic drugs) was found guilty because on 03/09/2009 he had 0.35 grams of "heroin", which he held for further unauthorized selling. Due to prolonged use of narcotic drugs his consciousness was significantly reduced, but he was aware of the fact what he intended to do was prohibited and he still wanted to perform it. He packed the narcotic in three plastic sachets and carried it with him while going towards building of Employment Service in V., in order to do unauthorized selling to witness S.A. He was convicted according to Article 246(1) of Criminal Code, to imprisonment of 3 (three) years. The authorized police officer noticed the defendant standing on the street, and because he was suspicious (suspected to be involved in selling narcotics) they continued to watch him. He noticed when V.M. entered the passenger vehicle parked next to him, and since there was someone sitting on the front passenger seat he sat at the back seat. The officer continued to follow the vehicle and when it stopped at the traffic light,

he approached the vehicle, identified himself as a police officer, and called the intervention police patrol which arrived soon. When the vehicle was examined three bags of heroin, of the specified weight, were found at the back seat and the same were confiscated from the defendant with official report made. Witnesses (driver and the man seating next to him) confirmed at the trial they intended to buy narcotic drugs from the defendant. The defendant denied that the drug was his, but experts isolated his DNA profile when expertise of the sachet with drugs was done. For the Court that was, along with other testimonies (of the customers and the police) enough to convict the defendant according to the Article 246(1) of the Criminal Code. The defense counsel appealed to the Court of Appeal which confirmed the first instance judgement on 21/01/2011.

From the example listed, the Court practises vary. Apart from the listed examples, we analysed all the judgements rendered by the Higher Court in Valjevo in the period between 2010 and 2014 for this type of criminal offence. In one of the judgements, it is stated that it is necessary to prove the sale, irrelevant of the quantity of the narcotics which has been found, because in case *in dubio pro reo* the Court is obliged to decide in favor of the accused; in another judgement, if there is a buyer, then it must be proven that the accused sold them the narcotics, because the accused bought the narcotics from the 'drug dealer' for the buyer and was only being a carrier of the drugs between the dealer and buyer for a certain fee; in the third judgement, the accused did not sell 'the quarter' (0.25g of heroin) but only let him use and enjoy it; in the fourth judgement, possession of 600g of marihuana and admittance to buying the 250g found in 5 separate bags in Exit music festival in Novi Sad, was not sufficient material evidence to prove the intent to sell, for the reason of considering this a smaller amount attended for personal use (the accused uses 30g of marihuana for one tea dose, and he makes tea with it for drinking and relaxation); in the fifth judgement, 31g of narcotic drug 'heroin' was confiscated in one bag, which indicates personal use, because it is a widely known fact that heroin is sold in packets made of plastic bags of precise weight, so 31g can be considered a smaller amount, because the accused uses 2g a day, lives in Valjevo, but buys his drugs in Belgrade and is financially capable of buying this quantity at once, and also no precision scales nor packaging was found; in the sixth judgement, the fact that the 8.45g of narcotic drug 'amphetamine' was separately packed in 13 bags does not mean that it was prepared for sale, but it could only indicate that, also the accused lives in Valjevo and is buying in Lajkovac, where the drugs are cheaper, but is also financially capable of buying this quantity at once for longer period (of one month), all indicates that this is a smaller amount; in the seventh judgement, the accused admitted to buying dugs in one packet which he later measured and divided into smaller packets, and the electronic scales for precision measurement were found during the search, this activity does not indicate, in the opinion of the Court, that there was an intention to sell; in the eighth judgement, 10g of heroin was found which, as stated by the Court, cannot be objectively considered as 'small quantity', but taking into account that 1-2g are consumed a day, means it only covers the accused needs for 7-10 days, and it does not make sense for the accused to have to go to Belgrade every other day to buy a quantity of 1-2g, so the reasonable defence of the accused is that: buying 10g at once is cheaper than buying multiple smaller amounts; in the ninth judgement, previous conviction for selling narcotics (the accused has only just come out of prison, after serving 3 years) and also finding 13 packets of amphetamines in overall quantity of 15g during the search does not indicate carrying out of a criminal offence under the Article 246(1).

To the contrary of the above judgements, in the judgements in which the accused were convicted for criminal offence 246 from the Criminal Code, smaller quantity of drugs was seen as quantity equating from one to two doses which the particular person can consume, and anything above this cannot be considered a smaller amount, for the reason that narcotic

users always think about obtaining a quantity which they immediately require, and possibly one more, and while they are under the influence they don't think about a future dose; that the narcotics were meant to be sold is obvious from the fact that it is a larger amount of narcotic drugs (500g of marihuana) which the accused certainly did not need for personal use considering that they were not a regular user, they are without regular income, with occasional jobs, and live on the father's pension; it is therefore illogical that the accused who is unemployed, and is supported by the parents, buys a large amount for drugs (50g of marihuana) for personal use; for this he pays 200 euros and it would cover 2 months, although he states that he only uses 2-3packets a day and occasionally even less, as they mix it with tobacco to smoke. In one of the judgement, it is explained in a similar way why even 5.5g of heroin divided into multiple bags can be considered a larger amount of drugs intended to sell.

CONCLUSION

Based on all of the above, the conclusion is that unless the police and the public prosecutor provide sufficient evidence to prove that selling of narcotic drugs took place, primarily meaning providing evidence that particular persons bought drugs from the accused, it is pure lottery if the conviction or release would be the judgement to criminal offence from the Criminal Code, Article 246. From the convictions listed, it is not possible to draw a unanimous stand and legal opinion, which would be acceptable for convicting a person who has been found with a certain amount of narcotic drugs (from 10g of heron or amphetamine, to 600g of marihuana) under the Criminal Code, Article 246. Law practices have been so inconsistent that you would not dare, at the end of this document, claim that a certain person who is found by the police with, for example, 30g of amphetamines, divided into 60 bags and a high precision scales, would be convicted for unauthorised selling of narcotics, unless there is additional proof from people who have bought the drugs. But, we couldn't claim with certainty that this person would be found not guilty for this criminal offence and instead convicted for offence of minor significance - possession of narcotic drugs.

For the reasons mentioned, the High Public Prosecutor's Office will more often avoid trying to prove the bigger criminal offence to do with narcotic drugs abuse (Article 246) and will pass the criminal report to Basic Public Prosecutor's Office to prosecute the suspects for criminal offence of minor significance (Article 246a). For example, Valjevo Transport Police found, during a routine check in the traffic, a bag with 20g of marihuana, a bag with 7g of amphetamines and electronic scales. On another occasion, we have an accused (who already previously served a multiple year prison sentence for unauthorised selling of narcotic drugs) who was found, by the Criminal Police on the 19/04/2014 during the search of his vehicle in traffic, with 10g of 'cocaine'. The same case was passed from the High to Basic Public Prosecutor's Office, as they considered that there was not sufficient evidence to prove the criminal offence from Criminal Code, Article 246. The accused was convicted with house arrest, and since then, on the 13/06/2015, the police searched his premises and found 5g of heroine, divided into 18 plastic bags. This case is also passed down from High to Basic Public Prosecutor's Office. The following example considers an accused person, who was stopped by the police in traffic checks on 16/10/2015 and, in his passenger vehicle, found 6g of marihuana, 13 bags of 11.3g of amphetamine each and 2 ecstasy pills. High Public Prosecutor's Office pleaded that there were no basis to suspect that criminal offence from Article 246 was executed. The last example that we will give happened on the 19/05/2015 in Lajkovac. When the police stopped a car, the driver threw away 2 plastic bags, containing smaller 34 plastic bags, overall weighing 8.8g of a substance which was suspected to be a narcotic drug 'heroine'. The accused was arrested, based on the Article 291(1) of Criminal Procedure Code. The deputy of the High

Criminal Prosecutor's Office was informed and he stated that there are sufficient suspicions that criminal offence from Article 246(1) of the Criminal Code was carried out and decided that based on the Article 294 of Criminal Procedure Code, the suspect should be kept. The police decided to keep the suspect (as entrusted by the public prosecutor) and engaged an attorney on official duty (for the mandatory defence). The following day, High Public Prosecutor's Office re-qualified the criminal offence to 246a Article of Criminal Code and ordered for the suspect to be taken to the Basic Public Prosecutor's office in Ub.

The above mentioned law practices create enormous difficulties for the police. The police will adjust its work, based on the previous Court practice, and will look for evidence which they think is required and sufficient for the Court to charge for a particular offence. Based on the Court's attitude in the examples presented here, it is difficult for the police to adequately direct its work towards collecting evidence in order to prosecute persons involved in unauthorised selling of narcotic drugs.

In certain occasions, although the Court's practises lead the police in the direction of collecting evidence of selling the narcotic drugs by collecting evidence about the buyers, there still could be difficulties. The most clear situation would be to find the narcotic drugs (for example, 0.20-0.25g of heroin) with the buyer (the end user) during the handover[30] or immediately after by searching the buyer. But, what happens frequently is that the end user will place the small amount of narcotics in their mouth, and transport it that way to the place where they would use it. That way, if they are stopped by the police, they destroy all of the DNA traces of the seller, swallow the drugs immediately and by doing so, destroy the object of the criminal deed and make it impossible to prove anything.

De lege ferenda, in case the legislator decides that Article 246a will remain as part of Criminal Code, some thought should be given to possible definition of the 'smaller amount for personal use' of narcotic drugs which would be sufficient to prove criminal offence from Article 246a of the Criminal Code. In our opinion, which has been based on the analysis of the convicting judgements for Article 246 of the Criminal Code, smaller amount should be considered as 1-2 doses of narcotic drugs that a person can use based on their current health condition. Besides, the Court expert (of medical profession) would have to determine, in each case, the dose that the particular user (the suspect) is using. By regulating the matter in this way, you would avoid cases where the suspect in possession of 10, 20, 30 or more grams of heroin or 600g of dry-pressed marihuana could be convicted only for the possession of narcotic drugs for personal use.

REFERENCES

1. Delić, N; „ *Zabrana (isključenje) ublažavanja kazne u određenim slučajevima*", Crimen, no. 2, Faculty of law in Belgrade and Institute of comparative law in Belgrade, 2010
2. Delibašić, V.; „*Suzbijanje zloupotreba opojnih droga sa stanovišta krivičnog prava*", Official Gazette, Belgrade, 2014.
3. „*Zakon o psihoaktivnim kontrolisanim supstancana*" *(„Sl.glasnik RS", no.99/2010)*
4. „*Zakon o uređenju sudova*", ("Sl.glasnik RS", no. 116/2008, 104/2009, 101/2010, 31/2011 – other laws 78/2011 – other law, 101/2011 and 101/2013)
5. „*Zakon o maloletnim učiniocima krivičnih dela i krivičnopravnoj zaštiti maloletnih lica*", "Sl. glasnik RS" no. 85/2005.

30 See: Example 15.

6. *„Zakonik o krivičnom postupku“*, (“Sl.glasnik RS”, no. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013 and 55/2014)

7. *“Zakon o organizaciji nadležnosti državnih organa u suzbijanju organizovanog kriminala, korupcije i drugih posebno teških krivičnih dela”*(“Sl.glasnik RS”, no. 42/2002, 27/2003, 39/2003, 67/2003, 29/2004, 58/2004 – other law, 45/2005, 61/2005, 72/2009, 72/2011 – other law, 101/2011 – other law 32/2013)

8. *„Zakon o ratifikaciji Konvencije Ujedinjenih nacija protiv nezakonitog prometa opojnih droga i psihotropnih supstanci“* (“Sl.list SFRJ – Međunarodni ugovori”, no. 14/90)

9. *“Krivični zakonik”*(“Sl.glasnik RS”, no. 85/2005, 88/2005 - revision, 107/2005 - revision, 72/2009, 111/2009, 121/2012, 104/2013 and 108/2014

10. *“Konvencija o psihotropnim supstancama”*, “Službeni list SFRJ”, no. 40/73

11. Konstantinović, Vilić, S; Nikolić, Ristanović, V; Kostić, M; *„Kriminologija“*, Niš, 2009.

12. Kolarić, D..; *„Krivičnopravni instrumenti državne reakcije na kriminalitet i predstojeće izmene u oblasti krivičnih sankcija“*, *„Optuženje i drugi krivično pravni instrumenti državne reakcije na kriminalitete“*, LIV Conference of the Serbian Association for Criminal Code theory and practice, Zlatibor, 2014, page 485-504

13. 13. Marković, S.; *„Kriminalistička i krivično-pravna analiza krivičnog dela nedozvoljene proizvodnje i stavljanja u promet opojnih droga“*, Zbornik radova: *„Suprostavljanje savremenim oblicima kriminaliteta – analiza stanja, evropski standardi i mere za unapređenje“*, Tom 1, Criminal-police Academy, Belgrade, 2015, page 437-449

14. Marković, S.; *„Zloupotreba opojnih droga i institut (zabrane) ublažavanja kazne u praksi Višeg suda u Valjevu“*, Zbornik: *„Suđenje u razumnom roku i drugi krivičnopravni instrumenti adekvatnosti državne reakcije na kriminalitet“*, Zlatibor-Beograd, 2015., page 215, Serbian Association for Criminal Code theory and practice, Intermeks, Zlatibor-Beograd, 2015, page 205-232

15. *Pravilnik o utvrđivanju Spiska psihoaktivnih kontrolisanih supstanci*, “Sl.glasnik RS”, no.111/2015, on 29/12/2015.

16. Stojanović, Z.; *„Krivično pravo-opšti deo“*, Belgrade, 2013.

17. Stojanović, Z., Delić, N; *„Krivično pravo-posebni deo“*, Faculty of law, Belgrade, 2013.

UDC: 343.261-052-055.3
342.726-055.3

TRANSGENDER PRISONERS

Zorica Mršević, PhD[1]
Institute of Social Sciences, Belgrade

Abstract: The subject of this paper is theoretical review of position of transgender persons serving prison sentences. The paper aims to raise the level of knowledge about the existence of high exposure to violence and sexual abuse of that group and to offer answers to some of the issues of crucial importance, for example, once when in prison, where they are supposed to be placed, among women or men, and could they upon request, change sex while in prison. The paper presents and argues possible legal solutions, relying on legal comparative answers to basic questions of prison accommodation of transgender prisoners: in accordance to their acquired (desired, or wished) rather than to their anatomical, biological gender. How to protect them from violence, how to answer to demands of transgender people to continue hormone treatment started before serving a prison sentence, as well as on their request to begin with the gender reassignment process while in prison. In situation where there is a significant lack of research data documenting involvement of trans issues in the contemporary security studies, it opens a lot of room for improvement in that area. Although it seems easy to continue ignoring penological aspects of transgender issues, failure to discuss raising level of respect for human dignity in the prison system of Serbia would be irresponsible. Especially given that this group, while becoming visible in our society after legalized process of gender reassignment within the health system of the Republic of Serbia, financed by the health funds, at the same time becomes subject of further discrimination and violence.

Keywords: transgender prisoners, gender identity, sex reassignment surgery, hormone treatment, sexual violence, human dignity.

INTRODUCTION

All people – including the convicted persons serving prison sentences in prison – have right to a life free of violence, including the ability to live their authentic lives. The fact is that transgender persons[2] face a high level of violence and threats when they are in prison because they often experience harassment and various dangers in the whole system, more often than others prisoners. When it comes to trans people, it can be generally concluded that all types of detention and prison institutions pose a serious threat to their lives, human dignity, physical and mental integrity, and the general welfare.

1 E-mail: zmrsevic@idn.org.rs.
2 The term "transsexualism" The World Health Organization (World Health Organization) defines in its International Classification of Diseases (International Statistical Classification of Diseases and Related Health Problems (Tenth Revision), ICD 10) as "the desire to live and be accepted as a person of opposite gender, which is usually accompanied by a feeling of discomfort and maladjustment with their anatomical sex, and desire to be assisted by surgery and hormonal therapy to achieve the greater physical correspondence with the desired sex".

The terms transgender people and trans people[3] are both used to refer to a diverse range of people who find their gender identity does not fully correspond with the gender they were assigned at birth. In addition to changing name and social gender role, gender reassignment may also involve using hormones and/or surgery to alter the person's physical body.

Social gender is the gender in which a person lives their day to day life. Where a person has transitioned to change their social gender role, then it may also be referred to as their acquired gender or new gender.

- Trans men: female-to-male (FTM) transsexual people who have started living permanently as men as part of a process of gender reassignment. They may or may not have undergone any genital surgery.

- Trans women: male-to-female (MTF) transsexual people who have started living permanently as women as part of a process of gender reassignment. They may or may not have undergone any genital surgery.

- Non-reassigned trans people: transgender people who have not permanently changed the gender in which they live. They may propose to undergo future gender reassignment but at present are still continuing to live predominantly as the gender they were assigned at birth. Additionally, this group can also include:

  - transvestite/cross-dressing people who occasionally wear items of clothing traditionally associated with the other gender without proposing to undergo gender reassignment;
  - gender-variant/non-binary-gender people who have highly complex gender identities and don't identifying clearly as either men or women;
  - intersex people who have been born with aspects of their chromosomes, internal reproductive systems or external genitals which are not clearly male or female; historically, intersex people were referred to as hermaphrodites but this is now an out-dated term.

Or as is explained at the theoretical level, the gender nonconformity means a person whose gender expression, role and identity are different from the expectations of the culture of a particular sex. Transgender indicates[4] a spectrum of individuals whose identity or lived experiences do not conform to the identity or experiences historically associated with sex at birth: those with intersex conditions; non-, pre-, and postoperative transgender individuals; cross-dressers; feminine men and masculine women; and people who live as a gender other than that assigned to them at birth.

When it comes to the needs of transgender people in prison, UN Yogyakarta Principles[5] explicitly state that States are required to ensure adequate access to health care and psychological counselling, which recognizes the special needs of the convicted person, whether it be their sexual orientation or gender identity, including the use of hormones or other forms of therapy, as well as the ability to gender reassignment if the convict wants it. UN Office on Drugs and Crime has recommended that a responsible person should meet the special needs of LGBT convicts as well as to provide them with access to treatment for gender dysphoria, such as, for example, hormonal therapy or surgery to gender reassignment if it's available in the community (state).

3 All terms are explained in Scottish Prisoner Gender Identity and Gender Reassignment Policy.
4 Simopoulos Eugene F., Khin Khin Eindra, 2014, Fundamental Principles Inherent in the Comprehensive Care of Transgender Inmates, *Journal of American Academy of Psychiatry and the Law Online 42:1:26-36 (March 2014).*
5 http://www.yogyakartaprinciples.org/principles_en.htm.

The conditions in detention centres and prisons, not only can be traumatic for trans people, but these are often dangerous places with threatening situations and relationships, especially for transgender persons and those who are gender non-compliant (whose sex and gender are not in consent).[6] Everywhere, the police stop, legitimize, check and examine transgender persons more often than other, ordinary citizens, because their daily struggle for survival includes frequently sex work (prostitution) or any other criminal acts, such as offences related to drug traffic, property crimes, etc., due to which they are faced with an increased risk to find themselves behind bars.

Being a transgender person or a person whose gender and sex conflict in every detention or prison often means daily humiliation, physical and sexual abuse, with the constant fear of retribution if that person uses legal means to solve problems with violence. Other convicts believe that, "if they have a penis, then they are only one kind of gay". Transgender prisoners allege that they were discriminated not only by other prisoners but also by prison staff who does not accept their lifestyle, does not understand their needs and treats them with open contempt.[7] They share space stigmatized within these institutions, along with other "socially undesirable" persons, such as various types of sex offenders, for example, paedophiles, child molesters, rapists, prisoners with mental disabilities and informers. Most often it is assumed that transgender women are homosexuals, and are despised by other prisoners and prison staff.

This is known to prison administrations, which therefore apply, as the most common security measure for trans people, their isolation and separation from other prisoners.[8] Therefore, many transgender persons are placed in solitary confinement or similar separate regimes serving a prison sentence for months or even years, just because of their transgender.

Prisons are organized in accordance to their historical foundations as strictly divided into separated facilities for women and for men: as such they represent the most gender segregated institutions of the modern era. Until the last decade of the twentieth century, the division of the prison by sex was the least contested prison practice/policy in all geographic regions, by all governments, at all levels, by prison institutions, as well as by their own prison population. In short, the institutional manifestation of the prison culture of gender binary division is taken as indisputable fact that defines a prison in all its aspects. There are very few exceptions to the dominant practice that transgender women are not placed in a male prison on the basis of their gender acquired by birth, so it is all an open question how to solve this obvious contradiction between their official gender and their appearance, sense of gender identity and gender aspirations.

SCOTLAND

In Scotland, in October 2013 the Prison Policy document on gender identity and gender adjustment was adopted, which is one of the most comprehensive policy documents of its kind in Europe and globally.[9]

This policy aims to ensure that all persons who identify themselves as transgender, or who intend to start or have already made the transition gender adjustment, at any time, be treated fairly and with respect by the Scottish prison service. Rubdown searches should be carried

6 Stohr Mary K. 2015. The hundred years' war: The aetiology and status of assaults on transgender women in men's prisons. Women & Criminal Justice 25:120–29.
7 Jenness Valerie, Fenstermaker Sarah, 2016, Forty Years after Brownmiller Prisons for Men, Transgender Inmates, and the Rape of the Feminine, *Gender & Society,* February 2016, Vol. 30, No. 1, pp. 14–29.
8 TransGender Law Center: Prisons and criminal justice.
9 Scottish Prisoner Gender Identity and Gender Reassignment Policy.

out in accordance with the gender in which the prisoner is currently living, rather than their physical characteristics. Confidentiality must be maintained.

Information about a prisoner's gender reassignment should only be shared with other staff without the prisoner's permission where this is essential to manage the risk of crime. Staff must not reveal information about a prisoner's gender reassignment to other prisoners. Prisoners should be allowed access to items such as clothing, prosthetics, chest-binders, hair-pieces/wigs and other equipment needed to facilitate their gender reassignment and express their gender identity. Prisoners who are already undergoing gender reassignment must be allowed to continue receiving gender reassignment hormone treatment which began prior to imprisonment.

Prisoners who are seeking to undergo gender reassignment must be allowed to access specialist assessment and treatment via the NHS Scotland Gender Reassignment Protocol. Prisoners must be allowed access to gender reassignment hormone treatment, hair removal and/or surgeries they have been medically approved.

PRISON RAPE ELIMINATION ACT

Attention to the problems transgender prisoners face while serving prison sentences in the United States[10] has been directed since 2003, when the Prison Rape Elimination Act (PREA)[11] was adopted, which marked prevention of prison rape as a leading national priority that requires federal intervention. This was a historical progress since the first time when attention was paid to rape of trans people behind bars.

PREA is a comprehensive set of federal regulations that regulate all aspects of correctional institutions relating to the prevention, detection and response to abuse. It is important to emphasize that PREA contains special provisions relating to "lesbian, gay, bisexual, transgender, intersex and gender non-compliant prisoners". Among the most important measures of protestation is the initial beginning evaluation and classification: in all prisons, at the reception, location of a prisoner must be determined only after the assessment of the risk of experiencing violence or abuse, including the identification of those who may be at risk because of their transgender, gender nonconformity, sexual orientation or intersex condition. One's individual perception of the existence of vulnerabilities must also be considered.

Individuals cannot be punished if they hide facts during the evaluation and failed to report the facts related to their gender identity, sexual orientation, intersex status, disability status, or previous experience of sexual abuse. Prison institutions must use this information to make appropriate decisions about individual security and classification of the individual and their accommodation.

THE KOSILEK CASE

The most important is the sentence passed in the case *Kosilek v. Spencer in 2012*[12] by which the District Court of Massachusetts ordered the prison authorities to ensure the gender reassignment surgery of transgender convict of the type "a man into a woman". Since in prison,

10 Jenness Valerie, Fenstermaker Sarah, 2016, Forty Years after Brownmiller Prisons for Men, Transgender Inmates, and the Rape of the Feminine, *Gender & Society*, February 2016, Vol. 30, No. 1, pp. 14–29.
11 LGBT People and the Prison Rape Elimination Act JULY 1, 2012.
12 https://scholar.google.com/scholar_case?case=4986521262718791593&q=Kosilek+v.Spencer&hl=en&as_sdt=2006&as_vis=1.

Kosilek has twice attempted suicide, and once tried to castrate himself. Although it is so far the only successful legal proceedings, the courts continue to attempt to define the medical needs of prisoners as well as to find answers to them. In Kosilek v. Spencer, the District Court in Massachusetts ruled that Kosiliek's rights were violated, because the only way to ensure the right under the Eighth Amendment is to provide adequate treatment of his serious medical needs that consist of the gender reassignment surgery. This is the first precedent judicial decision ordering the state to ensure this surgery to a convicted person. Massachusetts Administration of Prison Facilities challenged that judgment finding that the refusal to allow gender reassignment surgery does not constitute inadequate medical care. Prison authorities have many times reiterated the existence of security risk if allowing Kosilek to be operated on, as this will create him a target of sexual assault by other prisoners in the men's prison. The Court nevertheless supported Kosilek whom surgery is a medical necessity rather than a frivolous desire to change his exterior. Everyone has the right to meet health needs, were in jail or at liberty. Convicted persons who have a heart, hips or knees problems get surgery to repair their health. Medical needs of transgender persons are not less important than the need of any other prisoners who have the same right to health protection based on the constitution. Decisions to undertake gender reassignment surgery are serious decisions that can make medical professionals in accordance with the patient and not the prison authorities.

CALIFORNIA

California is a home to one of the largest correctional systems in the Western world and is an ideal site for collecting data on transgender prisoners. When data collection began in 2008, approximately 160,000 adult prisoners were incarcerated in California's 33 prisons. Well over 90% of California state prisoners are housed in 30 prisons for adult men. Among these prisoners, there are more than 300 transgender inmates in prisons for men. If the estimate that there are approximately 750 transgender prisoners in the United States is correct, California is home to nearly half of all transgender prisoners in the United States.[13] Because transgender prisoners do not conform to the dictates of an extremely heteronormative and hyper masculine environment,[14] corrections officials perceive transgender prisoners as a potential source of in-prison disorder and attendant management problems. Corrections officials and prisoners alike share an understanding of transgender prisoners as prisoners failing to "man-up" in prisons for men. In addition to being incarcerated, transgender prisoners are drastically and disproportionately marginalized along other dimensions of social status and health and welfare. When examined along the lines of employment, marital status, mental health, substance abuse, HIV status, homelessness, sex work, and victimization, the transgender prisoners in this study are more precariously situated than no incarcerated and/or incarcerated no transgender populations. For example, transgender prisoners are *13 times* more likely than their no transgender counterparts to be sexually assaulted in prison.

California is the first state to allow prisoners gender reassignment surgery while serving a prison sentence as it accepted to provide them with a paid surgery treatment by adopting a separate document[15] entitled Guidelines for review of requests for sex reassignment surgery.[16]

13 Jenness Valerie, Fenstermaker Sarah, 2014, Agnes Goes to Prison Gender Authenticity, Transgender Inmates in Prisons for Men, and Pursuit of "The Real Deal". *Gender Society*, February 1, 2014, 28: pp. 5–31.
14 Rosenberg Rae &Oswin Natalie, 2015, Trans embodiment in carceral space: hypermasculinity and the US prison industrial complex. *Gender, Place & Culture: A Journal of Feminist Geography.* Volume 22, Issue 9.
15 California sets policy for inmate sex reassignment. 15 October AlJazeera, 2015.
16 GUIDELINES FOR REVIEW OF REQUESTS FOR SEX REASSIGNMENT SURGERY.

The document entered into force in October 2015, when California became the first US state to legally allow prisoners the process. Previously in California in 2014 it was agreed to regularly pay treatments which include hormonal therapy and change of biological sex surgery of prisoners. Directions were issued by the California Department of correctional institutions who oversees the mental health of prisoners. Thus California established a model for the rest of the country to ensure that prisoners while serving prison sentences can use life necessary medical care.[17]

In any case, the adoption of this Guide did not constitute "raising the dam" and there was not a flood of requirement for that surgery, because many transgender prisoners simply are not interested in such an operation or do not meet the requirements of the Guidelines which many describe as restrictive and conservative.[18] One of the conditions is that the rest of sentence the convicted person has to serve is a minimum of two or more years in prison. [19]

REGULATION OF THE SPECIFIC SITUATION OF TRANSGENDER CONVICTS

Treatment of transgender convicts serving a prison sentence requires detailed regulation of specific situations which differ from similar ones where there are other persons serving a prison sentence. It is necessary to regulate procedures relating to deprivation of liberty of transgender people, as certain specifics occur during the arrest, and continue when it comes to detention.

Basic characteristic of the situation of transgender persons in prisons can be grouped into three areas: accommodation, management and medical treatment. Accommodation, treatment and medical treatment of transgender convicts presents three complex processes that coordinate the needs of transgender prisoners with prison rules and safety requirements but also the needs of other prisoners.

ACCOMMODATION

Appropriate institution is the one of their social gender, i.e. the gender in which a prisoner lives at least two years.[20] If there occurres a need to gender reassignment surgery while serving a prison sentence, it is possible to transfer to a gender-appropriate institution. On accommodations/changed accommodation should be decided at a case conference where all relevant facts will be taken into consideration, such as the need of transgender convicts to enable

17 One of the first two convicts who have used this right, Norsworthy, said she was very proud that she was a part of the movement that led to the adoption of this policy. She was living under stress and suffering from anxiety due to gender dysphoria but she realized that she needed gender reassignment surgery only when she was in the prison. She states that she has suffered for decades because her identity, her medical needs and her very humanity were denied by the people and the system responsible for taking care of her.

18 One study of the Williams Institute, which is considered as the think tank of California University for LGBT issues, stated that 42% of the surveyed persons stated that they had an operation, including those defined by the ministry as a cosmetic. Therefore, the refusal of such an operation is considered a restrictive measure.

19 This guide is added with respect to the case of Norsworthy, who was released from prison one day before a federal appeal court accepted her claim that the prison system would pay her gender reassignment surgery, which raised the question of the expediency of such costs.

20 National offender management service: THE CARE AND MANAGEMENT OF TRANSSEXUAL PRISONERS PSI 07/2011 March 2011 till March 2015.

them normal functioning but also, of the prison community, for example, joint training, communication, work and other activities with other prisoners, communication with staff, etc. Not acceptable solutions are permanent accommodation in the prison hospital departments, permanent isolation and separation. Convicted/detained person shall also require accommodations swapping. It should be borne in mind, for example, that trans people, "a woman into a man" who owns the vagina, may not feel safe in the men's prison, and that he might look for accommodation in a prison institution for women because of the increased risk of sexual violence in men's prison environment. In any case, it is necessary to take into account all the specific features of each particular transgender persons in the prison environment and the dangers that can happen, and accordingly conduct an assessment and find the most appropriate solution. Previous criminal acts of sexual violence are facts that will be taken into consideration at the case conference when deciding on accommodation.

MANAGEMENT

Prevention of all forms of sexual and other, by transphobia motivated violence, is one of the main priorities in order to achieve security of physical and mental integrity and respect for the human dignity of transgender persons in prisons. The accommodation of such persons automatically practiced earlier was in isolation (solitary cells) or ghettoization (in special, separated space devoted to LGBTI prisoners) are not adequate solutions and represent a further punishment of these people, not only for their deeds they have done, but for their identity. Isolation and segregation contribute in addition to poor mental and physical health of the population, which is usual, due to the enormous traumatization, violence and discrimination faced by elevated risk of self-harm and suicide. Therefore, these should be used as little as possible, just in case of emergency, urgent prevention of violence that last for as short as possible, and that should be ended as quick as possible and replaced by other solutions decided by the case conference.

Rubdown search and personal belongings search must be carried out in accordance with the role of social gender i.e. social gender identity in which the arrested/detained/convicted trans person lives rather than anatomical characteristics of that person. If the gender affiliation is unclear, through a discussion with that person, it should be agreed which sex the officials involved in the search of bodies and personal belongings should be. The agreement shall be in writing and signed by both parties, which a case conferences will confirm or revise. If no agreement is reached, the decision is to be made by hierarchically highest ranked official in a particular institution, taking into account the assumed social gender, in particular trans persons deprived of their liberty.

Alternative (adapted local conditions where it is difficult to assume that someone will enter into agreements with arrested persons): A person deprived of liberty shall sign written request that the body and personal rub-down search is to be carried by official whose gender affiliation is in accordance with the social gender identity in which arrested/detained/convicted transgender person lives, but not in accordance with the anatomical characteristics of that person.

Organizing a case conference is a type of consultative meetings with the participation of, on the one hand, the representatives of the competent authorities of prison establishments, and of the other hand, medical experts, advocate/lawyer of the convicted person, as well as experts on transgender issues. The case conference may be attended by representatives of organizations for the protection of the rights of transgender persons to provide information about the current ways of protecting human rights of transgender people. The purpose of these meetings is making specific decisions concerning the organization of serving prison

sentences for certain transgender persons. Case conferences are held periodically in a regular schedule (monthly, quarterly, semi-annually), as well as urgently, whenever there are problems to be solved urgently.

Possession of appropriate identification documents of transgender convicts is different from case to case. It is undisputed that all persons with identification documents issued in accordance with acquired gender should be treated accordingly in terms of accommodation, search, rubdown, security, ways of personal addressing, etc.

Persons who have undergone gender reassignment process or are still in ongoing process, but they do not have identification documents in line with the newly acquired gender identity, have the right to require treatment in accordance with the acquired gender whose modalities are to be decided on a case conference. They, as well as persons who, while serving a prison sentence are in process of gender reassignment, have the right to request the name change, issuing the new identification documents with the change of a sex mark under the same conditions as persons at liberty. The ways of respect of these rights of convicted persons, shall be decided on a case conference.

The possession and use of specific items, such as powder, lipstick, depilation products, wigs, vests, corsets, prosthesis, hormone preparations, etc., is approved.

Clothing that is appropriate to social gender roles in which the detained/convicted person lives, that suits also type of prison institution where that person is located, is approved.

MEDICAL TREATMENTS OF TRANSGENDER CONVICTS

Possession and acquisition of specific hormonal preparations (creams, injections, tablets, gels, etc.), as well as their use as a continuation of a specific therapy that was previously prescribed, and began before imprisonment is regularly performed, is allowed as well as any other previously initiated medical treatment. The prison medical service which controls any other use and procurement of necessary medicines shell be informed on all such treatments in advance.

Transgender inmates may be at different stages of the process of gender transition at the time of deprivation of liberty by arrest or committal to prison.

If the process has not started, the convicted person has the right to request the start of the treatment of gender dysphoria, the same manner and under the same conditions, by using the health procedures that are carried out in accordance with the provisions of the laws and bylaws which are available to persons at large in the Republic of Serbia in the same or similar situation.

If the case of a gender adjustment process that started before a person has been sent to serve the prison sentence, i.e. the process is in progress, it is necessary to promptly and without any delay enable the continuation of this treatment in prison.

If the process is completed before serving the prison sentence and the convicted person already lives in the role of the newly acquired gender, respect of this gender role continues in a prison facility, as well as all the necessary treatments.

Confidentiality of the existence of gender dysphoria and/or gender reassignment is one of the essential components of human rights, human dignity and the basic safety of transgender persons serving prison sentences. The history of the process of gender reassignment and the fact the process of gender reassignment happened while serving a prison sentence are considered as highly confidential data. These data are considered confidential and can be known/available only to officials when necessary to prevent the commission of crime or their investigation.

CONCLUSION

All prison systems around the world are always complicated, and any changes face the expected barriers of deep-seated irrational fears or prejudices related to the primary imperative of organizing security in prisons. Requirements of present time go towards achieving a more equal and inclusive society, and gradually the prison environment too, and no matter how justified, they present a real challenge for all prison systems.[21] Comparative legal analysis, however, recently has provided good practice models. In Europe, the most excellent example is Scotland and its Prison policy on gender identity and gender reassignment. In the United States highlighted the example of California is, and there is a whole history of sentences that allowed medical treatment of transgender prisoners while serving prison penalties, as well as the Prison Rape Elimination Act (PREA) on the prevention of sexual violence in correctional institutions. Although it seems easy to continue ignoring penological aspects of transgender issues, failure to discuss raising level of respect for human dignity of transgender people in the prison system of Serbia would be irresponsible. Especially given that this group, while becoming visible in our society after legalized process of gender reassignment within the health system of the Republic of Serbia, financed by the health funds, at the same time becomes subject of further discrimination and violence. It is therefore necessary to introduce flexibility in accommodation of transgender prisoners, to allow the gender reassignment surgery, as well as all other necessary hormone treatments.

REFERENCES

1. Becky Kent, Research Associate, Scottish Transgender Alliance Equality Network Edinburgh. Explanation of functioning the Scottish Prisoner Gender Identity and Gender Reassignment Policy
2. California sets policy for inmate sex reassignment. AlJazeera, 2015, 15 October,
3. http://america.aljazeera.com/articles/2015/10/21/california-sets-policy-for-inmate-sex-reassignment.html.
4. GUIDELINES FOR REVIEW OF REQUESTS FOR SEX REASSIGNMENT SURGERY (SRS), http://transgenderlawcenter.org/archives/12109.
5. Jenness Valerie, Fenstermaker Sarah, 2014, Agnes Goes to Prison Gender Authenticity, Transgender Inmates in Prisons for Men, and Pursuit of "The Real Deal". *Gender Society*, February 1, 2014, 28: 5-31, http://gas.sagepub.com/content/28/1/5.full.
6. Jenness Valerie, Fenstermaker Sarah, 2016, Forty Years after Brownmiller Prisons for Men, Transgender Inmates, and the Rape of the Feminine, *Gender & Society* February 2016 vol. 30 no. 1 14-29, http://gas.sagepub.com/content/30/1/14.full.
7. Kosilek v. Spenser, https://scholar.google.com/scholar_case?-case=4986521262718791593&q=Kosilek+v.Spencer&hl=en&as_sdt=2006&as_vis=1. LGBT People and the Prison Rape Elimination Act JULY 1, 2012, http://www.transequality.org/issues/resources/lgbt-people-and-prison-rape-elimination-act.
8. National offender management service: THE CARE AND MANAGEMENT OF TRANSSEXUAL PRISONERS PSI 07/2011 March 2011 till March 2015,
9. http://uktrans.info/attachments/article/365/psi_2011_07_care_management_transsexual_prisoners.pdf.

21 Becky Kent, Explanation.

10. Prisoner Gender Identity and Gender Reassignment Policy, https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804941cd.
11. Rosenberg Rae &Oswin Natalie, 2015, Trans embodiment in carceral space: hypermasculinity and the US prison industrial complex. *Gender, Place & Culture: A Journal of Feminist Geography.* Volume 22, Issue 9.
12. Scottish Prisoner Gender Identity and Gender Reassignment Policy,
13. https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804941cd.
14. Simopoulos Eugene F., Khin Khin Eindra, 2014, Fundamental Principles Inherent in the Comprehensive Care of Transgender Inmates, *Journal of American Academy of Psychiatry and the Law Online 42:1:26-36 (March 2014),* http://www.jaapl.org/content/42/1/26.full.
15. Stohr Mary K. 2015. The hundred years' war: The etiology and status of assaults on transgender women in men's prisons. Women & Criminal Justice 25:120-29.
16. TransGender Law Center: Prisons and criminal justice, http://www.transequality.org/issues/police-jails-prisons.
17. Yogyakarta Principles, http://www.yogyakartaprinciples.org/principles_en.htm.

UDC: 94(100)"1914/1918"
355.48(497.16)"1915/1916"

OPERATION MOJKOVAC A CENTURY LATER

Božidar Otašević, PhD[1]
Ministry of the Interior of the Republic of Serbia
Dragoslava Mićović, PhD
Academy of Criminalistic and Police Studies, Belgrade

Abstract: The Battle of Mojkovac was the epilogue of a three-month long bloody battles of Montenegrin Sanjak Army from October 1915 to January 1916 (the operation lasted 93 days), with the goal to stop at any cost the offensive of the Austro-Hungarian army from the direction of South-East Bosnia, whose intention was to cut off the retreat of the Serbian troops and people over Montenegro in the direction of Čakor, Murino, Andrijevica, Matesevo, Podgorica, Shkoder and further across Albania towards the Adriatic Sea. The symbol of this operation is the Battle of Mojkovac which was conducted on January 6 and 7, 1916. Some contemporary historians speak about "futile sacrificing", since purportedly the Serbian army was beyond the reach of the Austrian forces. However, it should take into account that for three months the Montenegrin Sanjak Army managed to keep the front from the Bay of Kotor to Zlatibor, Pester, Mokra, Čakor and Prokletije, and from the military point of view had the Austrian-Hungarian forces broken the last line of defense at any part of the front, the Serbian army would be in a hopeless situation. Montenegrin troops and officers had never questioned such a decision of theirs, they made superhuman efforts and protected to the last breath the retreat of the Serbian army. Stopping the enemy in December on the positions between Bijelo Polje and Turjak and on the mountains of Mokra and Čakor was of crucial historical significance for the successful retreat of the Serbian army across Montenegro and Albania. Vasojevići and Čakor detachments held these positions until January 5, 1916. This is why the Battle of Mojkovac was and still is the pride of the people who fought it and for the nation they belonged to and the Mojkovac hills have been endowed with the message of Serbian perseverance.

Key words: Battle of Mojkovac, Serbian troops, Austro-Hungarian offensive, military actions

INTRODUCTION

Following the great warfare successes in the first year of the Great War (1914-1918) in late 1915 and early 1916 already Serbia and Montenegro experienced one of the most difficult and most tragic moments in their newer history. They were broken militarily, occupied and politically completely weakened.

In October 1915, German and Austro-Hungarian divisions launched a general attack on Serbia. What the significance was of this military campaign can be illustrated by the fact that the famous army leader Field Marshal August von Mackensen was appointed the Command-

1 bozidarotasevic@yahoo. com

er-in-Chief, the victor against the Russians at Golitze-Tarnow front. Serbia found itself in even harder situation than that in summer and autumn of 1914. [2]

Mackensen's troops took control of Belgrade on October 10, 1915, and then continued to push back the units of Belgrade defense towards the inland regions of Serbia.[3] This was at the same time the beginning of general withdrawal of the Serbian army towards the South, since following the success in Belgrade it was much easier for the German and Austro-Hungarian troops to cross on a massive scale the Sava and the Danube rivers as well as other sectors of the front. The Serbian Government and the Supreme Command decided to use the tactics of gradual withdrawal, with strong resistance, but without engaging in some great or decisive battles, such as the one for Belgrade which showed all futility of making so much effort and suffering losses without real prospects of success. The basic idea was to ensure through gradual withdrawal and persistent resistance as much time as possible for allied forces embarked in Thessaloniki to get as much northwise as possible through Macedonia, so that it would be possible to organize further joint campaign against Mackensen's divisions.[4] On October 14, when the Mackensen's divisions were joined by the Bulgarians, attacking the Serbian army both from the side and from the back, it was clear that the Government and the Supreme Command did not have real prospects not only to achieve their military plan but to defend and save Serbia at all.

The penetration of the Bulgarians over the eastern Serbian borders, taking over of Skopje on October 22, and taking control over Vardar-Morava communication, the key strategic gap in the Supreme Command's plan occurred, and therefore the direction of withdrawal had to be changed and redirected towards Kosovo and Metohija. Since the Serbian army did not succeed in the attempt to make a break from Kosovo polje towards Skopje on November 18 to 20, in order to connect with the allied forces, Serbian Field Marshal Putnik ordered on November 22 the withdrawal of the Serbian troops to the left bank of Sitnica river. Soon after that the Serbian Supreme Command made the decision on withdrawal of the troops to the surroundings of Peć and from then over Montenegro and Albania towards Shkoder and Durres.[5]

The general order of the Supreme Command regarding the withdrawal of the Serbian army over Montenegro and Albania along Durres-Shkoder line dated November 25, reads as follows: "Along this line our army must reorganize, make provisions in food, clothing, footware, weapons and ammunition, as well as all other material requirements."[6]

Three directions were established for withdrawal: the direction Peć-Andrijevica-Podgorica-Shkoder, for the First, Second and Third army and the troops of the Belgrade defense; the direction Djakovica-Vezirov most and Prizren-Ljum Kula-Spas-Fleti-Puke towards Shkoder and Lezhe for the troops of new regions; the direction Prizren-Ljum Kula-Peshkopia-Debar-Elbasan for the Timocka army. The First army was given the task to provide the rear-guard.

The retreat of the Serbian troops over Montenegro started on December 3. In that situation difficult for the Serbian army, the Montenegrin army was given an extraordinary important role: to rearguard the retreat of the Serbian army through Montenegro against the enemy actions from Sanjak, Herzegovina and Boka. The Montenegrin army fronts at the very beginning of the Serbian army retreat had the role to rearguard the right side of the Serbian troops, and later on the Montenegrin army got the role of general protection of the main forces of the

2 Трипковић, Ђ. (2001). *Српска ратна драма 1915-1916,* Институт за савремену историју, Београд, стр. 38.
3 According to the data of General Mihailo Zivković, the commander of the Belgrade defense troops, Mackensen's cannons fired 25,000 grenades of various calibers during the attack on the city in October 1915. How heroic the defenders of Belgrade were is supported by the fact that the number of Belgrade defense troops was reduced to a third. Cited according to: Ђурић, А. (1985). За част отаџбине-како се Београд бранио у првом светском рату, Београд, стр. 91.
4 Трипковић, Ђ. (2001). оп. цит. стр. 46.
5 Ракочевић, Н. (1997). *Црна Гора у првом свјетском рату 1914-1918,* ИТП „УНИРЕКС" Подгорица, стр. 117.
6 *Велики рат Србије за ослобођење и уједињење Срба, Хрвата и Словенаца* (даље:ВРС), XIII, 72-74.

Serbian army during their withdrawal towards Shkoder. The best chronicler of the Operation Mojkovac and the warfare drama of Serbia and Montenegro, Vasilija Vukotić, the daughter of Serdar (Count) Janko Vukotic, the only female participant in the battle of Mojkovac, describing these days, says: "Those dark days have come with only tragic news: pressed from three sides by mighty German, Austro-Hungarian and Bulgarian armies, the Serbian army started to retreat. The news came that the Bulgarians stabbed the Serbian army in the back, they cut off the main communications towards Niš, Skopje and Thessaloniki and this is why the Serbian army must set off over Kosovo towards Montenegro. At that moment my father received a historical telegram from the Serbian Supreme Command:

"If Montenegrin Sanjak army succeeds in preventing the enemy penetration from Višegrad to the positions of Uvac-Prijepolje-Sjenica and Novi Pazar and thus does not allow them to attack the Serbian army from the side and to the back, it has paid its dues to the Serbianhood."

This is what Serdar Janko Vukotić replied:

"The Supreme Command should not worry: the Montenegrin Sanjak Army is determined to make sacrifice to the last soldier and not let the enemy attack the brotherly army from a side, not to mention from behind."[7]

After arriving to Peć, the majority of Serbian troops, refugees, representatives and diplomatic corps found themselves in a hopeless situation. Describing the spirit of the mass which flew into the Kosovo, August Boppe, the French representative to the Serbian Government wrote as follows:

"*Arriving to the point from where there is no way out, the mass feels trapped. And indeed, it seemed there was no way out, there was no rescue; it was not possible to go back, and the Bulgarians were blocking the road towards Skopje; there was only the West left, snow-covered Albanian and Montenegrin mountains with no roads whose peaks seem to touch the sky – dark and arduous, but the only way of salvation."*[8] What the condition was like in these first days in December 1915, when the operation of army reatreat from Metohija towards the Adriatic coast began, can be seen from the report sent to the Supreme Command on December 1, according to the decision reached at the session of the army commanders: "Morally and materially the condition of our troops is desperate. Despite all measures to prevent deserting the troops are rapidly breaking up. They run away en masse… The number of soldiers in the regiments includes only a few hundred people. There is food for troops for not more than 4-5 days. According to the report of our delegate from Cetinje food in Montenegro is nowere to be found, and the troops cannot find it anywhere along the way to the Coast… The great number of troops are naked and barefooted…"[9]

In addition to all material troubles and physical suffering, pressured by constant retreat which lasted for the full two months already, the soldiers were also in a terrible psychological condition. This is how Sima Marković, an artilleryman from Blaznava, described the frame of mind of the retreating army according to his memory:

---

7 At the moment of receiving this telegram Serdar Janko Vukotić was in Čajniče, from where he ordered the headquarters to prepare for movement and setting off to the positions from where the retreat of the Serbian army would be protected. Serbian people in Čajniče received this news with great concern, since they thought they would be left without protection. Although Pavle Vujisić with his unit was supposed to arrive to Čajniče from Kozara, the people thought they were being sacrificed and they were in a great problem. Realizing the people's concern the great leader leaves his daughter Vasilija in Čajniče as a guarantee that the people won't be left at mercy of the enemy. "*You heard Gagun. You will stay here. I gave my word to the villagers. This may be the only guarantee that they are not in danger*." Cited according to: Ђурић, А.: (1987). *Жене солунци говоре*, НИРО „Књижевне новине", Београд, стр. 61.

8 Трипковић, Ђ. (2001). оп. цит. стр. 52. .: (1987). *Жене солунци говоре*, НИРО „Књижевне новине", Београд, стр. 61.

9 Павловић, Ж. (1968). *Рат Србије са Аустро-Угарском и Бугарском 1915. године,* Београд, стр. 845-848.

"(…) It happened that the cannon broke down. But we did not have spare parts. After that we felt desolate, since it is not easy to retreat. You leave your land, home, family, you leave everything and only God knows if you will ever return, if you will ever see your village. I watched the soldiers crying like babies. We first came to Priština, and then there was Kosovska Mitrovica, then the crossing over Lab and Peć … This is the place where we destroyed the cannons. That was the hardest moment I had ever experienced. We dug a hole for my cannon and buried it just like a dead man. And it served us for so long that we got used to it like we would to a living being. We are now left bare handed… Even the birds in the sky could attack us. We are not an army any more, we are a scattered vagrants. Alas, this shouldn't even be mentioned (…)."[10]

In this period there was not a single road communication between Serbia and Montenegro which was favourable for road traffic, and this appeared as the first class living requirement in these warfare circumstances. Dramatic and unrepeated retreat of the Serbian army from Peć across Montenegro to Albania would show in the most drastic manner what price was paid for the lack of such a road. Extremely bad travelling conditions, particularly the direction across Čakor Mountain, required superhuman efforts, not to mention that pulling artillery and other heavy equipment could not be even imagined. Even today, after a century, in the village of Velika at the bottom of Čakor there are cannons preserved which had been left there by the exhausted Serbian soldiers during the retreat.

OPERATION MOJKOVAC

What was happening in October 1915 with the Serbian and Montenegrin armies defied military logic. Serbian Supreme Command was abandoning the land which they could not defend, but did not enter the trap prepared to accept the crucial battle at the connection of three Morava Rivers or later on at Kosovo and Metohija, where they would be destroyed for sure. When the Field Marshal Meckensen realized the far-reaching scope of the strategic manoueuvre of Field Marshal Radomir Putnik, by which he wanted to save the army even beyond his own state territory, he gave a categorical order to his subordinate general Keves to force, as soon as possible, the take over of the direction of the Lim river valley towards Berane, so that he would prevent the manoeuvre of retreat of the Serbian troops from Kosovo-Metohija plain towards Montenegro and Albania. This is exactly why the Sanjak Army of Serdar Janko Vukotić, which numbered 23,000 soldiers, acquired the character of the decisive strategic rear guard.

In early November the focus of operation of the Austro-Hungarian forces was on the direction Ivanjica-Javor-Sjenica, at the very joint of Serbian and Montenegrin armies. From November 8 to November 16, Montengrin Sanjak Army led fierce battles from Lim to Javor. If the Austro-Hungarian troops had managed to get deeper into Sanjak at that time, the Serbian army would have not succeeded to penetrate in the direction of Skopje, they would have found themselves in the position difficult for retreat over Montenegro, and perhaps even their retreat would have been brought into question. [11] This is why the operations by the Montengrin army from October 22, and particularly from November 07, to 16, are ranked among the most significant battles they led in World War I.

There are some historians who think that it was in the ten-day long battles at Javor that the Battle of Mojkovac was won. It is hard even for the most skilled writer to depict the true drama which was unfolding in these days at Karadjordjev šanac, for instance. This is sufficiently supported by the fact that this legendary trench was taken three times in the course of only

10 Шантић, М. (1938). Витезови слободе, Београд, стр. 87.
11 Ракочевић, Н. (1997). оп. цит. стр. 117.

one afternoon; and won back three times with knives and bayonettes, so that the heroes of Mojkovac operation would wait for the night in it. It is in these battles that the commander of Čevsko-bjelički battalion, Spasoje Gardašević, was wounded. Naturally, this was not the end of the drama on Javor. On November 12, fierce battles were conducted on Mučanj, where Rovački battalion under the command of Captain Milinko Vlahović managed to conquer this elevation, inflict serious losses to the enemy and capture 57 soldiers. During these days on Javor fierce battles were conducted by Pješivački battalion of Petar Mijušković as well, but all other batallions as well. [12] It is interesting that in these battles both Vlahović and Mijušković had to reach the decisions which at least at first sight strongly opposed all textbook postulates of military tactics. The enemy forces were at least five times bigger than their own, not to mention that they also had advantages regarding artillery, machine guns, ammunition and equipment… Knowing all this, they did not want to stick around in defense and suffer intensive fierce fire and losses, without artillery support and good fortifications, but they made incredibly bold decisions to launch attack. This all caused shock in the opponent's forces, since the enemy could expect anything but the attack regarding such a relationship of forces.

After the battles on Javor, the Sanjak Army was retreating from November 17 to the end of December 1915 from the line Javor-Kokin brod-Višegrad-the Drina River (160 km wide) to the line Čakor-Mojkovac-the Tara River (145 km wide). [13] Its operations had the character of guerrilla-defensive warfare with manoeuvring retreat. Vukotić had strict order to secure the direction Peć-Andrijevica-Trešnjevik, as well as to secure the later course of the Lim River and the grounds from Sjenica towards Novi Pazar and Rožaje from the penetration of the enemy from the North. Together with the Montenegrin Sanjak Army the retreat was supposed to be secured by the glorious First Army of Field Marshal Živojin Mišić. However, when Drinska II and Dunavska II second call-up – or to be more precise, what was left of these elite and glorious divisions, arrived to the area around Rožaje, it turned out that their exhaustion was such that they were not able to complete successfully the mission to secure these territories. These divisions were gathered in the wider area of Andrijevica for break and consolidation of a sort, and their protective role was completely undertaken by Vukotić with his troops.[14]

From December 17 to 23, Austro-Hungarian troops were launching fierce attacks towards Mojkovac, Berane and Čakor. These battles were especially severe and dynamic at Mojkovac, which was the main target of the enemy attack. In these battles the Sanjak Army units, with their great sacrifice, managed to fight off the enemy attacks and to thwart their intention to penetrate the northern borders of Montenegro through Mojkovac. These battles were also particularly important for the retreat of the glorious First Serbian Army of Živojin Mišić, which on December 22, got the order to set off towards Albania from the area of Andrijevica, where the majority of survived Serbian solders were. Being aware of that fact, General William Rainel wanted to crash the Mojkovac defense of the Montenegrins in order to cut off the retreat at least to that group of the Serbian army. Particularly cruel was the night battle of Mjeden guvno, where the Sanjak Army engaged in night combat for the first time. Fierce battle lasted for almost the whole night, the Austro-Hungarian units stormed four times violently, but they were stopped each time by Kolašinska Brigade of Miloš Medenica. It was during that night that embodied in Miloš Medenica, an inconspicuous and private person, actually a peasant, unbending resistance was exposed of a handful of highlanders against a mighty empire. [15] When Kolašinska Brigade batallions engaged in the decisive attack, the opponent started retreating towards Razvršje and Bojna Njiva, and later to the starting positions around Lepenac.

12 Опачић, П., Драшковић, А., Ратковић, Б. (1998). *Знамените битке и бојеви српске и црногорске војске (књига седма).* Православна реч, Нови Сад и Војноиздавачки завод, Београд, стр. 165.
13 Ракочевић, Н. (1997). оп. цит. стр. 118.
14 Опачић, П., Драшковић, А., Ратковић, Б. (1998). оп. цит. стр. 169.
15 Ђилас, М. (2013). *Бесудна земља,*ОКТОИХ, Подгорица, Штампар Макарије, Београд, стр. 187.

Forest plateaux, ravines and forests in the area of Mjeden guvno looked really scarefully. Through trampled and bloody snow at each step there were scary marks of cruel night battle. There were a few wounded men, bloody, frozen and left behind, giving last signs of life. Over 100 troops and officers were captured. Visual insight to the images of enormous deaths created an unrealistic image of enemy losses. The number of 500 dead was operated with and such data can be found in some official documents.[16] This number is by all means exaggerated, it has never been determined precisely, since neither domestic nor foreign sources correspond to the real state of affairs. However, that the enemy losses were great is supported by the fact that two weeks had to pass to fill in the units and for General Rainel to set off to the new decisive battle at Mojkovac.

BATTLE OF MOJKOVAC ON JANUARY 6 AND 7, 1916

When the First Serbian Army left the territory of Montenegro, formal reason for the Sanjak Army to function as the rear guard of the Serbian retreating troops seized to exist. Still, it remained constantly on their snow and ice bound battling positions.

Describing the moments on the eve of the Battle of Mojkovac Vasilija Vukotić wrote: "*Here at the Mojkovac door, when the Serbian Army exhausted and decimated by hunger and incessant marches was out of reach of enemy's forces, the final act of the drama was supposed to be played in which the Austro-Hungarian battalions and Montenegrin platoons will disappear, which will later enter the history and legend that still lasts and will last as long as the fiddles exist. Since this was really the generation born for the song.*"[17]

On the Christmas Eve, on January 6, general attack on all Montenegrin positions began, especially on the slopes above Mojkovac: Uloševina, Bojna njiva and Razrvšje, with the goal to conquer the terrain and continue penetration inside the main formation of Kolašinska Brigade. The enemy numbered 15,000 men, while the forces of Vukotić numbered just above 6,000 men.[18] General all-day long battle on the Christmas Eve was won by no one. The Montenegrins lost those positions which they had no intention of defending at any cost. They lost what they "planned" they could lose, Uloševina and Bojna Njiva, but kept Razvršje until further, and this represented a capital fighting position for both sides in the forthcoming conflict which was inevitable.[19] Rainel counted on the fierce resistance of the opponent, but had confidence in his forces and their advantage in the number of troops as well as materially better equipment which had to be used. Contrary to him, Serdar Janko Vukotić was being broken by the global destiny of Montenegro. The destiny backfired on him, not only of Mojkovac but also of the Vasojević platoon, pressed by enormous force of the enemy at the Berane front.

In the headquarters of Petar Martinovic in Štitarica on the Christmas Eve, after he had heard the detailed report by Brigadire Martinović, Serdar Janko Vukotić made a decision to attack the enemy first at six o'clock on the Christmas morning. The plan was as follows: "Uskok's battalion was to be informed during the night and they would attack first at six in the morning. Abruptly and suddenly they would flank the enemy from the left, and when they get engaged with the Uskoks, an hour later, at 7 o'clock, the Kolašinska Brigade was to attack with full force and as boldly as possible in order to create chaos within the enemy."

16 Опачић, П., Драшковић, А., Ратковић, Б. (1998). оп. цит. стр. 182.
17 Ђурић, А. (1987). *Жене солунци говоре*, НИРО „Књижевне новине", Београд, стр. 70.
18 The first Sanjak division in Mojkovac, as far as artillery is concerned, was not that poor, but they lacked ammunition in necessary quantities. The Commander of the entire artillery in Mojkovac was Serbian Major Dragutin Hadži-Ilić.
19 Опачић, П., Драшковић, А., Ратковић, Б. (1998). оп. цит. стр. 188.

According to the order of Serdar Vukotić, at the dawn of Christmas Uskok's battalion of Ljubo Poleksić led man to man combat on Čelinska kosa with the forces of General Swartz. The battle was led in the middle of dense beech forest, in more than a meter deep snow which was falling incessantly limiting visibility to 10 m. Without the contact with the main body of the troops, without filling of ammunition and without orientation as to what was happening around them, the soldiers of Ljubomir Poleksić covered with their blood each part of the snow and each beech tree around Čelinska kosa. Forty nine dead and forty six wounded troops were the final result of the battle.[20] An hour later Kolašinski and Gornjomorački battalions attacked the enemy trenches at the bottom of Razvršje. On that occasion they encountered deathly fire which nailed them to the ground. Charges were repeated many times but were not changing the situation at the battle field. Two weak battalions of recruits were supposed to attack Bojna njiva from the west, but both their charges failed, and their massive deaths reduced their number to sad remnants. [21] The enemy kept introducing fresh reserves into the battle, it was only a matter of time when they would launch a general attack. The commander of the division Martinović, at the request of Miloš Medenica, introduced his last reserve into the battle for Bojna, the Drobnjak battalion. The commander of that battalion Nikola Ružić had already been wounded, so a part of the battalion was commanded by his nephew, Lieutenant Jevto Ružić. After the third charge in a row the Drobnjaks took the first line of the trenches at Bojna njiva. Encouraged by this unexpected result, Miloš Medenica ordered the commander of Rovački battalion, Milinko Vlahović, to take energetic charge, which caused confusion in the enemy defense. Then General Rainer introduced his last two platoons of reserve and he himself led the counter attack for which he did not have power. This, at the same time, was the end of the Battle of Mojkovac, without the real goal and result, but for sure sufficient for epic song and legend.

Both the Austrians and Montenegrins remained on the same slopes above Mojkovac, both in the forests and snow, face to face, until the glorious Sanjak Army retreated without fight on January 1916, when the order was implemented to "dismiss the Montenegrin army and let them go home." [22] The Sanjak Army commanded by Serdar Janko Vukotić, remained at their positions at Mojkovac and Berane even after the fall of Lovćen, until the mentioned order on dismissal. According to the official Austro-Hungarian confession, all that time "they were resisting staunchly".[23]

SANJAK ARMY

The Battle of Mojkovac on January 7, was cruel beyond any doubt. An Austrian source dated 1933, comprised based on authentic documents, speaks about more than 700 wounded and 224 dead. The losses of the Montenegrin army, according to the report by Petar Martinović, Chief Commander at Mojkovac these days, dated January 09, 1916, reports about 164 dead and 281 wounded soldiers. [24] Regardless of the fact that they were watching the sufferings of the Serbian army, which retreated into the unknown, far from their homeland, the moral of the Montenegrin army was high. It was not recorded that any soldier deserted or that a unit left its position or disobeyed their superiors. There is not any mistic in this fact, this was simply the moral code acquired through warfare and brotherly-tribal organization of the Montenegrin army.

All historians that wrote about the Operation Mojkovac agree on one thing, that the army consisted of the ordinary people, the peasants to the true meaning of that word. This army

20 Ibid. p. 191.
21 Batallions of recruits consisted of young men of 18 to 21 years of age.
22 Ibid. p. 190.
23 Operations log of the Third Army.
24 Опачић, П., Драшковић, А., Ратковић, Б. (1998). оп. цит. стр. 193.

had no uniforms, they waged war in their own clothing and row cow hide peasant shoes. As for age structure, it is clear from the available data that both fathers and sons fought in the same company, which was regular, and it was also no exception that even a grandfather fought together with his son and grandson. The army did not have any logistic support or regular provisions. Half a kilo of bread per soldier for a few days, and no other food. This chronic lack of food was overcome by probably unique manner in the history of warefare, the army got provisions from their homes.

What the state could not provide from its military warehouses was compensated by a brave and persistent Montenegrin woman. While the operations were in progress, everyone could see the columns of black stooping figures of women with full bags on their back walking slowly from the farthest Montenegrin villages along goat paths towards the front and then back with the wounded on the strechers. This process went spontaneously, without any influence or organization of the state. How poor Montenegro was at that time was well described by General Piarron de Mondesir, a chief of French delegation in the Serbian army, who describing the meeting with Princess Ksenija in Virpazar wrote the following: "A woman slaughtered a chicken for breakfast as hard as wood… What I saw of Montenegro looks pretty miserable…"[25] The situation at the front of Mojkovac and Berane was uncomparably worse. The weapons given by Russia in the Balkan wars were worn. These were mostly the Russian rifles, the so called "Moskovka rifles", which together with the bayonettes were 30 cm longer than the Austrian Mauser rifles, which again turned out to be decisive for man to man combat led at 25 degrees below zero in one meter deep snow, even up to two meters at some points.

Former Austro-Hungarian officer, Coloner Richter, who would later be admitted to the army of the Kingdom of the Serbs, Croats and Slovenians, describing the Mojkovac battle said the following: "*As an Austro-Hungarian officer I was at the Russian front (Carpathes) and Italian front (Soca). All these battles cannot be compared with the Battle of Mojkovac. The courage of the Montenegrin soldier has no examples in the history of warfare in any other army. There were days when certain positions changed hands for several times in storms. There you could see a Montenegrin soldier attacking the enemy bare handed. This meagre and primitively armed Montenegrin army was holding at the Mojkovac area far more numerous Austrian army that had modern weapons. Each step of the land is soaked with their own as well as enemy blood. And each part of the ground was covered with their own and enemy corpses!*"[26]

Montenegro mobilized 25% of their entire population, or 40% of the total male population. Out of about 50,000 soldiers around 20,000 soldiers were killed or died from the consequences of being wounded or in prisoners-of-war camps. This was 10% of the entire population, or 20% of male population, or 40% of the total number of mobilized soldiers.[27] Montenegro suffered great losses in civilian population as well. Due to warfare hardship, ocupator's repression, particularly weak nutrition and diseases, the mortality increased in comparison with the prewar situation while the natality dropped considerably.

OPERATION MOJKOVAC AND SERDAR JANKO VUKOTIĆ YEARS LATER

The living fellow warriors of Serdar Janko Vukotić are long gone, those who might tell about their memories to the younger generations in vivid words how the Orthodox Christmas was "celebrated" in 1916 at Bojna njiva and Razvršje near Mojkovac… National history has

25 Генерал Пиарон де Мондезир (1936). Албанска Голгота-успомене и ратне слике, Графичко предузеће просфета, а.д. Београд, стр. 37.
26 Source: Internet: www.vijesti.me, accessed on January 12, 2016.
27 Ракочевић, Н. (1997). оп. цит. стр. 461.

not paid due attention to the warfare performance and military-strategic result of the most numerous detachment of the Montenegrin army named the Sanjak Army. The Operation Mojkovac has not been given the place it belongs to it in the recent history of either Serbia or Montenegro, it has barely been recorded. However, the narrative and tradition have moulded and modelled this battle in the minds and imagination of the people, especially in Montenegro. This is how the legend has been created which still exists. The "reasons" have always been found for it which were the least scientific, or valid and sustainable from military-historical point of view. The historical sources are rather scarce, the reliable memoire literature even scarcer. [28] This is why memory was used and the wows of the dead calling not to forget their honourable sacrifices. It all has given strength to consider from different angles – strategic, social, psychological, moral, anthropological – a several centuries long war drama of a small nation, who in the conflict with the mightier was holding on due to their persistent courage and moral tenacity.[29]

Unfortunately, little is know about the essence, complexity and strategic connotations of that circle, three-month long wartime events, which were led and endured by the Montengrin Sanjak Army of Serdar Janko Vukotić. It happens that it is not only the poor knowledge of the intellectual public or public in general, but this is to a great extent the case with the people of the profession, historical profession as well for that matter. What lives the longest in the minds and knowledge of people on the events at Montenegrin north-east battle field, in other words the sector covered by the Montengrin Sanjak Army of Serdar Janko Vukotić, is the final of the war drama which happened at Mojkovac on January 6 and 7, 1916, known as the Battle of Mojkovac. [30] The echoes of this battle are more present in literature than in any other field of social life, mostly through the works of Milovan Djilas (the novels "The Land without Justice"and "Montenegro") and Mihailo Lalić (the novels "Until the Mountain Turns Green" and "Looking down on the Roads"), who were motivated more than others to narrate about the Battle of Mojkovac. They were listening day in day out the touching stories of the participants in this battle, who were reliving the heroism and tragic of the Mojkovac warfare. The Battle of Mojkovac was also the main motive of the novel by the same title by Ćamil Sijerić, and Rastko Petrović also deals with this battle in his novel "The Sixth Day".

After World War I the enemies of historical truth, shallow historians and cheap political intriguers tried to cast a shadow on Serdar Janko Vukotić and the glorious Operation Mojkovac. Janko Vukotić was accused of being one of the culprits for the capitulation of Montenegro on January 21, 1916, which naturally is not true if we take into account the set of all circumstances in which Montenegro found itself. The Montenegrin Supreme Command hoped that the Montenegrin army would evacuate with the last units of the Serbian army, which can be seen from the two following telegrams. Assistant Chief of Staff of the Serbian Supreme Command Colonel Žika Pavlović asked the Montengrin Supreme Command from Shkoder (Decision no. 27018 dated January 05, 1916) "is the battalion of 8. Regiment second call-up, which was held in Plav according to the order of that Command (Decision no. 8115, dated December 02, 1915), directed to Shkoder and where is it now?" Serdar Janko Vukotić replied to this telegram (Telegram no. 97, dated January 06, 1916) "that this battalion is still in Plav and that it will retreat on time down Cijevna towards Shkoder, presumably together with our troops."[31]

28 Vasilija Vukotic, the daughter of Serdar Janko, is the only woman participant of the Battle of Mojkovac and she left quite a faithful account of this battle. More about this: Ђурић, А. (1987). Наведено дело, стр. 45-82.

29 Поповић, Б. (2002). *Критичка промишљања,* Јавно предузеће Службени лист СРЈ, Београд, стр. 100.вв

30 Опачић, П., Драшковић, А., Ратковић, Б. (1998). оп. цит. стр. 142.

31 Мартиновић, Н. (1957). Јанко Вукотић и капитулација Црне Горе 1916. године, ауторско издање, Цетиње, стр. 18.

It is obvious that the only salvation for the Montenegrin army was to retreat in due time outside Montenegro. This did not happen because of political calculations and dynastic interests of King Nikola. All those who were holding the most responsible posts in the state administration were also holding King Nikola's side. It is a wrong opinion of those who thought that King Nikola would have taken out the army if he could. Rakočević has a good reason to believe that he could have done that, but did not want to. The main reason he was guided by at that time was his fear that he would lose power over the army and that it would blend in the Serbian army. [32] There had never been real trust between the Serbian government and King Nikola. From the very beginning Serbia and Montenegro were different due to different concepts of the two states uniting into one national community.

The war that started in 1914 was reckoned by both states as a great historical moment of general uniting of Serbian people, but the official state policies about that had two different approaches: the Montenegrin side advocated the idea to unite the dynasties, and the Serbian side advocated the uniting of the people. These two things stand as the realationship between the real and personal union, as the formulae of national union. [33] The principle one nation-one state was in the spirit of the time and that principle from historical depth called in question the existence of Montenegro as a separate state.

All this contributed to the Operation Mojkovac to be forgotten fast and marked modestly from time to time. In the previous one hundred years the jubilee of the Battle of Mojkovac was celebrated four times in four states: first at Cetinje on August 31, 1940, and in Mojkovac in the Kingdom of Yugoslavia on September 1, 1940; for the second time, on the occasion of the 50th anniversary, in the SFRY, on October 30, 1966, when the monument in honour of the heroes of the Battle of Mojkovac and all Montengrin soldiers in World War I was unveiled; for the third time it was in Mojkovac, in the FRY, on January 06, 1996, marking the 80th anniversary of the Battle of Mojkovac and organized by the Association for fostering the tradition of liberation wars until 1918 from Belgrade; and finally in 2015, there were separate celebrabtions in Serbia and Montenegro.

Glorious Serdar Janko Vukotić was followed by similar fate. There is an impression that Montenegro easily abandoned the army leader who had liberated a great part of its present territory from the Turks in the Balkan wars.[34]

32 Ракочевић, Н. (1997). оп. цит. стр. 194.

33 Екмечић, М. (1973). *Ратни циљеви Србије, 1914.* Српска књижевна задруга, Београд, стр. 406.

34 It is well known that in the First Balkan War Janko Vukotić disobeyed the order of King Nikola that following the liberation of Mojkovac and Bijelo Polje "makes no step further into Sanjak" even if all important points and towns sent him deputates and offered to surrender". The first and only King of Montenegro did not want any complications with mighty Austro-Hungary. However, an educated officer recognized well a good political and military-tactical moment, so his glorious army liberated Pljevlja, Berane, Plav and Gusinje. A novelist Veljko Milićević wrote several extraordinary reports from the Eastern front in the Balkan Wars, where Janko Vukotić was a commanding officer. Of particular interest is his coverage "From the Montenegrin battle field", written for Sarajevo journal "Narod" (December 8-21, 1912). Milićević saw Vukotić for the first time in the Headquarters of Eastern Detachment in Berane. He was impressive. According to his impression he says: "There is energy exuding from each his movement." He saw him for the second time at the slopes of Rugovske Mountains when he defeated Javed Pasha's army which numbered 12,000 soldiers. Serdar was eloquent. "His narrative was impressive and his words gave confidence and strength", writes Milicević. Describing the secret of military successes of Serdar Janko, Milićević says that the army thought of him as a part of its organism and vice versa. "Maybe there lays a part of success of the Eastern Detachment, while the other part is due to great strategic skills of Serdar Janko. Easterm Detachment has always functioned excellently, and this is thanks to great determination of the army to fulfil their duties so willingly. The cooperation between the wings and the center was perfect and the enemy was broken effortlessly. And this happened constantly, with minimum casualties on the Montenegrin side, since there are no many army leaders who know to preserve their troops like Serdar Janko. The secret of his tactics is caution and firm energy in a strike at the moment he chooses. The Eastern Detachment conquered more territory than entire Montenegro

Milovan Djilas says: "Janko Vukotić is the last great man of classic Montenegro. It is because of him that it shined for the last time more beautiful than ever." [35] This was probably what the local government in Mojkovac failed to take into account when they changed the day of their municipality, which used to be celebrated on January 07, in memory of the glorious epopee of Vukotić and his brave army, into August 13, the day when the municipalities of Polja and Mojkovac united into one municipality. If we take into account the statement given by one of the local politicians in Mojkovac, who said in 1997 on the occasion of unveiling the monument, that he would "move" Vukotić out of the town at the Tara River, then we can rightfully ask the question: Why are the Montenegrins afraind of the dead Serdar? The irony of fate is even greater since the Embassy of Serbia was opened in the house of Serdar's grandson Janko in Podgorica, after the disintegration of the state union in the creation of which Serdar participated with his brave Sanjak Army, and this is the ground where the glorious army leader rests.

CONCLUSION

The significance of the great Operation Mojkovac reflects in the fact that the meagre Montenegrin Sanjak Army managed to stop several times mightier enemy and provides for the brotherly Serbian army to retreat to the Albanian coast, wait for the allied ships and find rescue at Corfu and Biserte, to penetrate the Thessaloniki front later and reach Kajmakčalan, the gate of their homeland. Vasilija Vukotić wrote: "If it weren't for that bloody Christmas in Mojkovac, there would be no Easter on Kajmakcalan. It it were not for the Montenegrin eagles, those young men who despised death in an instant, closed the door of Mojkovac with their own flesh and bones not allowing the enemy to flank or ambush the Serbian Army, the destiny of Serbian-hood would be sealed for good." Each and every of these brave men knew that they could not hold. They held up, for a moment, in three-month long battles, in sufferings, which measure the strentght of a nation and an idea. This operation was certainly a brave and honourable Montengrin share in the fight of the Serbian people for survival under the attack of German invaders.

Everything that was happening after the glorious Mojkovac battle is the consequence of unclear settings for waging war. Montenegro did not have a clear warfare goal, which would correspond to the spirit of time and strivings of the Montenegrin people, who wanted to unite with Serbia. On the one hand, the Montenegrin army was completely subordinated to the operational goals of the Serbian Supreme Command. This was justified considering that Serbian-Montenegrin front was a united front at which good cooperation in the battle field gave exceptional results. On the other hand, the Montengring King Nikola and the Government were not capable of leading their country in the conditions of a truly difficult war in the manner dictated by the complex historical circumstances. This inability led the country to capitulation. We are sure that this was not a treason of any kind, but great lack of resourcefulness and poor assessment of the events, and ultimately in the depth of it all there was the question of dynasty, i.e. the tendency of King Nikola to preserve his throne.

had with barely three hundred casualties. This capability and these successes make Serdar Janko Vukotić one of the most interesting and one of the greatest Serbian army leaders in this war". Cited according to: Мартиновић, Н .: (1957). оп. цит. стр. 5-6

35 Ђилас, М. (1989). *Црна Гора*, Књижевне новине, Београд, стр. 16.

REFERENCES

1. Ђилас, М. (1989). *Црна Гора*, Књижевне новине, Београд.
2. Ђилас, М. (2013). *Бесудна земља,* ОКТОИХ, Подгорица, Штампар Макарије, Београд.
3. Ђурић, А. (1985). За част отаџбине - како се Београд бранио у првом светском рату, Београд.
4. урић, А. (1987). *Жене солунци говоре*, НИРО „Књижевне новине", Београд, стр. 45-82.
5. Екмечић, М. (1973). *Ратни циљеви Србије, 1914.* Српска књижевна задруга, Београд.
6. Иинтернет: www.vijesti.me, претражен дана 12.01. 2016. године.
7. Мартиновић, Н. (1957). *Јанко Вукотић и капитулација Црне Горе 1916. године,* ауторско издање, Цетиње.
8. Опачић, П., Драшковић, А., Ратковић, Б. (1998). *Знамените битке и бојеви српске и црногорске војске (књига седма).* Православна реч, Нови Сад и Војноиздавачки завод, Београд.
9. Павловић, Ж.: (1968). *Рат Србије са Аустро-Угарском и Бугарском 1915. године,* Београд.
10. Пиарон де Мондезир (1936). Албанска Голгота-успомене и ратне слике, Графичко предузеће „Просвета" а.д. Београд.
11. Поповић, Б.: (2002). *Критичка промишљања,* Јавно предузеће Службени лист СРЈ, Београд.
12. Ракочевић, Н. (1997). *Црна Гора у првом свјетском рату 1914-1918*, ИТП „УНИРЕКС" Подгорица.
13. Трипковић, Ђ.:(2001). *Српска ратна драма 1915-1916,* Институт за савремену историју, Београд.
14. Шантић, М. (1938). Витезови слободе, Београд.

UDC: 336.221.24
351.713
336.225.68

THE STATE'S CONTEMPORARY APPROACH TO THE SUPPRESSION OF NON-COMPLIANCE WITH TAX LAWS[1]

Marina Dimitrijević, PhD[2]
University of Niš, Faculty of Law

Abstract: The compliance with tax laws by tax payers is a very important issue for every state due to the fact that it is the fundamental prerequisite of its successful financing and functioning. The fiscal goal of taxation (the provision of funds for the needs of the treasury) is still dominant even though it is a fact that taxes, from the end of the 19th century up to today, have also gradually taken over the role of instruments which are used to achieve non-fiscal goals of taxation. This is particularly confirmed by the current financial-economic crisis. It has forced many states to undertake the measures of fiscal consolidation which have helped timely and constant realisation of tax claims, while rationalising public expenditure, in order to firmly establish the central position within the field of public finances.

The wider international economic and financial cooperation and the fast development of information technologies pose significant challenges in the taxation sphere. The adequate opposition of the legal state to numerous modalities of tax avoidance (tax evasion) and the provision of a significant level of tax discipline is possible only through permanent strengthening of its institutions. The contemporary approach of the state in the area of suppression of non-compliance with tax laws includes numerous novelties and the treatment provided by the tax (state) authorities, such as the application of the complex of measures of preventive and repressive nature directed towards strengthening tax discipline, creating a positive atmosphere in tax relations, modernising tax functions (tax assessment, tax control and tax collection), implementing the concept of managing risks in tax collection, intensifying the fight against international tax frauds and strengthening the international exchange of tax information as a globally accepted tax standard.

Key words: taxes, tax laws, tax evasion, legal state, tax discipline.

INTRODUCTION

Since the introduction of taxes, they have been followed by their evasion. The attempt to pay as low taxes as possible or to evade them has always to a lesser or a greater extent been present among the population of tax payers. Non-compliance with tax laws is the current topic in the contemporary state which tends to be a legal state. Functioning of the legal system in its entirety and in the part concerning the tax law stands for the presumption of the legal state and the rule of law, which are basic political and legal ideals of every democratic society. The rule of law creates an all-inclusive frame for the social and economic development.

1 This paper is a result of scientific research conducted within the project "Protection of Human and Minority Rights in the European Legal Area" (No 179046), supported by the Ministry of Education, Science and Technological Development of the Republic of Serbia.
2 marina@prafak.ni.ac.rs

At the turn of the second decade of the 21st century, a large number of states in the world are facing a crisis in their public finances. Fiscal consolidation, that is, the reduction of the fiscal deficit and the level of public debt represent necessary steps in overcoming the crisis. In this context, the questions referring to the provision of a sufficient level of obeying tax laws, and the timely and consistent realization of tax claims, accompanied by the reduction of public spending, are becoming important. At the same time, the contemporary circumstances which are, on the one hand, characterised by the wide international economic-financial cooperation and the fast development of information technology, and, on the other hand, the changes of social structures marked by a decrease in the economic power of most tax payers, by social and economic polarisation, by the destruction of social cohesion and solidarity, represent a specific challenge for the implementation of the current tax systems. Therefore, contemporary states work hard on modelling a new approach in the area of the suppression of tax non-compliance. Identifying the causes and forms of non-compliance with tax laws and the development of adequate measures, concepts and procedures to reduce the evasion of taxes represent the basis of this approach, and its effectiveness will be confirmed or denied by the years to come.

THE CAUSES OF NON-COMPLIANCE WITH TAX LAWS

The adoption of high-quality tax laws by the parliament and their consistent application in real life are the prerequisites of good functioning of the tax system and the realization of planned goals. Tax non-compliance is an inevitable companion of the implementation of tax systems and its features and scope can be different. A high level of disobedience of tax liabilities has a negative influence on financing the public sector and the vital functions of the state, the economy, the economic growth. It is also a symptom of deeper disturbances within the society and, at the same time, an initiator of the further expansion of the crisis and social fragmentation.

The phenomenon of non-compliance with tax laws (tax evasion) has its causes. Certain institutional, legal and socio-economic causes shape the environment suitable for the erosion of the tax payers' willingness to comply with the taxes. A low level of democracy in society, weak institutions, inefficient and overabundant public administration, a large scope of discretionary powers of civil servants and corruption are the characteristics of the institutional infrastructure which creates the space for tax evasion. The legal system as well, that is, its characteristics such as the presence of imprecise legal regulations and ineffective system of sanctioning, statutory modalities of taxation, inadequate controls of tax payers, instability of tax legislation, should also be seen as the suitable "soil" for tax non-compliance. The inadequate purposes of spending collected tax revenues, low tax morale, high level of taxation pressure, macro-economic instability, and the degree of the fragmentation of the economy[3] represent socio-economic causes of disrespecting tax liabilities.

The causes which are related to the conceptualisation and the application of the tax system are particularly noteworthy within the domain of the causes of tax (non)compliance. Fair and simple taxation, high-quality administration of the tax system, modern tax administration and developed tax functions (tax assessment, tax control and tax collection), low taxation costs (administrative costs of taxation and tax compliance costs),[4] and a well established nor-

3 In the economies which are dominated by medium-sized and large businesses, the level of tax evasion is lower, on an average. See: Tanzi, W., Parthasarathi, S. (1993), A Primer on Tax Evasion, *IMF Staff Paper*, 40(4), p. 809.

4 One of the most comprehensive analysis of the studies of administrative costs of taxation and tax compliance costs was conducted more than a decade ago. See: Evans, C. (2003), Studying the Studies: An overview of recent research into taxation operating costs, *e-Journal of Tax Research*, 1(1), pp. 64-92.

mative framework for sanctioning tax delicts have a positive influence on the fulfilment of tax liabilities.

In essence, fair taxation implies that individuals with similar economic power are exposed to similar pressure of taxation. In order to protect their own interests, the countries which export capital use powerful financial organisations to achieve the role of moderators of contemporary tax structures. The processes of globalisation, tax harmonisation, and tax competition have formed tax systems which rely on the consumption taxes (i.e. regressive and unfair tax systems), thus showing all the gravity of the "struggle" for resources and attracting capital. The existence of a stimulating tax ambience is a priority goal, while the social aspects of tax policy, which reflect in fairness, especially vertical one, are given secondary significance. Being that it is necessary to strengthen the economy, tax instruments are used dominantly in order to achieve this goal, meaning that the principle of efficiency dominates the principle of fairness in taxation.[5] In these circumstances, it is not surprising that the absence of fairness in taxation initiates the resistance to paying taxes.

Tax systems with a large number of tax forms and complex tax procedures are suitable for tax evasion. The control of an appropriate application of tax laws is significantly hardened, and also the costs of taxation are increased. This is the reason why it is necessary for each country to continually build up the capacities of the most important fiscal institution – tax administration. Namely, the undeveloped tax administration delegitimizes and makes pointless all efforts to use it in order to implement a desired tax policy. It has to be mentioned that most countries have recognised the need to modernise revenue bodies, and, therefore, implements their reform.

The literature on tax evasion names two groups of factors which influence this phenomenon.[6] Tax payers first compare the amount which they save with tax evasion and the costs in case they are detected. The expected costs depend on the probability of being caught while disobeying tax norms, the size and scope of prescribed sanction (fine), the probability of the sanction being applied and the predisposition of tax payers to take risks.[7] In addition, certain influence also comes from the attitudes of tax payers towards tax evasion, that is, the social norm of conscientious tax behaviour. The incorporation of this norm into the consciousness of tax payers can discourage them from not paying their taxes, increase the belief that other tax payers also pay their taxes, and reduce their interest in tax evasion.[8]

THE FORMS OF NON-COMPLIANCE WITH TAX LAWS

Non-compliance with tax laws has several forms of occurrence which substantially influence the achievement of planned fiscal and non-fiscal goals of taxation. The forms and scope of disobedience of tax laws change in time, thus showing, in a specific way, the ability of competent state organs to confront them and prevent them.

The activities of tax payers which result in the break of tax laws and which are done in order to evade paying tax claims represent tax evasion (tax delicts). Besides this form of evasion,

5 Dimitrijević, M. (2015), Fairness and the Current Process of Modeling Tax Systems in the Contemporary World, *Collection of Papers, Faculty of Law,* Niš, LIV(70), pp. 289-290.
6 Slemrod, J. (2007), Cheating Ourselves: The Economics of Tax Evasion, *Journal of Economic Perspectives*, 21(1), pp. 25-48.
7 Increasing the probability of discovering tax evasion is, according to many results of empirical research, a more efficient instrument of its reduction in relation to other mechanisms (for example, enhancing the punishments). See: Alm, J., Jackson, B., McKee, M. (1992), Estimating the Determinants of Taxpayer Compliance with Experimental Data, *National Tax Journal*, 45(1), p. 110.
8 Edlund, J., Aberg, R. (2002), Socials norms and tax compliance, *Swedish Economic Policy Review,* 9, p. 224.

revenue bodies of many countries also tend to oppose the unacceptable minimisation of the tax liability which does not result in the direct breach of law. In fact, it can be said that these cases represent a breach of tax laws if there is proof of deliberate circumvention of legislator's intention (tax avoidance). Besides tax avoidance there is an acceptable tax planning, and it is not sanctioned. In practice, the following forms of tax planning are most common: the restraint from spending, the substitution of consumption of one product with another (less taxed), business reorientation, the change of the place of residence, the change of the place of conduction of activities, the change of citizenship, the change of the form of capital, etc.

The line of demarcation between acceptable and unacceptable tax evasion is very fluid because sometimes it is difficult to draw a precise boundary between the skilful running of business and the abuse of rights in tax matters. The concept of the abuse of rights, which is often used by jurisprudence in recent times, provides the revenue bodies with the basis for confronting such plans of tax payers. If a tax payer does not tend to achieve legitimate commercial goals in his/her business activities, but uses certain legal forms in order to skilfully avoid paying certain taxes, such behaviour is qualified as illegal exercise of rights. In the practice of some countries, courts can refer to the principle of *looking through* (the doctrine of *substance over form* in Anglo-Saxon systems) which implies the scrutiny of the essence of a transaction through its form. The application of this principle is based on the interpretation of the law and seeks the solution within the doctrine that essence is more important than form, or it relies on the so-called economic interpretation, which is usually not applied in other areas of the law, or it relies on the civil law concepts of severability of simulated legal matters, that is, the circumvention of the law.[9]

Taking into consideration the complexity of the request which is set upon tax payers by the modern taxation, it is important to point out one more fact. The disobedience of tax laws does not always have to represent a manifestation of deliberate intents of tax payers to use incorrect representation (withholding) of relevant taxation facts in order to reduce (evade) their tax liabilities (active tax evasion). The lack of obedience of tax laws can also be the result of the unsuitable involvement of revenue bodies in the segments of informing and educating tax population, as well as the tax regulation of poor quality (passive tax evasion).[10]

THE CONTEMPORARY STATE AND THE SUPPRESSION OF NON-COMPLIANCE WITH TAX LAWS

Non-compliance with tax laws is an undesirable occurrence and the formulation of an adequate approach within the field of its suppression is the indisputable responsibility of the state, that is, the competent state authorities. An authoritative position of state organs in their relation towards tax payers is reflected in the permissions which enable the fulfilment of the public interest in the taxation area, which is more powerful in comparison to the private interests of tax payers. In order for the tax system to be successfully implemented over a longer period of time, an institutional triangle made of the ministry of finances (tax administration) – the ministry of internal affairs – the ministry of justice should be efficient. Among these subjects, it is necessary to establish the practice of mutual trust, the exchange of data in real time, and the creation of mutual teams of experts with the aim of responding adequately to the occurrence of complex forms of tax crimes. It should be mentioned again that the relation between tax payers and state organs can be viewed as a kind of a "game" in which, on the one hand, there is prominence of the ability of tax payers to "circumvent" in some way the tax

9 Popović, D. (2008), Tax Law, Faculty of Law, Official Gazette, Belgrade, *cit*. p. 46.
10 Jelčić, B. (1998), *Financial Law and Financial Science*, Informator, Zagreb, p. 191.

regulations, and, on the other hand, there is the ability of state organs to discover with a high level of probability such actions, in order to adequately sanction them (the so-called "cops and robbers" game).

In principle, it is very important to use the legislation which regulates the taxation procedure in order to lower the possibilities of evading the payment of taxes, to provide enough space for giving support to tax payers in their fulfilment of requests which are imposed by tax laws, to discourage disobedience of tax liabilities. The unwillingness of state organs to oppose properly to tax indiscipline sends a bad "signal" to honest tax payers, and, at the same time, encourages the effect of role-modelling onto the dishonest tax behaviour.

The innovation in the field of the application of tax laws implies a certain organisational adjustment of, primarily, revenue bodies in the way they achieve the function of taxation, as well as the introduction of socially-desirable forms of communication with tax payers. This creates positive atmosphere in the tax law relations. With the intention of reducing the direct contact between revenue bodies and tax payers, the contemporary state has chosen a wide application of self-assessment (the assessment of tax by tax payers) in the segment of tax assessment.[11] Self-assessment is accompanied by the provision of tax services and the main goal is to adjust them to tax payers, to make them available, understandable and timely and to achieve the effect of strengthening tax compliance. Today, revenue bodies search for an optimum combination of methods and means for the provision of tax services, while trying to achieve the balance among the demand to improve the quality of these services, the need to make taxation less uncomfortable for tax payers and the need of revenue bodies to lower their expenses. It is necessary to avoid the complexity of the technique of self-assessment because the effect of this complexity will undoubtedly be unfavourable. Namely, the complexity will bring tax payers many difficulties during the assessment of tax liability but also some space for evading it, and for irregular economic activities and deformations of tax law relations.

The environment within which the tax laws are applied is susceptible to frequent changes. Depending on the type and intensity, they can be considered to be potential risks for the successful administration of the tax system. The management of tax risks starts with the establishment of fundamental risks at the level of the tax system, and then, at the level of certain categories of tax payers. The categorisation of tax payers based on different criteria (income potential, activity, etc.) is particularly important for the clear identification of risks, the determination of their priorities and the application of adequate measures (the so-called strategy of managing tax risks).[12] Tax control is very important in this segment, so the focus has to be directed towards the increase in the effectiveness of the mechanisms of tax control, the improvement of the existing and the development of the new methods of control. The recognition of tax risks is possible if there is a high-quality selection of tax payers who should be controlled, the efficient monitoring of tax controls and their frequency, the reliable analysis of the results of tax controls, and the like. The application of information technology notably supports the function of the tax control, as well as other functions of revenue bodies. The complete computerisation of the taxation procedure, i.e. the existence of a tax information system enables the intersection of the data of revenue bodies with the data of other state bodies and it determines the accuracy of the established facts (tax) in the taxation procedure. Also, it enables more quality in the monitoring of tax collection.

Taking into consideration the experience of numerous tax administrations, a relatively small number of tax payers pay for a large share of tax revenues. Namely, those are tax payers

11 The concept of self-assessment includes the taxes which are within the mode of the withholding tax.
12 Mahmood, M. (2012), *Compliance Risk Management Strategies for Tax Administrations in Developing Countries: A Case Study of the Malaysian Revenue Authority*, Warwick Business School, The University of Warwick, p. 19.

with the largest income potential (multinational companies) – the so-called large tax payers. They are characterised by: complex business operations around the world; a large scope of financial transactions on a daily basis; a considerable number of employees; the use of services of tax advisors who help them to minimise their tax liabilities, and other.[13] Due to the aforementioned characteristics, it is clear that large tax payers represent the highest risk for the quality work of revenue bodies.[14] The successful management of this risk demands special professional qualifications of tax administration employees and the existence of specific organisational units of tax administration for working with large tax payers. The specificity and the complexity of tax situations of large tax payers is what causes a differentiated approach of revenue bodies towards them. This differs the contemporary revenue bodies from the traditional ones which treated all tax payers in an equal manner.

Being that the functioning of multinational companies creates possibilities for an aggressive tax planning, non-compliance with tax laws and the large international tax frauds, the main task of contemporary revenue bodies is to predict their future tax behaviour in a timely manner and to adequately monitor them. The question of cooperation between tax administrations is more and more insisted upon, although the formation of an efficient system of international exchange of tax information is facing a lot of obstacles. [15] In February 2014, the OECD and the Group of twenty most developed countries in the world (G-20) pronounced the automatic exchange of information to be a global standard.[16] The time ahead of us will show what kind of benefits and what risks are brought by this standard. In our opinion, the process of the exchange of tax information on an international level requires the setting up of certain limitations, in order not to jeopardise financial and other interests of countries and the violation of tax payers' rights.[17]

CONCLUSION

The contemporary state is faced with a significant number of disloyal tax payers. If there is no permanent effort to strengthen the institutions of the legal state and to formulate an adequate approach in the area of the suppression of non-compliance with tax laws, dishonest tax payers will systematically cause damage to the public finances. This will create long-term negative consequences for the population, and the economic and social development.

The policy of the suppression of non-compliance with tax laws, which is based on a complex of measures of preventive and repressive nature, adequately influences the tax discipline. It reduces the number of tax payers who enter the sphere of tax non-compliance, and it also encourages the removal of tax payers from the sphere of tax non-compliance to the sphere of tax compliance. The improvement of the organisational structure of revenue bodies, at the

13 OECD (2009), *Tax Administration in OECD and Selected Non-OECD Countries: Comparative Information Series* (2008), Centre for Tax Policy and Administration, pp. 44-45.

14 Contemporary tax systems insist on the increase in the success rate of revenue bodies. Thereby, they use the approach of the "three E's", that is, the evaluation of economy, efficiency and effectiveness of their activity. The measurement of performances represent a part of broader processes of strategic and operational planning and it is important for the provision of responsibility and transparency of the functioning of revenue bodies. See: Crandall, W. (2010), Revenue Administration: Performance Measurement in Tax Administration, IMF, Fiscal Affairs Department, *Technical Notes and Manuals*, 10/11, p. 1.

15 See: Zee, H. H. (2005), World Trends in Tax Policy: An Economic Perspective, *Financial Theory and Practice,* 29(2), p. 236.

16 OECD (2014), *Standard for Automatic Exchange of Financial Account Information,* Common Reporting Standard, p. 6.

17 See: Oberson, X. (2003), The OECD Model Agreement on Exchange of Information – a Shift to the Applicant State, *Bulletin for International Fiscal Documentation,*57(1), pp. 14-17.

first place, and then the modernisation of all stages of the tax procedure, the specialised training of tax administration employees, the intensive tax public relations, and the development of tax morale are inevitable activities of contemporary governments in the domain of administering tax. In order to maintain the satisfactory obedience of tax regulations in a certain society, the coordination and mutual actions of revenue bodies with other state organs in the domain of the suppression of tax delicts, as well as the international tax cooperation, have to be a priority. This confirms the absence of tax discrimination as the most important indicator of an unbiased attitude of the state towards its tax payers.

REFERENCES

1. Alm, J., Jackson, B., McKee, M. (1992), Estimating the Determinants of Taxpayer Compliance with Experimental Data, *National Tax Journal*, 45(1), 107-114.
2. Crandall, W. (2010), Revenue Administration: Performance Measurement in Tax Administration, IMF, Fiscal Affairs Department, *Technical Notes and Manuals*, 10/11, 1-12.
3. Dimitrijević, M. (2015), Fairness and the Current Process of Modeling Tax Systems in the Contemporary World, Collection of Papers, Faculty of Law, Niš, LIV(70), 277-292.
4. Edlund, J., Aberg, R. (2002), Socials norms and tax compliance, *Swedish Economic Policy Review,* 9, 201-228.
5. Evans, C. (2003), Studying the Studies: An overview of recent research into taxation operating costs, *e-Journal of Tax Research*, 1(1), 64–92.
6. Jelčić, B. (1998), *Financial Law and Financial Science,* Informator, Zagreb
7. Mahmood, M. (2012), *Compliance Risk Management Strategies for Tax Administrations in Developing Countries: A Case Study of the Malaysian Revenue Authority*, Warwick Business School, The University of Warwick
8. Oberson, X. (2003), The OECD Model Agreement on Exchange of Information – a Shift to the Applicant State, *Bulletin for International Fiscal Documentation*, 57(1), 14-17.
9. OECD (2014), *Standard for Automatic Exchange of Financial Account Information,* Common Reporting Standard
10. OECD (2009), *Tax Administration in OECD and Selected Non-OECD Countries: Comparative Information Series (2008)*, Centre for Tax Policy and Administration
11. Popović, D. (2008), *Tax Law,* Faculty of Law, Official Gazette, Belgrade
12. Slemrod, J. (2007), Cheating Ourselves: The Economics of Tax Evasion, *Journal of Economic Perspectives*, 21(1), 25-48.
13. Tanzi, W., Parthasarathi, S. (1993), A Primer on Tax Evasion, *IMF Staff Paper*, 40(4), 807-828.
14. Zee H. H. (2005), World Trends in Tax Policy: An Economic Perspective, *Financial Theory and Practice,* 29(2), 225-247.

UDC: 341.456
343.341
343.9.02

THE ROLE OF INTERPOL DEALING WITH CRIME AND TERRORISM

Sasho M. Stojanovski, PhD[1]
Ministry of the Interior of the Republic of Macedonia,
International Police Cooperation Department
Metodija Dojchinovski, PhD
Military Academy, Department of Security,
Crisis Management, Protection and Rescue, Skopje
Biljana M. Stefanova, MA
Ministry of the Interior of the Republic of Macedonia,
International Police Cooperation Department

Abstract: Historically, crime dates back to the origin of civilization itself and in that regard there is no period in the human existence in which the crime was unknown. With the development of modern society the crime gets its new forms and organization which makes it particularly dangerous for the state systems. Organized crime in it's various forms, particularly terrorism as the most dangerous form of violence, represent a threat which can cause enormous human and material consequences. Namely its influence can be noticed in further social development both nationally and internationally.

Regarding the fact that crime does not know boundaries and does not recognize and respect the legal rules and regulations, joining efforts in dealing with it should be aimed at its obstruction, reduction and prevention. To achieve these goals at national, regional and international level, special police and judicial prosecutorial units are formed, numerous conventions, protocols, resolutions and recommendations are brought and adopted, national with international legal acts are recon ciliated, and new instruments are created. Despite all efforts that appear by the participants in the process, it can be concluded that the expected results are not at the desired level.

Interpol has a particularly important role in dealing with the crime, and particularly pays attention to organized crime and terrorism which are qualified as the most dangerous forms of international crime. The main instrument for its obstruction and prevention consists securing and enabling continuous cooperation between Member States.

The above mentioned facts imply the need for a more detailed analysis of the activities of Interpol in the fight against crime and terrorism, particulary in order to increase the capacity utilization and the opportunities that are offered to its members. For the existing conditions in the area of cooperation some data will be presented from the performed empirical research of the authors.

Keywords: crime, organized crime, terrorism, Interpol, international cooperation.

1 E-mail: smstojanovski@yahoo.com.

INTRODUCTORY REMARKS

Historical events in the area of crime show that cooperation finds its roots in earlier practices used in cases of international control of individuals and organizations, political opponents of the existing systems. The formation of large national states in the XIX century and the emergence of organized crime caused the need of more intensive and continuous cooperation. Over time it becomes a unique and most important instrument in the fight against crime and its perpetrators. Abrogation of the political motives of cooperation was the most significant reason for its development and contributes to devote more attention to crime. On the other hand, the evolution of terrorism reflects its complexity, vitality, intensity and his huge threat to the national security of States and overall international security. Today, international relations are characterized by the appearance of new dangerous forms of terrorism with the ability to cause mass effects and the world that is slowly becoming a hostage. If we analyze terrorism, one of the many findings that would occur is that there is a direct and indirect effect. The indirect goal would be the one through which terrorism through its action in all segments of modern society, sows fear among the population worldwide. The direct goal emerges from the threat and weakening of the security of a country and the international community as a whole. Terrorism often uses nonentities to create power hopping that from below it can achieve what the country has from above. Terrorism has various roots and forms but as time passed it evolved, changed and perfected its tactics and methods of action which resulted in changing the traditional concept with a new one called hyper-terrorism.

TERRORISM

The meaning of the word "terrorism" for different people has different meanings. The word terror (the French word "terreure" denotes sowing fear[2] and Latin „terror„ means fear, terror, rule by intimidation, political violence[3]) in political terms it means act of violence, which is taken for political purposes of intimidation and without regrets breaking the resistance of the one for whom it is meant.

A solely definition for the term terrorism does not exist. Its definition is open for discussion because what until yesterday was considered as terrorism today it is not or what today is considered as terrorist until yesterday was considered as a liberation movement and vice versa. If one person in a segment of a society is called a terrorist for another segment of the same society he is respected as a fighter for freedom. The definition of terrorism is not yet completed, mainly because of two important reasons: according to some theorists is impossible to define it because of its various forms and according to others because of the political overtones of the term that excludes any objectivity.

According to several authors in the term as constituent elements should be contained the following notions: executor, intent, motive, use of force, the primary subject (victim), excessive sacrifices, intimidation[4]. To prove that the definitions of terrorism are similar, two Dutch scientists from the University of Leiden, Alex Schmid and Albert Jongman, collected 109 scientific and official definitions of the term and analyzed them to find their major components[5]. Basically, for all definitions there are three common elements: using violence, political purposes and intent to instill fear in a targeted population.

2 Politicka enciklopedija –Savremena administracija.Beograd, 1975,str.1079

3 Mala enciklopedija –IP Prosveta Beograd 1970,str.,94

4 'J. J. Paust-Preliminary Thoughts-on terrorism-American Journal of International Law- 1974, No.3str.502; Dr. Vojin Dimitrijevic-Instead on the right, the blame is thrown on the left - Student no.19 from 1977; „Politicka enciklopedija„ – Sovremena administracija - Belgrade 1975, str.719

5 The results of the analysis showed that the word violence is consisted in 83,5% of the definitions, political aims in 65%, in 51% incitement of fear and terror, in 21% of the definitions negotiations and hostages were mentioned, and only in 17,5% civilian victims, unarmed persons, natural persons and foreign elements were mentioned

According to the Interpol: "Terrorism is a crime that characterizes violence or intimidation to achieve political or social objectives and mostly against innocent victims"[6].

Looking at the historical roots of political violence, its origin and motives of application, it is necessary to start from originally organized societies, as the state, through its relations which have always produced the inequalities that are created and maintained on the basis of ownership of the resources of production by which the terror was used as an instrument of punishment or dissuasiveness.

This means that terrorism is deeply rooted in history and present in all periods[7]. Terrorism has always assailed and weakened the social - economic system, undermined the democracy, led to delay of democratic reforms and increased the tension between the countries. Today, it represents a global danger and the most serious threat to democracy, to human rights, to economic and social development. As a form of threat it represents the most widespread form of destructive behavior that daily in the world takes a number of casualties and causes immeasurable damage to property.

Today's international terrorism is usually identified with fundamentalist - Islamist movements and ethnic extremism and organized crime. Terrorist violence as a product of the new and old contradictions develops into a real world problem in the beginning of the XXI century, especially with the opportunities for terrorists to possess weapons of mass destruction[8].

Terrorism received its international significance in 1930, with the first hijacking of an airplane, so that today it would become a global threat. Modern international terrorism does not target just one society or one country, which is why it is a global issue. International terrorism is a set of activities prohibited by international law, directed against individuals, groups, states and its institutions. International terrorism breaks all conventions on human rights and freedoms on national and international level. Because of its serious threat and endangerment of states and the international community as a whole, a wide range of international - legal modalities of cooperation are established and practiced, joint participation in their prevention, and preventive[9] and repressive[10] measures are taken. The international cooperation in preventing terrorism, apart from the extradition, is familiar with other instruments that are outside the criminal - proceedings. Those are: international police cooperation, expulsion, exchange of information on inmates, supervision of condition-

6 Kotovchevski, M. Advanced terrorism, Macedonian civilization, Skopje, 2003, p. 24.

7 Traces of terrorism in history take us to the Zeloti (called Sikarii – Jewish sect) who murdered officials in the local authority, with the aim to raise a revolution and ban the Romans from the territory of Palestine. From the middle east most known are Asasini (1090-1275.н.е Islamic sect) which killed political rivals of the ruler for whom they worked for. In the period of ancient Greece and Rome the murderers of the "tyrants" were raised to the heroic pedestal and their acts were accepted with glorification.

8 Modern terror has the intention to enter the sphere of weapons for mass destruction, in the cosmic systems which are installed for the need of humanity, as well as in nuclear systems that can be fatal for humanity. With the exception of the attack with nerve gas on the Tokyo metro in March 1995, carried out by the sect „Aum Shinriko„, the whole terrorism in the last years was carried out in the conventional way. That means that terrorists have limited their *"modus opeeandi"* to bomb attacks, throwing bombs, setting fires, weapon attacks, kidnapping and vandalism. The attack with nerve gas in 1995 was an overturn because it was the first case in history using chemical and bio weapon in an urban society.

9 The prevention is combined of several conventions and other acts brought and adopted by the UN and Council of Europe. Geneva convention for combating terrorism from November 16 1937, Convention for the Suppression of Ulawful seizure of Aircraft (Hijacking Convention - The Hague, 16.12.1970, Convention for the Suppression of Ulawful Acts against the safety of Civil Aviation - Montreal, 23.09.1971, European convention against terrorism from 1977, European convention for punishing terrorists (Brussels,6.12.2001). It is fulfilled through international judicial and police organizations and national bodies. The conference was held in Geneva from 1-16 November 1937 in which 35 countries took part.

10 The repressive measures are provided with the regulations of international and national legislation in terms of acknowledging the criminal acts and criminal sanctions.

ally sentenced or conditionally released persons, arrest and surrender of persons that illegally crossed the border, legal aid, etc.

INTERNATIONAL CRIMINAL POLICE ORGANIZATION – INTERPOL

Until the beginning of the XX century states did not have a special need for the establishment of a special international police organization, although the first attempts, in this regard, are made in the middle of the XVIII century with the formation of the Police Union of German states in 1851[11]. In this direction were also: The proposal to establish an international police League of Austria and Switzerland in 1898, holding the first conference on police co-ordination of police measures to defend from the anarchists from 24 November to 21 December 1898 in Rome, holding the Second International Conference against anarchism in March 1904 in Saint Petersburg.

Political commitments, ideological divisions and the existence and expression of nationalist sentiments among major countries, were the main reasons for such conditions.

At the end of the XIX century, the police institutions round out the process of professionalism and develop the system for collecting data on crime and its perpetrators. The more intensive traffic of any kind allows quick transport of people and objects anywhere and anytime. The increasing number of crimes committed with a foreign element and the emergence of transnational organized crime with its features, imposed the need to accelerate the process of creating a police organization that will influence broader.

FORMATION AND DEVELOPMENT OF THE ORGANIZATION

One of the largest international organizations that actively participate in the fight against threats to security in the world and which contribute to global security is the International Criminal Police Organization - Interpol. (International Criminal police Organization - Interpol). The motto of the organization "For a safer world" speaks for itself about the goals of the organization[12].

The establishment of Interpol is in fact a continuation of the efforts of the world community for the creation of an international police organization. Holding the first international court - police and criminal - law conference from 14 to 18 April 1914 in Monaco, is the first step of the plan. The next step in international police cooperation against transnational organized crime is made on the second international police congress in Vienna from 3 to 5 September 1923, with the establishment of the International Criminal Police Commission - ICPC known as Interpol, based in Vienna[13].

The development of the Commission continues with the formation of the central police units for international cooperation within the national police services[14] and in 1930 are established several specialized departments, international central bureau, office for

11 Deflem Mathieu, (2002), Policing World Society:Historical Foundations of International Police Cooperation,Oxford University Press,p.65-77

12 By the number of member states (190) in the international organizations has the second place in the world right after the United Nations which has 192 member states.

13 In the beginning the Commission was with an undefined legal status and saw itself as European, however after the joining of non European countries the Commission gained a multinational character.

14 The Second General Assembly of ICPC held in Berlin in 1926. This step is assumed to be the basis for forming the national central bureaus – NCB today

international police records, bureau for falsified passports, an international radio connection was introduced. The number of states in 1938 increased to 38. During the World War II, the Commission's activities are stopped. In the presence of representatives of 19 countries in 1946 in Brussels, the Commission has been restored. The Statute[15] is being established and the police cooperation is limited to criminal acts of general crime, while the seat is moved to Paris. On the XXV session of the General Assembly held in Vienna in 1956, the name of the Commission is changed in the International Organization of criminal police force that is in use even today. Up to 1958 it was considered as a non-governmental organization and in 1971 within the UN acquires status as a council body that deals with crime prevention. The meeting held in the period from 6 to 13 October 1986 adopted a paragraph according to which each country independently decides the time and manner of subscription and use of the opportunities that the organization offers. Till 1989 Interpol headquarters was located in Paris, when it was moved to its current location in Lyon.

Adjusting to the new technical - technological innovation and the opportunities they offer in order to increase its efficiency and in order to accelerate the exchange of information electronically and efficient search across multiple databases at the same time, steps are taken for constant technical development[16].

ORGANIZATIONAL STRUCTURE OF THE ORGANIZATION

According to the Statute of Interpol, the organizational structure is consisted of the General Assembly[17], the General Secretariat[18], Executive Committee[19], NCB[20], and advisors. The communication between members transacted in four official languages: English, French, Spanish and Arabic.

OBJECTIVES AND PRINCIPLES OF ACTION

Interpol basically provides support for the security services and agencies to combat all forms of transnational crime. The main objectives are consisted of providing reciprocal assistance to all organs of the forensic police in accordance with their national legislation and the development of instruments that can contribute to the prevention and repression of crime, while respecting the provisions of the Universal Declaration of Human Rights. Activities that are taken to achieve the objectives are accomplished through various forms and methods of collecting and exchanging data and information on specific treatment requirements for police investigation and criminal legal aid. Interpol's constitution prohib-

15 More on this in the papers of Diskopf, P. (1956),,,Novi stari Interpol,,,Izbor,,broj 2,str.289-293 i Ustav Megjunarodne Kriminalisticke Policije (1957), Izbor, broj 2, str.143-150.

16 In that direction from 1990 in use is the telecommunication system X-400 and from 1992 the system for automatic search of data - ASF (Automatik Search; Facilliti-ASF). During 1998 the Interpol Criminal Information system – ICIS was created and in 2003 the new telecommunication system based on the Internet Insist I - 24/7 which ensures a secure way for exchanging data and information between "LEAs" - Law enforcement Agencies.

17 The Assembly is the highest command body which is consisted of delegates from all member countries. It brings the most important decisions related to the acting politics, recourses, work methods, finances, activities and work programs.

18 The Secretariat is consisted of the General Secretary, technical and administrative personnel in charge for the functioning of the organization and the international police cooperation.

19 The competence of the Comity is in regards of following of the executions of the dissensions, supervision of the secretariat and the administration

20 National central bureaus functions as national offices of Interpol and as such represent contact points between national police services within the countries, between two or more NCBs and between NCB and the General Secretariat

its any intervention or activities that have political, military, religious or racial character. The basic principles of treatment are consisted in respect for national sovereignty, universality, equality of members, flexibility of working methods and cooperation with other institutions and agencies.

Guided by four core tenets: Secure global police communication services[21]; Operational data services and databases for police[22]; Operational police support services[23]; and Police training and development[24]; Interpol offers 24 hours support of law enforcement authorities dealing with international crime. Within Interpol also function - Interpol Response Teams and - INTERPOL Major Event Support Teams.

If we know that fast information is the basis for the prevention of crime and terrorism, then the advantage of the work of Interpol in relation to other security agencies is consisted of rapid access to relevant databases and their exchange. This form of operation is provided by continuously introducing the latest technical - technological infrastructure of technical and operational support to all police organizations to meet the growing challenges of crime in the XXI century.

PRIORITY AREAS OF ACTION

Interpol's activities cover a number of areas. Among them priority or as activities that the organization pays special attention to are: public safety and terrorism, human trafficking, drug trafficking and criminal organizations, financial and computer crime, fugitives and corruption.

PUBLIC SAFETY AND TERRORISM

Public security and terrorism are areas of special attention because terrorism as a threat to life and property of the people and the state can also be threatened. Because of these dangers, Interpol to its members, in their efforts to protect their citizens and the state from crime and terrorism[25], offers different kinds of support. To achieve such activities it collects, stores, analyzes and shares information on suspicious persons and groups and their activities and coordinates the circulation of warnings of terrorists, known offenders with foreign elements and armed threats.

21The new system I 24/7 contains information for perpetrators of criminal acts and their activities: database for suspected terrorists, database for perpetrators which are subject of search with a view of extradition, database for fingerprints and photographs, DNA database, database for stolen/lost identification documents, database for stolen goods and works of art, database for stolen vehicles, trucks, boats, rowboats and containers, database for stolen weapons etc.

22 Access to the databases through the new system helps the investigators in dealing and preventing crime and facilitates their criminal investigations

23 Constant support is provided by the Command and Co-ordination Centre" – CCC" in regards to priority cases with which the organization is dealing with:public safety and terrorism, human trafficking, drugs and organized crime, financial and cyber crime, fugitives and corruption.

24 With the aim to help Interpol employees of the member States in advancing their operative skills and efficiency, building their capacities to be able to respond to the globalization and specific nature of crime in 2007 a special program was established.

25 Including bioterrorism, arms and explosives, attacks against civilian population, piracy and weapons for mass destruction

To help in dealing with terrorism in its reports about terrorist activities, Interpol issues a practical guide "Guidelines", and encourages members to submit reports about other types of crime which is suspected to have connections with terrorism[26]. The increased possibilities of terrorist attacks with biological or chemical weapons in the world, represent a growing threat, and because of that, in the frame of Interpol operate a specialized unit for bio - terrorism with a task to implement various projects for more efficient and consisted cooperation between NCB and region offices. On this topic are organized annual conferences where hundred participants - experts from specialized units for combating terrorism are exchanging practices, experiences, information and develop strategies for further successful fight against this threat.

NCB INTERPOL AND THE REPUBLIC OF MACEDONIA

National Central Bureau of Interpol in Macedonia was established in 1993 in the framework of the Ministry of Interior. Since the formation until today, NCB Interpol Skopje suffered more reforms to fully meet the standards and working conditions for the functioning and realization of international police cooperation at the highest level. Today, NCB Interpol Skopje is part of the Department for International Police Cooperation, where besides Interpol, function other units as well.

The NCB activities are aimed at sharing information, knowledge and data on persons and objects, participation and coordination of joint international investigations, search and arrest of persons, subject to international search and their extradition. Most of the activities take place through the system of global communication Interpol I 24/7. Through this system in 2015 are received and processed about 120,000 messages. In daily operations, beside cooperation with other NCB and Law enforcement, it makes direct cooperation with other institutions: Ministry of Justice, Public Prosecution, Courts, Customs, Financial Police and so on.

EMPIRICAL RESEARCH

Within the analysis[27] of answers of respondents to the question "What are the biggest threats to peace and security" of the responses received it was concluded that for 43.7% of respondents, terrorism remains the number one threat in the world.

Regarding the measures to be taken to deal effectively with new forms of organized crime, 20% of respondents believe that they should be directed to the appropriate changes in legislation and to increase cooperation between the competent institutions. Asked about the effectiveness of international cooperation between the judicial authorities and internal affairs, 42,9% of the respondents believe that it is not effective. About the forms of cooperation between the judicial authorities and internal affairs on international level, that would contribute to dealing with new forms of organized crime 31.8% of respondents believe that they should be aimed at establishing common international database and exchange of information.

A dedicated research represents the basis for concern about maintaining the peace and security of citizens around the world that explicitly indicates the need to strengthen the police force and international security and police cooperation; raising confidence in the security structures intended for prevention, early warning and dealing with contemporary security

26 Activities in relation to suspicious financial transactions, illegal arm trade, money laundering, document forgery used for traveling and identification, seizer of nuclear, chemical and biological materials
27 Stojanovski M. Sasho, (2011), International cooperation in the area of justice and home affairs in EU dealing with organized crime, Master dissertation, Skopje.

challenges, strengthening national security facilities, benchmarks and national bureaus, creating programs to reduce the impact of security risks and threats, exploitation of political and diplomatic resources to fight against terrorism and organized crime and acceptance of appropriate reforms in the security sectors.

CONCLUSION

The threats that come from new forms of transnational organized crime, especially terrorism, make the world societies unsafe. Terrorism remains the number one threat for the world and for all nations. Today terrorists act anywhere. Their presence will grow, and its impact will spread worldwide. The phenomenon will not disappear, because it is in the process of constant evolution. The creation of a growing number of international terrorist organizations and the seriousness of terrorism as a nuclear, biological and chemical threat, poses a mortal threat to the future of humanity.

Therefore, the international community announced a global war on terrorism and the countries transform their institutions and social systems by forming centers for crisis management, protection and rescue, counter-terrorist centers, and the security agencies and intelligence services directed their activities towards preventive action, early detection, cooperation, coordination and exchange of intelligence information.

International solidarity and cooperation is essential. Faced with the challenges and escalating terrorism, states endeavor to prevent and in principle all agree on the need for an uncompromising struggle. But ideological, unofficial neighborhood confrontation and promoting ideas for the protection of human rights and democracy in a violent manner, makes it impossible to conduct such declarative support and also because some countries through terrorism achieve their own aims. If we add to this the terms of the slow and complex procedures, the large number of different national and international legal acts, their mismatch, various international positions and interpretations, perceptions of their national sovereignty, language barriers in mutual communication and the possibilities offered by modern resources of communications and transport in terms of their use by the crime and its perpetrators, the achieving international cooperation becomes problematic.

These conditions contribute to the mismatch of the measures and activities that need to be taken jointly. The latest events with the refugee crisis in Europe as a result of military actions in some North African countries and countries from the Middle East confirm this conclusion.

The way out of this situation is seen in the coordinated approach, in achieving rapid and efficient cooperation between institutions responsible for its prevention and treatment free of formalities, increase mutual trust, using the most modern sources of communication, efficiency, mobility, overcoming the problem of national sovereignty and differences in national legislation, full utilization of capacities and opportunities offered by Interpol.

This means that international institutions and instruments should be adapted to the new requirements and contribute to more effective dealing with threats through increased cooperation and mutual assistance in the investigation and resolution of security issues.

This work shall be an initiative for further research and debate on this subject with the aim of bringing closer the criminal justice systems and successfully dealing with the threats of crime by organized crime and terrorism.

REFERENCES

1. Abadinsky Howard, 1994, Organized crime 4th ed. Chicago.
2. Arnaudovski Ljupco, 2002, Repression in function of prevention of organized crime, edition organized crime Project program Tempus and cards, Skopje.
3. Deflem Mathieu, (2002) Policing world society: "Historical Foundations of International Police Cooperation", Oxford University Press, November.
4. Jensen, R.B (2001), The International police and fight against Anarchist terrorism (1900-1914) Terrorism and political violence, 13 (1).
5. Kambovski, Vlado, 2005 Justice and home affairs in EU, Skopje
6. Yamold, Barbara M„ (1991), International fugitives: A new role for the International Court of Justice", First published in 1991, Praeger Publishers, One Madison Avenue, New York.
7. US Department of Defense: (1998) Terrorist Group Profiles; Washington, DC, US Government Printing Office;
8. Europol, 2006, An Overview of the Counter Terrorism Unit activities, The Hague.
9. Naumovski Vladimir, 2010, „Fight against terrorism financing in world with special overview to some Southeast European countries.
10. Stojanovski M. Sasho, 2011, International cooperation in the area of justice and home affairs in EU dealing with organized crime, Master dissertation, Skopje.

LEGISLATION

11. Law for international cooperation in criminal matters of the republic of Macedonia.
12. United Nations Convention against Transnational Organized Crime and its Protocols.
13. European convention for repression of terrorism.
14. European Convention on the Suppression of Terrorism, 27.I.1977, Strasbourg;
15. Southeast Europe Convention for Police Cooperation;

INTERNET SOURCES

16. http://www.interpol.int
17. http://www.organized-crime.de/OCDEF1.htm#coe
18. http://www.ejn-crimjust.europa.eu/ejn_tools.aspx

UDC: 328.3:351.74/.75(497.11)
328.3:355.02(497.11)

PARLIAMENTARY OVERSIGHT OF SECURITY SYSTEM: THE CASE OF SERBIA[1]

Maja Nastić, PhD[2]
University of Niš, Faculty of Law

Abstract: Bearing in mind the parliamentary mission to represent the interest and opinions of citizens, this paper focuses on parliamentary oversight. The parliamentary oversight of security system is an essential element of the separation of powers at the state level. This institute has been introduced in Serbia only recently. Basics of defense and security and their oversight are set out in the Serbian Constitution (2006). Ten years later, we analyze the scope and challenges of the established system of parliamentary oversight from the perspective of the basic functions of Parliament: legislative, budgetary and control over executive bodies. In particular, we focus on the roles of Committee for Defense and Internal Affair and the Committee for Control of Security Services, as main holders of parliamentary oversight.

Key words: the National Assembly, security system, committees, the parliamentary question

INTRODUCTION

Security is one of the basic values and one of the key tasks of modern state. The security system has been established with the intention of securing peace and stability, safety and protection; it is vital for the creation of strong and independent democratic institutions. In order to achieve these goals, it is necessary to establish the control of their work. If there is no efficient mechanism of control over the security system, it may misinterpret its mission and establish "a state within a state". Democratic control of the security system is implemented in accordance with democratic principles and the protection and promotion of national security. It is possible in the system based on the rule of law, the principle of separation of powers, independence of judiciary, free and fair elections and election changeability of power holder, free and critical publicity.[3] Oversight may cover all aspects of state organization or may relate to certain areas, such as organization's finances, policies or use of personal date. Oversight may contribute to maintain a high level of responsibility of both organizations or individuals and building public confidence by informing the public about their activities. Oversight is a catchall term which can encompass processes such as monitoring, evaluation, scrutiny and review.[4] However, in terms of this article, oversight does not imply direct involvement in decision making regarding the organization's policy or practice.

There are six pillars of democratic oversight of the security system: internal control, control of the executive, parliamentary oversight, judicial control and supervision of institutions for public service institutions.

1The author acknowledges the grant of the MNTR 179046, for carrying out this research.
2 maja@prafak.ni.ac.rs
3 Milisavljević, B. et al, Skupštinska kontrola i nadzor sektora bezbednosti, Beograd, 2012, s.19
4 Willis A, et al. Parliamentary oversight of security and intelligence agencies in the EU, 2011, p.41

The focal point of this paper is parliamentary oversight of the security system. There is a widespread belief that security policy is a "natural" task of the executive power as they have the requisite knowledge and ability to act quickly[5], while the parliament is considered to be a less suitable institution for dealing with security issues. Relying on the fact that "the most fundamental and persistent problem in politics is to avoid autocratic rule" (Dahl), it is obvious that we need to engage Parliament as a cornerstone of democracy. Our starting point is that " the role of parliament is not just to support the executive but to impose its own personality and to influence the development and the implementation of policy".[6]

Bearing in mind that the security system is very complex by its nature, as it includes all state institutions and agencies that have the legitimate authority to use force, to order force or threaten to use force, effective parliamentary oversight is possible if certain conditions are met. Firstly, it is crucial to establish a solid regulatory framework governing the security system and parliamentary oversight. The second condition relates to the existence of human and material resources, including relevant committees and MPs who are familiar with security issues and have the necessary supervision competences and capacities. However, the political will for its implementation is the most important and the most difficult factor for exercising parliamentary control. Even the broadest constitutional and legal powers, and a host of the available resources and expertise, are insufficient if there is no will to implement them. Therefore, it is reasonable to say that parliamentary oversight of the security sector is a mixture of legal and political elements. Parliamentary oversight could be defined as a set of competencies, procedures and methods established by the Constitution and the law, relating to the inspection, identifying and improving the efficiency and effectiveness of public authorities responsible for the security of the Republic of Serbia, which is performed by Parliament.

The basic postulates of defense and security and their oversight are laid down in the Serbian Constitution, which has established the competence of the National Assembly to supervise the work of the security services and to adopt defense strategy (Art.99). Moreover, the Constitution defines the status of the Army, its competences, use outside the state borders, and control over it (Art.139). Therefore, we will focus on parliamentary oversight of the Army and security services, its advantages and challenges and possible drawbacks.

THE LEGISLATIVE FUNCTION AND SECURITY SYSTEM

The legislative function, which implies adopting laws, is one of the most important functions of Parliament. The role of Parliament, as the supreme representative body, is to create the legal basis for the security system, to determine the main directions of domestic and foreign policy in security issues. Thus, the National Assembly reaffirms its impact on all parts of the national security system. The adoption of the Constitution was soon followed by the review of the existing but very scarce legal framework on the national security system and the adoption of new laws. Thus, the legislative activity of the National Assembly has been very intense.

The Security Services Act of the Republic of Serbia[7] is the basic legislative act in this area. It regulates the security-intelligence system, directs and coordinates the work of the security

5 Born, H. Fluri P, Lunn S (eds.) Oversight and Guidance: The Relevance of Parliamentary Oversight for the Security Sector, Geneva, 2010, p.2
6 Lunn S, The Democratic Control of Armed Forces in Principle and Practice in: Born, H. Fluri P, Lunn S (eds.) Oversight and Guidance: The Relevance of Parliamentary Oversight for the Security Sector, Geneva, 2010, p. 24
7 Official Gazette of the RS, No.116/2007

services and the control over their work. Security services are part of the unified security-intelligence system of the Republic of Serbia. They include the Security-Information Agency, as a separate organization, the Military-Security Agency and the Military-Intelligence Agency, as governing bodies within the Ministry of Defense. Security services operate in accordance with the Constitution, legislative acts, other regulations and general acts, national security strategy, defense strategy and security-intelligence policy. Their members cannot be members of political parties and they are bound to act impartially and neutrally in terms of politics. The Act lays out the basic principles of supervision over the security services. Namely, the supervision is established on the basis of subordination and accountability of the security services to the elected authorities of the Republic of Serbia. Security services are obliged to inform the public about the conducted tasks in accordance with the law. The political, ideological and interest neutrality of security services, their professional accountability and independent work should be present in conducting the assigned competencies.

The Security Information Agency Act[8] is one of the earliest legislative act regulating security issues[9]. The Security Information Agency has been established as an independent organization, which performs tasks related to security, detection and prevention of activities aimed at undermining or disrupting of the constitutional order; it manages, collects, processes and analyzes of security-intelligence data and security-related findings, and informs competent state authorities about those data.

The Serbian Armed Forces Act[10] regulates the position and competences of the Armed Forces, their organization, composition and functioning, the specificity of the military profession, command and management, democratic and civil control, transparency of their work. A member of the Army is obliged to act in accordance with the Constitution, law and other regulations, in an impartial and politically neutral manner. The Serbian Armed Forces Act stipulates the constitutional norm of democratic and civil control over the military. In particular, it includes controlling the use and development of the Serbian Army Forces, internal and external control of expenditures for military purposes, monitoring the conditions in the Army, allowing free access to information of public importance, and defining responsibilities for the performance of military duties in accordance with the law. Democratic and civilian control is exercised by the National Assembly, the Ombudsman, and other state bodies, in accordance with their competencies, the citizens and the public (art.29).

The Military Security Agency and the Military Intelligence Agency are part of a unified security intelligence system. Their competencies and control over their activities, are regulated by a separate legislative act[11], adopted in 2009, the Act on Military, Labor and Material Obligations, as well as by the Civil Servants Act and the Act on engagement of the Serbia armed forces and other defense forces in multinational operations outside the borders of the Republic of Serbia. All these acts establish the most important institutions of the security system and determine their position in the state. They also represent a normative basis for the establishment of democratic control and its development.

The legislative functions of the National Assembly, are mainly confined to enacting laws. In this context, it is worth mentioning, the adoption of some strategic documents such as the National Security Strategy and Defense Strategy, as well as the ratification of international treaties on security issues.[12]

8 Official Gazette of the RS, Nos. 42/2002, 111/2009, 65-2014-US, 66/2014
9 It was adopted in 2002, but it was amended several times in order to comply with the new Constitution. Pursuant to this Act, the state security was, for first time, separated from the Ministry of Interior Affairs.
10 Official Gazette, Nos. 34/2007, 31/2009
11 Official gazette, 88/2009, 55/2012
12 Inter alia, Serbia ratified a number of international treaties on security issues as: the International Convention against Recruitment, Use Financing and Training of Mercenaries; the Agreement among

We note that performing the legislative function on issues of security do not differ from the usual legislative procedure. New legislative acts are usually initiated by the Government, as the supreme creator of state policy, including security policy. It is hard to expect that the laws in this sensitive sphere are initiated by the citizens. After all, the citizens' initiative is completely neglected institute, thus the security sphere is not different from other areas. In order to increase the citizen participation in defense and security policy it may be very useful in organizing public hearings, which offer the opportunity for interested participants to discuss the proposed legal solutions and to promote them. This kind of dialogues between the state institutions and citizens strengthen the citizen's trust in state institutions. Public debate increases the chances of achieving broad social consensus on the current security issues and the state interests. Public debates make security and defense more transparent and increases public awareness of security and defense issues, which ultimately ensures the democratic stability in the society.

However, there is an obvious lack of quality public debates in the legislative process in the security sector. We may also note a lack of debate in the process of making the key document in the security system, which seems to be a common practice regardless of the content of the law at issue. Thus, we can say that there is no public debate on security laws, just as there is no public debate during the adoption of other legislative acts. Yet, there are exceptions to this common practice[13].

THE BUDGETARY FUNCTION

Besides the legislative function, another highly important function of the National Assembly is the budgetary function. The Budget Bill on the allocation of financial resources has a significant impact on the entire state, including the security system. "The budget is the most important economic policy tool of the Government and provides a comprehensive statement of the nations' priorities."[14] By adopting the Budget, the National Assembly decides how much money will be allocated to the Army, the security services and the security system as a whole, how the money will be spent and which needs and goals should be achieved. Therefore, the Assembly decides what kind of Army and security services should exist and can be financially supported. In pursuing the budgetary function, the National Assembly supervises how money is spent by the security system. The Government has the exclusive right to propose the budget but Parliament can change the Government priorities, including the in the security sector. Parliament can block the security services from performing certain activities by denying or limiting the funds allocated to the security service.[15]

The budgetary control function is a part of a check and balance system that ensures accountability and transparency in the use of public funds. But, in practice there are difficulties in exercising the function. Considering the line item budget, where individual financial statement items are grouped by cost centers or departments, it is hardly possible to have a clear picture which security policy aims will be achieved. Title lines and their description more hiding from discovering. Some budgetary expenditures may only be subject to assumptions and speculations. The non-transparent budget spending is emphasized because of the applying confidential procurements in the security system.

---

the State Parties to the North Atlantic Treaty and the other States participating in the Partnership for Peace regarding the Status of their Forces; etc.

13 Notably, one positive example is the decision of the Ministry of Defense to make all the draft laws within its competence publicly available. The draft laws were published in the Ministry website and all interested parties were able to send comments and suggestions by e-mail.

14 Krafchik W,Wehner ,J. The Role of Parliament in the budget process, http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.379.8510&rep=rep1&type=pdf

15 Lunn S, op.cit., p. 15

PARLIAMENTARY CONTROL OF THE GOVERNMENT

The focal point of parliamentary control involves supervision over the Government activities. It is focused on the following area: law enforcement, budget implementation, and control over the Government-implemented policies. Bearing in mind the subject matter of this paper, the focus is on the supervision pertaining to the security system and security policy. In a broader sense, the National Assembly monitors and checks whether the Government has provides all the necessary conditions for securing and preserving the national and individual security. In a narrow sense, this kind of control refers to the Army and security services. The main reasons for exercising this type of control are to detect and prevent abuses in the security and defense systems, to prevent illegal and unconstitutional conduct, to protect the guaranteed citizens 'rights and freedoms, to hold government accountable for how taxpayers' money is spent and to make the security system more transparent in order to increase public confidence in it.

It should be noted that the National Assembly is not entitled to appoint candidates for the leading ranks in the security sector. Their appointments are in the jurisdiction of the Government. In fact, by voting on the proposed Government officials, the Assembly indirectly elects all of them and assumes control over their activities.

The instruments of parliamentary control are parliamentary questions, motions, vote of confidence in the Government, and reviewing reports. The parliamentary question, as a particular question which MPs pose to the Minister or the Government, may be oral[16] or written. Oral questions are most common. Given the fact that these parliamentary sessions are broadcast live on national television, it is the way to inform the public with the content of questions and given answers. Namely, the Government, or the Minister, shall immediately reply orally to the parliamentary question asked.[17] The Rules of Procedure of the National Assembly explicitly envisage the right to ask parliamentary questions on topical matters of national and public concern, including the security issues. Acting upon a proposal of a parliamentary group, the Speaker of the National Assembly shall designate a specific day, at least once a month, when individual Ministers shall reply to parliamentary questions on the topical matter.[18]

Parliamentary questions stand out as the most effective mechanism of parliamentary control. They are most commonly raised by the opposition MPs, but they may also be posed by those from the Government majority. Yet, a closer analysis of these parliamentary questions shows a huge difference in the kind of issues raised in Parliament. The questions posed by the Opposition MPs are more frequently related to the corruption of Army or the security services officials than to the issues concerning the overall security system. Government officials are often asked to justify the rationale for accession to specific military and/or political alliances, and the reasons for justification. The principal aim of raising these questions is criticize the Government and their ultimate purpose is to win political points. In contrast, the questions asked by the MPs belonging to the Government majority do not deal with such serious issues. Instead, they usually refer to the social and financial status of members of Army and security services, housing issues and improving their position in society.[19] The Mps questions on security issues are most commonly addressed by the Ministry of Interior, Ministry of Defense and the Security Information Agency.

16 The Government may be asked oral parliamentary questions on the last Thursday of the month, between 16:00 and 19:00 hours, in the course of a regular ongoing parliamentary session and in the presence of Government officials; on that occasion, on parliamentary work on the current agenda is adjourned.

17 If the reply necessitates prior consultation of fact finding, they shall justify it immediately, and provide the reply to the MP, in writing, no later than eight days after the question was asked

18 Art. 209 Rules of Procedure

19 Erceg, V. , op.cit, p.,25

Interpellation is a formal request for information or clarification on policy of government. It differs from the parliamentary question by its content. It usually deals with the matters of national importance and involves more than one MP. In fact, a formal interpellation request may be submitted by at least fifty MPs seeking information or clarification on the work of the Government or a Government member. The interpellation should contain a clearly and concisely formulated question which needs to be considered. The Speaker of the National Assembly shall immediately submit it to the Government or a Government member The answer to the interpellation shall be placed on the agenda of the next National Assembly session, which must be held within 15 days. In the parliamentary session, there is an open debate, where all interested MPS may participate in the discussion on the interpellation issue. Then, the National Assembly votes on the reply to the interpellation. If it is approved, the National Assembly will continue its work; if it is rejected the National Assembly has to take a vote of confidence in the Government or the Government member. Thus, the interpellation is no longer a matter of a group of MPs, it becomes a matter of the entire Parliament.

The motion of confidence in the Government or a Government member is a traditional parliamentary instrument for raising the issue of political accountability of the Government. The motion may be submitted by at least 60 MPs. Unlike parliamentary questions and interpellation, the motion of no confidence has a concrete goal: to remove the Government from public office and replace it with a new one[20]. In parliamentary practice, the motion of no confidence has little chance of success if the Government has an absolute majority of all MPs. Considering the necessary circumstances for its successful implementation and the serious consequences it may cause, the motion of confidence is used only occasionally. Interpellation and motion of confidence are directly related to the Government, but they need not have a direct impact on the security system under its administration. Consequently, parliamentary questions are the most common and most effective instrument to be used in terms of parliamentary oversight. In the context of this paper, it should be noted that the Government is obliged to submit a report on its work to the National Assembly. In particular, the report focuses on the implementation of Government policies, laws and other general acts, implementation and development of spatial plans and implementation of the State Budget.[21]

Another important function of the National Assembly is the control and supervision of the legality of activities performed by the security sector officials and their observance of human rights. It implies the control and supervision over the implementation of specific procedures and measures for secret data collection, the use of force and exchange of personal data. The use of special procedures and measures for secret data collection can lead to excessive encroachment on the constitutionally guaranteed rights, such as privacy of correspondence, freedom of movement.[22]

The National Assembly has an important role in the control and supervision of bilateral and multilateral security cooperation. This refers to engagement of the Serbian armed forces and other defense forces in multinational operations outside the borders of Republic of Serbia. The National Assembly discusses and adopts the Annual Engagement Plan for the envisaged multinational operations in the current year.

Generally speaking, the main drawback of parliamentary control of the executive branch, is its inadequate implementation in practice, which is also reflected on the security system. This is correlated with the overall position of National Assembly. Namely, in the current circumstances governing the political system and the existing electoral system rules, the position

20 Notably, acting upon the Prime Minister's request, the National Assembly dismissed the Minister of Defense in session held on 5th February 2016.The reason for dismissal was not directly related to the scope of Minister's direct responsibilities but to inappropriate insinuations towards a female journalist.
21 Article 228 Rules of Procedures
22 Milisavljević, B. *et al*, op.cit, p. 107

of the Parliament is inferior to the executive power. Moreover, the executive power is likely to seize every opportunity to diminish the importance of Parliament, which further undermines the mechanisms of parliamentary control. Consequently, MPs are unable to make independent decisions, because their opinions are shaped by decisions of political parties. Therefore, it is necessary to strengthen the role of the National Assembly and the status of MPs in order to perform parliamentary control over the executive power.

HOLDERS OF PARLIAMENTARY OVERSIGHT

Taking into account all these aspects of parliamentary oversight, we point out that its primary holders are all current MPs and relevant parliamentary committees. The parliamentary control instruments are available to all MPs regardless of their political party affiliation. However, membership in a particular political party and a strong party discipline definitely govern every aspect of MPs behaviour. As this issue has been addressed earlier in this paper, we further focus on parliamentary committees.

Parliamentary committees are among the most powerful institutional units involved in parliamentary work. Committees are vital because they are able to scrutinize the work of the government and allow direct communication between MPs belonging to different political parties.[23]There are 19 committees in the National Assembly, but we will focus on the Security Services Control Committee and the Defense and Internal Affairs Committee. The explicit provisions on their functions can be found in the Rules of Procedures, which regulates the organization and work of the National Assembly and reflects its autonomy. However, the competence of the security sector committee was primarily regulated by the Security Services Act, and then by Rules of Procedure. The Security Services Act regulates the competences of the Committee, the session proceedings, the process of submitting reports to the Committee, direct supervision and confidentiality statement. The provisions in the Rules of Procedures provisions are scarce and rather general, for they do not go beyond repeating the committee competences established by the law.

The Security Services Control Committee supervises the constitutionality and legality of the work of the security services, their compliance with the national security and defense strategy, and security-intelligence policy; it also supervises the legality of application of special procedures and measures for secret data gathering, the legality of budgetary and other resources expenditures.[24] The Committee has the authority to establish facts about observed illegal acts, violations or irregularities in the work of the security services and their members; after adopting conclusions on these issues, the Committee is also entitled to give initiatives and propose laws within the scope of the security services, and to consider draft laws, other regulations and general acts including provisions on these services. The Committee also supervises, approves issues reports on the work of security services. These reports include the main activities of security services and enable previewing of the undertaken activities undertaken and tasks within the competencies of the service. This mechanism provides an insight into the implementation of the security policy and the legality of security service activities. In addition to issuing regular and extraordinary reports, other control instruments may be used in case of doubt concerning the regularity of their activities. One of these instruments is organizing field visits to security system institutions.

Field visits to security services are new instrument of parliamentary oversight, which has already been used in the practice of Security Service Committee several times. Filed visits

23 Lunn S, *op.cit*, p. 14
24 Article 16 law on Security Service Act, Article 66 Rules of Procedure

should enable the MPs to obtain first-hand information and direct insight into the work of the institutions, as well to establish a dialogue with the institutions officials. Committee members have access to the security service scope of work, data information and documents. But, there is clear legal standard on the information and date they may not obtain[25]. Such visits are usually announced in advance, but MPs may also practice unannounced ones. The advantage of unannounced visits is that MPs may get information that the authorities may wish to conceal during the announced visits. On the other hand, unannounced visits may be understood as an expression of MP's distrust in the work of particular state authorities.

The Security Services Control Committee is the most recent one, which includes only nine members and nine substitutes. More importantly, the Committee gender structure reflects the absolute dominance of men. At the present, there is only one woman acting as a substitute member, which ultimately reflects the situation in the security system as a whole, where women are still underrepresented. Therefore, there is a need to balance the gender structure of the security system and to implement the policy of equal opportunities. A slightly better gender balance is present in the Defense and Internal Affairs Committee, whose competencies are also important in the security system. This Committee has seventeen members and the same number of substitutes, four of whom are women. It is worth noting that the current chairperson of this Committee is a woman. The Committee considers the draft laws in areas of their competence, the National Security and Defense Strategy, and issues pertaining to the exercise of parliamentary oversight of the Army and the defense system.

By establishing the Security Services Control Committee and the Defense and Internal Affairs Committee, the National Assembly has appointed authorized holders of the supervisory activities in the security sector. Given the lack of database including detailed biographical data and taking into account the professional backgrounds of the current Committee members, we may challenge their expertise and the criteria governing the composition and selection of the Committee members. It is indisputable that there are MPs with sufficient knowledge in security issues but we still have an impression of a substantial lack of expertise in their activities; it clearly reflected in the quality of the Committee's activities, which often do not go beyond the adoption of the reports and members' incapacity to be act proactive. On the other hand, the MPs generally perceive the committee activities as the most effective instrument of parliamentary oversight. The Committee is a place where they could feel free to debate, discuss and confront opinions, where they have enough time for all these activities. Taking into account the urgency of law- adopting proceedings, this instrument is essential for the committees' efficient work. However, the MPs have very limited time for discussion and cannot make a constructive contribution. Moreover, the committees have abandoned an earlier practice where the committees were chaired by opposition MPs.

CONCLUSION

Parliamentary oversight reflects the position that the Serbian National Assembly has in the constitutional and political system. Bearing in mind that the exercise of parliamentary oversight is directly related to the core functions of the National Assembly, it will also have positive effects on the security system as long as Parliament is able to perform them efficiently. For a

25 The Committee members are not authorized to request from security services information on identities of current and former agents of the service; security service members with concealed identity, third parties if disclosure of such information might be damaging to them; methods of obtaining intelligence and security data; ongoing actions; application mode of special procedures and measures; data and information obtained through exchange with its foreign counterparts and international organizations and confidential data and information of other state authorities in the possession of the service (Art. 19).

long time, the security sector was a taboo area for Parliament. It has changed only recently and the system is still under construction.

In terms of conditions for effective parliamentary oversight, it could be said that there is an adequate legal framework which is still under construction. But, there is an apparent lack of qualified staff in Committees and in the parliamentary offices. There are difficulties arising from the insufficient knowledge or awareness of the scope and "borders" of Parliament activities, particularly, concerning the exact scope of parliamentary oversight and what can be controlled if such a limit exists at all. The key factor to mitigate these drawbacks is a political will to implement parliamentary oversight. If such a will exists, the legal framework will be able to facilitate the functioning of the MPs activities in conducting parliamentary control.

At this moment, we have the impression that parliamentary oversight of the security system is implemented just to meet the requisite form; yet, as a result of these shortcomings, the essential component is still missing. This is evident in the underdeveloped security culture, setting personal and partisan objectives above the state interests, and insufficient knowledge of rules.

REFERENCES

1. Born, H. Fluri P, Lunn S (eds.) Oversight and Guidance: The Relevance of Parliamentary Oversight for the Security Sector, Geneva, 2010.
2. Erceg, V. Parliamentary Questions as a Mechanism for Oversight of the Security Sector: an overview of the mechanism and practice of parliamentary questions on issues of security during parliamentary terms of the National Assembly of Serbia between 2008 and 2012, Belgrade 2014
3. W. Krafchik, J.Wehner, The Role of Parliament in the budget process, http://citeseerx.ist.psu.edu/viewdoc/download?doi= 10.1.1.379.8510&rep=rep1&type=pdf
4. Milisavljević, B. et al. Skupštinska kontrola i nadzor sektora bezbednosti, Beograd, 2012.
5. Willis A, et al. Parliamentary oversight of security and intelligence agencies in the EU, 2011
6. Constitution of the Republic of Serbia (2006)
7. Rules of Procedure of the National Assembly

UDC: 316.647:316.77
342.727
340.142:341.645(4)

HATE SPEECH IN THE EUROPEAN COURT OF HUMAN RIGHTS CASE LAW

Darko Dimovski, PhD[1]
Ivan Ilic
University of Nis, Faculty of Law

Abstract: According to the Rec. R (97) 20 of the Committee of Ministers to Member States on "Hate speech", the term covers all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism, or other forms of hatred based on intolerance, including intolerance, expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin. Freedom of expression is one of the essential foundations of a democratic society, and also one of the basic conditions for its progress. Paragraph 2 of Article 10 of the European Convention on Human Rights, is applicable not only to information or ideas that are regarded as inoffensive, or as a matter of indifference, but also to those that offend, shock or disturb the State, or any sector of the population. This means that every formality, condition, restriction or penalty imposed, must be proportionate to the legitimate aim pursued. In its case law, concerning incitement to hatred and freedom of expression, the European Court of Human Rights uses two principles; where the comments in question amount to hate speech and negate the fundamental values of the Convention, they are excluded from the protection, provided for by Article 17 (prohibition of abuse of rights). Where the hate speech is not intended to destroy the fundamental values of the Convention, the principle of setting restrictions on protection, provided for by Article 10, paragraph 2, of the Convention, is applied. The authors of the contribution deal with the ECHR case law regarding different forms of the hate speech, such as ethnic and racial hate, negationism and revisionism, threat to the democratic order, circulating homophobic leaflets, condoning terrorism and war crimes etc. Based on the standards of the ECHR practice, the authors compare it with the national regulation in force on this issue, giving suggestions for further improvements in the future.

Keywords: hate speech, ECHR, case-law, freedom of expression

INTRODUCTION

Hate speech can be defined as any statement that incites violence, hatred and intolerance against individuals or groups, based on race, ethnicity, nationality or religion.[2] This is any statement that aims to undermine an individual or group, on the basis of personal characteristics. Today, hate speech involves the creation of hatred based on sex, religion, political or other opinion, and on the basis of origin. Hate speech can be expressed verbally, through gestures, writing and showing signs that incite violence or prejudice, or which disparages or

1 E-mail: darko@prafak.ni.ac.rs.
2 Mandic, Mladen, The concept of hate speech and his comparative presentation with special reference to Bosnia and Herzegovina, in: Proceedings: How to overcome hate speech? Banja Luka, 2014, p. 94.

intimidates an individual or group.[3] Hate speech is a means to encourage discrimination, stereotyping and intolerance which can lead to the execution of violent crimes. For the definition of hate speech, the key focus is on some personal characteristic of an individual or group. The expressed attitude toward an individual or group does not have to lead to the use of violence. It is enough to encourage such behavior. It should be noted that the phenomenon of hate speech has existed from the earliest period of human civilization, because it is incorporated into hate crime. In fact, even in ancient times, the first case of hate crimes occurred in the form of persecution of Christians by the Romans. However, one should not equate terms such as hate speech and hate crime, because hate crime does not always involve hate speech and *vice versa*.[4] For example, the demonstrators against the Pride carry a banner reading "God hates fags." Such a label would not be a hate crime, because of the existence of freedom of expression. This brings us to another conclusion - that freedom of expression is a basis which defines the limits of whether something is or is not manifested as hate speech.[5] States respond to hate speech anticipating to civil[6] or criminal legal protection, or both forms of it. On the international level regulations of the Council of Europe, as well as European court of human rights (hereinafter: the Court, ECHR) practice are of great importance and will be discussed in this paper.

REGULATION OF THE COUNCIL OF EUROPE

The basic international document in Europe which guarantees freedom of expression is the European Convention on Human Rights and Fundamental Freedoms (hereinafter: Convention, ECHR) from 1950. It protects wide circle of fundamental rights and freedoms, among which there are rights that are by their character inherent. Given that hate speech is closely associated with discrimination, primarily important for the protection within the Council of Europe is Article 14 of the Convention, which stipulates that "the enjoyment of the rights and freedoms, set forth in this Convention, are provided without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, or other status". Protocol No. 12 from 2000 introduced universal prohibition of discrimination, especially by public authorities.

The Council of Europe Rec. R (97) 20 of the Committee of Ministers to Member States on "Hate speech", stressed that the term hate speech covers all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism, or other forms of hatred based on intolerance, including intolerance, expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin. The recommendation requires the Member States of the Council of Europe to impose community service sanction in the criminal legal protection system. In the area of civil protection it is recommended to allow legal standing to organizations that take care about the rights of victims. In particular, it emphasized the importance of the protection against hate speech in the media. Recommendation of the Committee of Ministers of the Council of Europe R (97) 21 on the media and promotion of a culture of tolerance requires that media reporting should be based on true facts. Reporting should be careful, when there is tension

3 *Ibid.*
4 Kambovski, Vlado, Hate crime and criminal aspects of the hate speech - approach of Macedonia, Megatrend review, no. 1/2013, pp. 323-334
5 Retrieved 22 January 2016, from http://www.lgbtrc.uci.edu/resource-library/unfinished/13faq/29oppression-discrimination/Hate%20Crimes.pdf
6 See: Petrusic, Nevena, Civil law instruments for the suppression of hate speech that spreads through the media - substantive and procedural aspects, Proceedings of the Faculty of Law in Nis, no. 61/2012, pp. 75-95.

between different groups. It is necessary to avoid the creation of stereotypes against religious, ethnic and cultural communities. Broadcasters need to challenge the intolerant claims, made during the interviews and television shows.

FREEDOM OF EXPRESSION ACCORDING TO ARTICLE 10 OF THE CONVENTION

As guaranteed under Art. 10 of the Convention, everyone has the right to freedom of expression, including the right to receive and impart information and ideas, without interference by public authority and regardless of frontiers. In order to be deemed acceptable, any interference with this right need to satisfy the conditions, set out in Art. 10(2). Consequently, any restriction imposed upon the freedom of expression needs to be prescribed by law, pursue a legitimate aim and be necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. According to the Court, the expression "prescribed by law" requires that the impugned measure should have some basis in domestic law, and also refers to the quality of the law in question, requiring that it should be accessible to the person concerned and foreseeable as to its effects. A rule is "foreseeable" if it is formulated with sufficient precision to enable any individual to regulate his conduct in a manner that enables him to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.[7] The test of "necessity in a democratic society" requires the Court to determine whether the interference corresponded to a pressing social need.[8] According to Art. 10(2), the freedom of expression may be subject to restrictions only if they are prescribed by law. The Court has stated that the 'prescribed by law' criterion does not refer to only codified law but also covers unwritten law, and thus the whole legal system.[9] Sometimes "law" also refers to international legal standards.[10] Again the criterion requires that the law is foreseeable in a manner that the citizen is able to regulate his or her conduct and to foresee the consequences which his actions may entail, at least to a degree where such consequences are not entirely unexpected.[11]

According to the Court, the initial responsibility for securing the rights and freedoms enshrined in ECHR lies with the individual Contracting States. They have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision. In exercising its supervisory function, the Court's task is not, however, to take the place of the national authorities, but rather to review and give a final ruling on whether a "restriction" is reconcilable with rights guaranteed in ECHR.[12] The Court must look at the impugned interference in the light of the case as a whole, including the content of the remarks made by the applicants and the context in which they were made. The Court must determine whether the interference at issue was "proportionate to the legitimate aim pursued"; whether the reasons adduced by the courts to justify it are "relevant and sufficient"; and whether the authorities relied on an acceptable assessment of the relevant facts.[13] When examining wheth-

7 See *the Sunday Times v. the United Kingdom (no.1),* § 49
8 *Handyside v. the United Kingdom*, § 48
9 *The Sunday Times v. the United Kingdom (no. 1)*, § 47.
10 *Medvedyev and Others v. France*, § 79.
11 *Yildirim v. Turkey* § 57.
12 See among other authorities *Lingens v. Austria*, § 39; *Pedersen and Baadsgaard v. Denmark*, § 68
13 See *Hertel v. Switzerland,* §§ 23, 29–30, 46

er there is a need for an interference with freedom of expression in a democratic society in the interests of the "protection of the reputation or rights of others", the Court has attached significant weight on whether the domestic authorities have identified the existence of conflicting rights and the need to ensure a fair balance between them.[14] The Court has recognised a wider margin of appreciation in cases where two rights guaranteed under ECHR are in conflict.[15]

The Court has referred to the freedom of expression as a right that constitutes one of the essential foundations of a democratic society, as well as one of the basic conditions for its progress and for the development of every man. It has been affirmed that this right does not relate only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb.[16] There is little scope under Art. 10(2) for restrictions on debate in questions of public interest.[17] As established by the Court, the public interest value is not limited merely to political issues, but also covers, for example, matters relating to sportsmen.[18] The Court has held that when private individuals enter the public arena, they lay themselves open to public scrutiny, criticism and greater tolerance is therefore required of them.[19] Moreover, the Court has insisted on the essential role of free press in ensuring the proper functioning of a democratic society, by imparting information and ideas on all matters of public interest. In order for the press to be able to play its vital role of "public watchdog", any restrictions to the freedom of expression must be narrowly interpreted and the need for such restrictions convincingly established.[20] In this respect, it has been stated by the Court that insofar as journalistic freedom is concerned, this freedom may also be considered to cover a possible recourse to a degree of exaggeration, or even provocation.[21]

Also, the distinction between statements of fact and value judgments needs to be taken into account, when evaluating the question of proof of impugned statements. In general, the existence of facts can be demonstrated, while the truth of value judgments is not susceptible of proof. Requiring the delivery of proof of a value judgment thus infringes the freedom of opinion itself and the right guaranteed under Art. 10.[22] As the Court has observed, concerning "false statements of fact", Art. 10 as such does not prohibit discussion or dissemination of information, received even if it is strongly suspected that this information might not be truthful. To suggest otherwise would deprive persons of the right to express their views and opinions about statements, made in the mass media and would thus place an unreasonable restriction on the freedom of expression.[23] The Court on several instances presented the view that the protection of the right of journalists to impart information on issues of general interest requires that they should act in good faith, on an accurate factual basis, and provide "reliable and precise" information in accordance with the ethics of journalism.[24] However, in the evaluation of the factual basis required, the above-mentioned classification into factual statements and value judgements has also to be considered.

14 See *Axel Springer AG v. Germany*, § 84.
15 See *Evans v. the United Kingdom*, § 77.
16 *Ibid*.
17 See, among many other authorities, *Observer and Guardian v. the United Kingdom*, 59 §.
18 See, e.g., *Nikowitz and Verlagsgruppe News GmbH v. Austria*, § 10
19 *Jerusalem v. Austria*, §§ 38–39.
20 *Observer and Guardian v. the United Kingdom,* 59 §
21 See, among others, *Pedersen and Baadsgaard v. Denmark*, § 71.
22 *Lingens v. Austria*, § 46.
23 *Salov v. Ukraine*, § 113.
24 *Juppala v. Finland*, §§ 42–43

HATE SPEECH IN THE ECHR PRACTICE

The Court in its case-law deals with hate speech when deciding on the alleged violations of Article 10 of the Convention. In most cases, it is about verbal offences, committed through the media, where the Court determines whether the applicants were deprived of the right to freedom of expression.[25] Different forms of hate speech, such as ethnic and racial hate, negationism and revisionism, threat to the democratic order, circulating homophobic leaflets, condoning terrorism and war crimes, have been considered. Chronologically speaking, the case-law has evolved. Earlier, the Court's approach was based on an estimate of an even balance between freedom of expression and abuse of rights under the Convention pursuant to Article 17.[26] The newer approach broadly interprets right under Article 10, including the expression of views which may be offensive and disturbing.[27]

In the case of *Pavel Ivanov v. Russia,*[28] the Court declared the application as inadmissible, with reference to Article 17 of the Convention. The applicant was owner and editor of a newspaper. He was convicted of public incitement to ethnic, racial and religious hatred, through the use of media. He published articles, targeting the Jews as the source of evil in Russia, seeking their exclusion from social life. The Court agreed with the decision of the national court, noting that the attack on the ethnic group is contrary to the provisions of the Convention. Given that Article 17 prohibits the abuse of law, the Court ruled that the applicant cannot enjoy protection on the basis of freedom of expression. Thematically similar to the previous is the case of *Garaudy v. France*.[29] The applicant appealed the decision of the State to convict him for the crime due to the publication of the book, in which he denied the existence of Holocaust. The Court pointed out that denying crimes against humanity was one of the most serious forms of racial defamation of Jews, in the given case, and of incitement to hatred of them. Due to the incompatibility of these procedures with the spirit of the Convention, the Court declared the application inadmissible, relying on Article 17 of the Convention. The Court appears to have taken a different attitude in the case *Perinçek v. Switzerland*.[30] Specifically, in this case the applicant, who is a Turkish politician, was convicted of voicing the opinion that mass deportations and massacres of Armenians do not constitute genocide. Unlike the position of the national court, ECHR considered the merits of the decision, and concluded that there was a violation of Article 10 of the Convention. The Court, firstly, considered the existence of a balance between freedom of expression and the right to private life (in relation to the victim's family). The Court, when making its decision, took into account that this was a matter of public interest and not calling for hatred and intolerance, and that the statement was made in Switzerland, where there are tensions on this issue. This decision of the Court, in a case where it comes to negationism, differs from practice in other cases, on the issue of the Holocaust negationism. Here the Court gave priority to the freedom of expression of the individual, over the rights of victims, and in the latter case the applications were rejected, with reference to the abuse of the rights of the applicant, thus indirectly giving priority to the victims' rights over freedom of expression.

25 For a list of relevant judgments of the Court, see: Factsheet – hate speech, available at: http://www.echr.coe.int/Documents/FS_Hate_speech_ENG.pdf, accessed: 06.02.2016.
26 For the development of ECHR practice, see Marinkovic, Tanasije, Hate speech as the basis for restrictions on freedom of expression, Proceedings of the Faculty of Law in Nis, no. 61/2012, pp. 311-330.
27 Djordjevic, Sanja, Media freedom of expression in European court of human rights practice, Faculty of Law in Nis Collection of papers, thematic issue: the media and human rights, nr. 61, 2012, p. 484.
28 App. no. 35222/04, dec. 20.02.2007.
29 Dec. 24.06.2003.
30 Application no. 27510/08.

The court decided in the case of hate speech, expressed in a theater play, in the case *M'Bala M'Bala in. France.*[31] The question was whether the expression of revisionism and negationism regarding the suffering of Jews in concentration camps came under the protection of Article 10 of the Convention. Performance which, even if satirical or provocative, could fall within the protection of Article 10, but in the specific case, it was a demonstration of hatred and anti-Semitism, and support for Holocaust denial. Given that expressed ideas were contrary to the letter and spirit of the Convention, the Court concluded that it does not fall within the scope of freedom of expression protection, but the abuse of rights, and rejected the application as inadmissible *ratione materiae.* In several cases, the Court has dealt with other forms of hate speech, such as racial and religious hatred. In the case in *Norwood, United Kingdom*,[32] the Court declared the applicant submission inadmissible, pursuant to Article 35 of the Convention. The Court noted that the call for the expulsion of Muslims from the UK, indicating the entire religious group as terrorists, is incompatible with the values of the Convention, notably tolerance, social peace and non-discrimination and that it is not freedom of expression. A similar argumentation was used by the Court in the case of the spread of ideas based on racial discrimination.[33]

Unlike cases in which the decisions on dismissal were made, the Court has, on several occasions meritorily considered about the existence of the alleged violation of Article 10. The Court primarily examined whether an interference in the freedom of expression exists, and then whether it prescribed by law, and if it pursues one or more legitimate aims, prescribed in par 2 of Article 10, and, finally, if an interference is necessary in a democratic society. In the case of *Surek v. Turkey*,[34] a newspaper owner was convicted for criticizing public authorities for the treatment of the Kurds. He felt that his freedom of speech was thus limited. The Court found no violation of Article 10 of the Convention, because published articles posed a risk that there could be revenge, because they cited personal names. The Court underlined the responsibility of the magazine owner for published information, because he was the responsible person. This responsibility can be more serious, especially in the case of conflict and tension in society. The Court also found no violation of Article 10 of the Convention in the case *Balsytė Lideikienė-in. Lithuania*[35]. The Court took into account the margin of appreciation, which had been left to the country, and found that there was a pressing social need for taking criminal measures against the applicant. In this case the applicant has printed the calendar which expressed nationalist views, inciting hatred against the Poles and the Jews. Since it provoked ethnic hatred, the court found that it had been necessary in a democratic society to ensure the protection of the reputation or rights of others. Commenting on the conviction of the applicant to the allegations in the book, which calls for a war with the aim of re-ethnic conquest of North Africa, the Court concluded that it constitutes incitement to ethnic and religious hatred, and found that no violation of Article 10 of the Convention, in the case of *Soulas and Others v. France*.[36] The reference to racial discrimination through leaflets during the political campaign does not belong to freedom of expression, under Article 10 of the Convention. Therefore, the Court concluded that there was no violation of Article 10 in the case of *Féret v. Belgium*[37], stressing that such a distribution of leaflets during the campaign has enhanced effect on the community. The Court noted that there is a legitimate aim for the functioning of the state with the aim of preventing disorder and protecting the rights of others, namely

31 Dec. 10.11.2015.
32 Application no. 23131/03, Dec. 16.11.2004.
33 *Glimmerveen and Hagenbeek v. the Netherlands*, app. no 8348/78, Dec. 11.10.1979 .
34 Application no.26682/95.
35 Application no.72596/01.
36 Application no.15948/03.
37 Application no. 15615/07.

immigrant community. In a similar case, *Le Pen v. France*,[38] the Court ruled on the inadmissibility of the application, arguing that the reaction of the state in the form of a conviction of the applicant was necessary in a democratic society. A national court convicted the applicant for incitement to discrimination, hatred and violence towards a group of people. He was the President of right-wing parties, who in an interview with the daily newspapers expressed fears of a growing number of Muslims in France. The Court underlined that it is not a debate of public interest, but that such statements may lead to rejection and hostility towards the religious community, as well as the antagonism between the French people and the Muslims, and concluded that such statements do not fall under freedom of expression. In the case of *Erbakan v. Turkey*,[39] however, the Court gave priority to the free political debate over fostering religious intolerance. The applicant was the head of a political party in Turkey, advocating in public meeting ideas contrary to secularism. The Court found a violation of Article 10 of the Convention, noting that the interference was not necessary in a democratic society. It can be concluded that the Court based its decision on the assessment that in a pluralistic society, an individual is allowed to put weight in favor of religion, even though the state is committed to secularism.

In the other case, *Gündüz v. Turkey*,[40] the applicant has been convicted for inciting to hatred and hostility on the basis of religion differences, for views expressed during a TV show. The Court found violation of Article 10 of the Convention, because that topic had been the subject of a widespread debate in Turkey and concerned a topic of general interest. According to the position of the Court, expression of the opinion about the incompatibility of democracy with Sharia values, without referring to violence, does not constitute hate speech. The Court rendered the same decision in the case of *Faruk Temel v. Turkey*.[41] Presenting viewpoints at a political rally on global issues does not constitute hate speech, if this does not call for violence, armed resistance or uprising. In contrast to the cases above, which referred to negationism, in the case of *Lehideux Isorni v. France*,[42] the Court found the existence of violation of the freedom of expression. The applicants were convicted of public denial of war crimes by collaboration with the occupier. The Court noted that the text is not a negationism, but polemics, and that the applicants scripts in the name and for the account of another, not in their personal capacity. The Court also took into account the lapse of 40 years, which affects the severity of the consequences that the article in question could cause.

The Court had to deal with cases involving hate speech which consisted in encouraging or supporting terrorism. In the famous case of *Leroy v. France*,[43] the Court found no violation of Article 10 of the Convention, so that the applicant was convicted of publishing the drawing that shows the terrorist attack on the US on September 11, with the accompanying text "We all dreamt of it... Hamas did it". Explaining the decision, the Court pointed out, as the most important argument, that in this case it was not a criticism of American imperialism, but an instance of supporting violence and destruction. In this way, the applicant had supported the violence against citizens and showed disrespect for the innocent victims. The Court also took into account the fact that the text was published in the Basque Country, which is a politically unstable region, as well as certain public reaction involving incitement to violence. Finally, the applicant was fined, and the Court found that the pronounced measure was proportionate to the legitimate aim.

38 Application no. 18788/09.
39 Application no. 59405/00.
40 Application no. 35071/97.
41 Application no. 16853/05.
42 Application no. 24662/94.
43 Application no. 36109/03.

In its practice,[44] the Court has established a standard that, when a journalist expresses personal views on historical issues, without causing violence, resistance or revolt, the conviction constitutes a violation of Article 10. In the very essence of freedom of expression in a democratic society is to freely express opinions, which contributes to the coming of the historical truth. When it comes to journalistic articles, the decisive criterion, which the Court takes into consideration is if the impugned articles had not been gratuitously offensive or insulting, and if they had not incited others to disrespect or hatred. A similar view is taken by the Court concerning alleged incitement to racial discrimination and hatred. In the famous case of *Jersild v. Denmark*,[45] the applicant had made a documentary with members of the group called "Greenjackets," which are known for presenting abusive and derogatory remarks about immigrants and ethnic groups in Denmark. He was convicted of aiding in the dissemination of racist ideas. The Court, however, found that the documentary had not aimed at spreading racist ideas, but rather at exposing such an approach and informing the public about an issue of public importance.

The Court found that even a display of symbols in the form of flags, which indeed can hurt feelings of the victims' families in a totalitarian regime, but that does not call for violence, falls within the freedom of expression if the applicant had not behaved violently.[46] In contrast to the feelings of totalitarianism's victims, the Court is unambiguous when deciding in matters of religious feelings, that insulting the Prophet Muhammad constitutes hate speech. Although in a democratic society there must be some tolerance of criticism of religion, in this particular case it cannot be said about the comments that were disturbing or shocking or a provocative, but it is the unwarranted and offensive attack on the religious feelings.[47] In the case of Otegi *Mondragon v. Spain*,[48] the Court has found a violation of Article 10 of the Convention, due to the national court conviction of one Basque leftist party spokesman, for insulting the Spanish king. The applicant implied the king as the commander of those who carry out torture against political enemies and the person who imposes monarchy by applying torture. The Court, however, disagreed with the national authorities, marking the speech of the applicant as a provocative and somewhat hostile, but that did not favor violence, and that did not represent hate speech. Therefore, the Court found the conviction disproportionate to the legitimate aim, in this case the protection of the reputation of the king. Interestingly, the Court further argued its decision that the applicant's statement was given at the press conference, and later could be reworded, or revoked before publication.

In the more recent case-law, there is a need for a decision on alleged hate speech through the Internet. The Court has, for the first time, discussed this issue in the famous case of *Delphi v. Estonia*.[49] The applicant, the owner of the Internet portal, was convicted of offensive comments that readers wrote on portal, later removed by the site owner, but at the request of the lawyer of the company, to whom they referred. The Court has made a ground-breaking decision, which for the first time highlighted the possibility of uncontrolled spread of hate speech on the Internet. Even after deleting comments from the portal, there is a possibility that they remain permanently visible, which prevents the elimination of consequences. Then the Court established the responsibility of the site owner for comments made by individuals, if there is an unambiguous conclusion that they constitute instances of hate speech, and yet are not urgently removed from the portal. Since in the specific case it was unambiguously hate speech, which infringed the personal rights of others and amounted to hate speech and incitement

44 *Dink v. Turkey*, applications no. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, which is not final!
45 Application No. 15890/89.
46 *Fáber v. Hungary*, application no. 40721/08, which is not final!
47 *İ.A. v. Turkey,* application no. 42571/98.
48 Application no. 2034/07.
49 Application no. 64569/09.

to violence against them, the Court found that the applicant's freedom of expression had not be violated.

The Court has stated that a prison sentence will be compatible with journalists' freedom of expression only in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as, for example, in the case of hate speech, or incitement to violence.[50] According to the Court, the punishment of a journalist for statements, made by another person, should not be envisaged unless there are particularly strong reasons for it.[51] Further, the mere risk of a prison sentence in connection with criminal proceedings may as such have a serious chilling effect. This threat itself may be disproportionate and lead to the violation of Art. 10, even if such a sanction has not been issued.[52] Lastly, the applicant's intention relating to dissemination of racist material has been an essential element in the Court's case-law on deciding whether the applicant could be held criminally liable or not.[53] Moreover, the Court has stated that imprisonment is a necessary and proportionate penalty for media only subject to serious violation of other fundamental rights through defamatory or insulting statements in the media, such as hate speech.[54] The Court has further emphasised that "the fact that there may be other measures available to protect against the harm does not render it disproportionate for a Government to resort to criminal prosecution, particularly when those other measures have not been shown to be more effective".[55] According to the Court, if the remarks in question are meant to incite violence and hatred, "the national authorities enjoy a wider margin of appreciation when examining the need for an interference with the exercise of freedom of expression".[56] When analysing the necessity of the interference, the Court takes into account the extent of the measures used. A particularly strict supervision is carried out if a sentence of imprisonment is at issue.[57] When assessing whether the penalty is proportionate, the Court can take account of the existence of other measures, which would have interfered to a lesser extent with freedom of expression.[58]

CONCLUSION

The United States Supreme Court took a liberal standpoint by which individuals have the right to freedom of speech and that only the most extreme speeches should be sanctioned.[59] Contrary to this attitude, there are the so-called communitarians who point out that the benefit of the community is the most important social aim and that the right to freedom of speech could be limited to achieve this goal. Fair and dignified attitude towards people requires certain limitations of freedom of speech with the goal of prevention of hate speech. The Court argues that it is possible to limit the freedom of expression for achieving certain goals, among which is the prohibition of hate speech. The Court has emphasized that "tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, plural-

50 *Cumpănă and Mazare v. Romania*, § 115.
51 *Jersild v. Denmark*, § 35.
52 *Erdoğdu and İnce v. Turkey*, § 53 and *Erbakan v. Turkey*, § 69.
53 *Jersild v. Denmark*, § 33. See also Weber (2009), pp. 33–35.
54 See also *Declaration on freedom of political debate in the media* (Adopted by the Committee of Ministers on 12 February 2004 at the 872nd meeting of the Ministers' Deputies).
55 See *Perrin v. the United Kingdom* (dec.).
56 Harris, David J/ O'Boyle, Michael/ Bates, Ed P/ Buckley, Carla M: *European Convention on Human Rights*, Oxford University Press, 2009, p. 453.
57 *Erbakan v. Turkey*, § 69.
58 Weber, Anne, *Manual on Hate Speech,* Council of Europe Publishing, 2009, p. 45.
59 See: Zivanovski, Nenad, Different treatment of hate speech in the processes of communication in Europe and the US, CM - the magazine for communication managing, no. 32/2014, pp. 57-68.

istic society". Thus, in some circumstances, it may be necessary to sanction – or even prevent – all forms of expression which "spread, incite, promote or justify" hatred based on intolerance. The actions adopted must, however, be proportionate to the legitimate aim pursued.[60] According to the Court any remarks directed against the values underlying ECHR, aiming at the destruction of the rights and freedoms of ECHR itself, are to be excluded from the protection of Art. 10 by Art. 17.[61] Moreover, a fundamental question when assessing the necessity of restricting an individual's right to freedom of expression is also whether the applicant intended to disseminate ideas and opinions through the use of "hate speech" or whether he was trying to inform the public of a public interest matter.[62] Accordingly, a distinction has also been made between the applicants as the authors of the impugned statements or as the people linked to their dissemination.[63] However, regard has also been paid to the responsibility of media professionals, in particular, not to provide an outlet for disseminating hate speech.[64] In its case law, concerning incitement to hatred and freedom of expression, the European Court of Human Rights uses two principles; where the comments in question amount to hate speech and negate the fundamental values of the Convention, they are excluded from the protection, provided for by Article 17 (prohibition of abuse of rights). Where the hate speech is not intended to destroy the fundamental values of the Convention, the principle of setting restrictions on protection, provided for by Article 10, paragraph 2, of the Convention applies. Based on practice of the Court, it may be concluded that the difference between the permitted freedom of expression and hate speech requires a casuistic approach in solving specific case.

At the national level, according to Article 49 of the Constitution of Serbia, inciting of racial, national, religious or other inequality, hatred and intolerance is prohibited and punishable. In addition to the Constitution, there are several laws which prohibit discrimination and hate speech, in particular in the sphere of electronic media.[65] Law on prohibition of discrimination[66] in Article 11 provides that "It is forbidden to express ideas, information and opinions that incite discrimination, hatred or violence against persons or group of persons because of their personal characteristics, in the media and other publications, at gatherings and places accessible to the public by printing and displaying messages or symbols or in any other way".[67]

In the Serbian Criminal Code,[68] there is no criminal act of hate crime. Legal protection from hate crimes is realized through other offences, such as, violation of equality, (Art. 128), violation of the freedom of expression of national or ethnic origin, (Art. 130), inciting national, racial and religious hatred and intolerance, (Article 317), racial and other discrimination (Article 387). Recognizing the prevalence of crimes of subordinates prejudice, intolerance and hatred towards members of minority groups, by adopting amendments to the Criminal Code in December 2012, an aggravating circumstance in determining the sanction the perpetrators of such acts was introduced (Art. 54a. CC). "If the offence was committed because of hatred of race and religious confessions, national or ethnic origin, gender, sexual orientation or gender identity of another person, the court will appreciate that circumstance as an aggravating circumstance, unless it is prescribed as an element of a criminal offence." Accordingly,

60 See *Gündüz v. Turkey,* § 40 and *Sürek v. Turkey,* § 62.
61 See *Kasymakhunov and Saybatalov v. Russia,* §§ 113–114 and *Lehideux and Isorni v. France*, § 35
62 *Gündüz v. Turkey*, § 44
63 *Jersild v. Denmark*, § 31. See also Weber (2009), pp. 37–38.
64 Harris, O'Boyle, Bates and Buckley, op. cit, p. 454.
65 See: Law on Public Information and the Media (Art. 4 Para. 2), Official Gazette no. 83/2014 and 58/2015.
66 Official Gazette, no. 22/2009.
67 For more information: Petrušic, Nevena, Beker, Kosana, Practicum for the Protection against Discrimination, Belgrade, 2012, p. 39.
68 Official Gazette, no. br. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013 and 108/2014.

there is a shift in the direction of better legal protection from hate speech in Serbia. The most significant step would be the introduction of the offence of hate speech in a similar way as it has been done in Croatia.[69] This would allow for easier legal qualification, which would receive encouragement for the initiation of criminal proceedings for such acts. Prosecuting and punishing hate speech establishes a fair balance between freedom of expression and the abuse of that right.

REFERENCES

1. Djordjevic, Sanja, Media freedom of expression in European court of human rights practice, Faculty of Law in Nis Collection of papers, thematic issue: the media and human rights, nr. 61, 2012
2. Factsheet – hate speech, available at: http://www.echr.coe.int/Documents/FS_Hate_speech_ENG.pdf,
3. Harris, David J/ O'Boyle, Michael/ Bates, Ed P/ Buckley, Carla M: European Convention on Human Rights, Oxford University Press, 2009, p. 453.
4. Kambovski, Vlado, Hate crime and criminal aspects of the hate speech - approach of Macedonia, Megatrend review, no. 1/2013
5. Mandic, Mladen, The concept of hate speech and his comparative presentation with special reference to Bosnia and Herzegovina, in: Proceedings: How to overcome hate speech? Banja Luka, 2014
6. Marinkovic, Tanasije, Hate speech as the basis for restrictions on freedom of expression, Proceedings of the Faculty of Law in Nis, no. 61/2012, pp. 311-330.
7. Petrusic, Nevena, Beker, Kosana, Practicum for the Protection against Discrimination, Belgrade, 2012,
8. Petrusic, Nevena, Civil law instruments for the suppression of hate speech that spreads through the media - substantive and procedural aspects, Proceedings of the Faculty of Law in Nis, no. 61/2012
9. Weber, Anne, Manual on Hate Speech, Council of Europe Publishing, 2009
10. Zivanovski, Nenad, Different treatment of hate speech in the processes of communication in Europe and the US, CM - the magazine for communication managing, no. 32/2014

69 In the new Croatian Criminal Code (Official Gazette no. 125/11, 144/12), which was introduced in 2013, hate crime is defined as an offense committed because of race, color, religion, national or ethnic origin or sexual orientation of another person. Such actions will be taken as an aggravating circumstance if the law does not explicitly stipulate harder punishment.

UDC: 343.85:343.53
346.2

PREVENTION AS THE KEY MEASURE IN FINANCIAL FRAUDS

Jelena Slovic, PhD
FINODIT, Belgrade
Snezana Mojsoska, PhD[1]
Faculty of Security, Skopje

Abstract: This paper considers the key system measures which can prevent financial frauds. Financial frauds prevention is crucial part of organized economical system and it materializes through the structures of controls. System of the structures of controls is called "three lines of business security" and its establishing and functioning has significant benefit for the economic system as a whole. All the elements of the structure need to function on their own and mutually in order to achieve business security. Functioning of modern states and economies relate to the gathering of reliable information in respect to the principal of cost efficiency and the functional "three lines of business security" system can contribute to that aim. What is the benefit of the "three lines of business security" model? The most important contribution of the model is that it can provide business security to all the participants in the economy. What is more, it can contribute in drawing of foreign investments, since business security is fundamental principle of attracting investors into the state's economy. Therefore, efficient system where the "three lines of business security" function properly can contribute to the national economics in total and at the same time to be part of the efficient system of financial fraud prevention.

Key words: "three lines of business security", economic system, legal system, internal controls, external controls, investigation, coordinating, functioning

INTRODUCTION

All forms of criminal activities are socially and economically detrimental phenomena which should be prevented in any possible way. Financial crime as a phenomenon is becoming more and more widespread so it is necessary to find mechanisms for its prevention and timely detection.

Financial crime occurs in the sphere of business activities among participants of business transactions, but regardless of the fact that it happens in a relatively limited segment of society related to business its detrimental consequences can be so huge that it can influence the other segments of society. In other words, it is an activity which provides certain benefits to perpetrators, but as any other type of crime it has its victims and the damage which can outweigh the obtained benefits. Detriments of the financial crime can sometimes spread to the whole economy and considerably ruin the economic system. It is because of this that the state needs to establish the regulatory system which will ensure legal and ethical business activities of all participants in business. However, it is a very complex process, so even the practice of modern

1 E-mail: smojsoska@gmail.com.

developed countries indicates that this is not easy to achieve even with the most up-to-date laws and mechanisms. The process of establishing a functional regulatory system is especially hard in ex-socialist countries in the region which are currently in the process of transition and where the problem of unclearly defined ownership relations is still present.

The prevention of financial crime should be devised in the way to deter, prevent and detect different types of these activities, regardless of the type of the act committed, whether it was property misuse, corruption, fraudulent financial statements or any other form of financial crime. In that sense prevention, according to Zabihollah and Riley, should include[2]:

- Corporate culture – an environment which promotes ethical behaviour in an adequate way;

- Control structures – Effective control structures which eliminate the possibility for individuals to get involved in embezzlements and similar acts;

- Procedures for the prevention of embezzlements and similar acts - it is necessary to develop, introduce, and truly follow procedures which will ensure prevention and detection of possible embezzlements and similar acts.

The recognition of symptoms of criminal behaviour supposes forming instruments of adequate preventive protection from the consequences of criminal behaviour. For these reasons, it is necessary to follow and recognise these types of behaviour both in broader social environment, on macro level, and in direct contacts on micro level. Actually, except for the regulatory framework and laws, it is necessary to establish and promote corporate ethics in the entire society, thus permeating both macro and micro level. In that way the damage that can sometimes be fatal for the survival of the contemporary business system is avoided. These are all reasons to control all co-workers, and all the people in the most general sense but also to make them believe that all their activities are controlled. Moreover, mechanisms and controls are the prerequisite of prevention[3].

CONTROL STRUCTURES

The aim of every well-organised state is to establish a functional economic system which will maintain the economic activity, encourage investment and growth because the whole society makes progress in that way. An important factor in attracting investors is security of doing business in a certain state; therefore it is of major importance to establish mechanisms which will ensure that. It is in the interest of every national economy to encourage investment in order to set the economic activity in motion, as well as to promote growth and development which reflects on all segments of life. The basic rule of investment is that all investors are interested in investing their funds with an aim to make maximum profit with minimal risk. However, there are investors who do not mind disorganised economy, because in that way they make profit in the zone of informal (grey) economy[4].

Furthermore, such circumstances are very convenient for different forms of corporate crime, including the fact that money laundering is made easier because risky countries are attractive for such types of investments which are short-term and it is their aim to legalise

2 Zabihollah Rezaee, Richard Riley – Financial Statement Fraud; Prevention and Detection, Page 19
3 Dr Jelena Slović – Finansijska forenzika; Istraživanje korporativnog kriminala (2014), Visoka škola strukovnih studija za ekonomiju i upravu, Beograd, Page 51
4 Informal (grey) economy – a part of economy characterised by irregular and illegal business activities. It can be observed as grey economy, business ativities which can be legalised by taking certain actions (for example by paying tax), and black economy which cannot be legalised. (for example drug dealing). All countries take measures to prevent it in order to increase tax revenue. – Ekonomski rečnik (2006), The Faculty of Economics , Belgrade University, Belgrade, page 463

money earned in illegal ways. When it is done, such investors withdraw their funds and invest in another more stable state with a lower risk. The paradox which results from this situation is that investors who earned money in the zone of informal (grey) economy are interested to take that money out after laundering it and make safe investments, so not even they are ready to accept the risks of a disorganised economic system[5]. Therefore, every state which aims to have a stable and continuous growth focuses on attracting long-term, quality investments, and in order for them to achieve that, the whole economic system needs to be organised in the way which will ensure secure business activities.

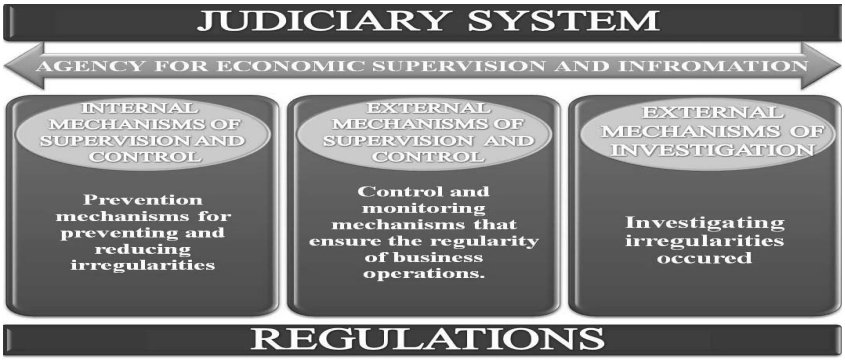
In order to ensure secure business it is necessary to establish control structures which are a result of a regulatory system and refer to mechanisms prescribed by laws, bylaws, regulations, professional regulations, etc. The aim of these mechanisms is to establish secure business by means of adequate regulations, control and supervisory bodies and other relevant participants (for example: banks). Establishing control structures is the first step towards the prevention of financial crime but its functioning is far more important.

The system of control structures is called "three lines of business security protection" and its operation ensures a complete, effective and efficient method of establishing and sustaining business activity.

MODEL OF "THREE LINES OF BUSINESS SECURITY PROTECTION"

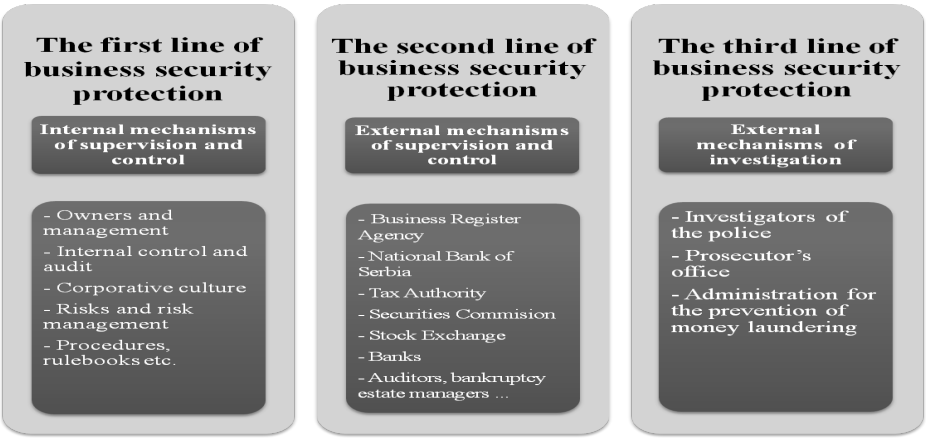
The model of three lines of business protection refers to mechanisms which exist with an aim to establish structure, organise, supervise, control and apply sanctions to the participants in business.

"Three lines of business security protection" are a part of a system which is based on the entire system of regulations, as a basis for business activities, which represents the foundations for each of the three lines of protection.



Every single line functions by itself, but they should also function mutually in order to make a major contribution to business security. The judiciary system represents the final line of protection of the whole system and it is based like all lines of protection on laws and regulations and is used for their implementation. In the model "three lines of business security protection" there is an additional line of protection whose function is to coordinate information and react timely in order to prevent irregularities in time.

5 Ibidem, Page 194



The first line of protection refers to internal mechanisms responsible for the establishment and maintenance of the regularity of a company business. The second line of protection comprises different supervisory and control bodies which control the regularity of business. The third line of protection includes the organs of investigation which come to the scene when the mechanisms from the first two lines of protection are not functional, because some criminal act was committed.

REGULATIONS AND THE JUDICIARY SYSTEM

Regulations refer to the group of all laws and bylaws, regulations, rule books and other, including professional regulations which organise certain questions in the country and it represents the foundation on which, among others the law and economy are built. When we talk about economy and finance, an important condition for the existence of numerous participants in business – companies and other forms of business and each of them is founded and operates in accordance with the existing regulations. In that sense the Law on business entities[6] is the law on the basis of which companies are founded, with other laws which organise certain activities (banks, brokers, etc.). Moreover, numerous laws are important for business, such as laws on tax, banks, capital market, customs, foreign exchange, accounting, auditing, etc. Criminal acts in the sphere of financial crime are prescribed by the criminal law, as well as by other laws which regulate certain spheres. Therefore, regulations are the basis on which the whole economic system is founded and it represents a priority form of structure, prevention and protection from different criminal acts, including financial crime.

Regulations are of utmost importance; however, uniqueness of countries in transition which are undergoing a social-economic transformation includes the change of numerous laws and reconciliation with EU laws. There has been significant liberalisation with regard to establishment of companies, but organised and secure business had been compromised, because companies are founded easily and they can simply obtain substantial funds (loans, stocks, etc), which is a way to encourage growth and economic activity, but it turns out that it is also a way to commit numerous frauds. A part of this problem lies in the fact that that the process of ownership transformation was not conducted in the right way. Companies were previously state or social property and they became private property through the process of privatisation. As a result, the process of management was deformed by establishing a specific

6 Law on Business Entities, Official Gazette RS number. 36/2011, 99/2011, 83/2014 – another law 5/2015

form of company despotism where the company is managed not by managers but by the majority owner personally or through people he selects in order to protect his interests by neglecting the interests of other shareholders, which by itself is not in accordance with the concept of shareholding[7]. Such economic circumstances create convenient atmosphere for numerous frauds, embezzlements, deceptions and other forms of financial crimes, including money laundering.

THE FIRST LINE OF PROTECTION

The first line of business security protection refers to internal mechanisms which are established in the company with an aim to create internal organisation of the whole business in line with laws and all other regulations. Mechanisms of the first line of protection refer to internal structure of the company which is related to owners and management, internal controls, internal auditors, corporate culture, risk management, procedures, rule books, etc. A well-organised company runs a lower risk of irregularities in business as well as the risk of frauds.

With regard to frauds, the problem stems from the fact that the risk of frauds is often not understood and that people neglect the possibility of fraud by assuming honesty. This causes insufficient supervision and inadequate control mechanisms as well as the fact that warning signs have been ignored[8]. Studies indicate that ethical business and behaviour have increasing importance and that their importance will be even bigger[9]. The way the management and the board of directors behave is a very important factor in supporting and promoting ethical behaviour and the corporate structure, as well as the size of pays and colleagues' behaviour[10]. Any single factor, by itself is enough to create and maintain ethical atmosphere in a company, but the synergy of the factors mentioned creates a favourable environment for the prevention of crime. The mechanisms of establishing the first line of business security protection can be prescribed by the law but they, above all, stem from the business policy of the company, and the most important factor for their establishment and maintenance is the management. These mechanisms can have a very high impact regarding the regulatory environment in a company, the identification of numerous business risks and their management, including the risk of frauds.

When a financial crime is committed in a company, an important factor in the course of investigation is if the management has taken measures to put the business in order, if it has identified the risks related to business and what it has done to decrease those risks. However, you must bear in mind that at the same time risk management represents a certain risk for the company depending on the objectives of the company and the way they are accomplished because the management can resort to committing and concealing criminal acts in order to achieve its objectives. On the other hand, if the management was familiar with the risks, including the risk of fraud and did not take any action to regulate the business and introduce mechanisms which will contribute to regular business, it can signalise that the management has no interest in setting the situation right. What is more, it implies that the management is involved in fraudulent activities.

7 Ibidem, Article 269 – Equal treatment of shareholders
8 Samaciuk, M., Iyer, N. (2013) – Kratak vodic kroz rizik od prevare, Norips, Beograd, Page 22
9 2014 Global Survey on Reputation Risk (2014), Deloitte, https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Governance-Risk-Compliance/gx_grc_Reputation@Risk%20survey%20report_FINAL.pdf, Page 7
10 Deloitte and Touche – Leadership Counts; "Deloitte & Touche USA 2007 Ethics & Workplace" survey results, http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/us_2007_ethics_workplace_survey_011009.pdf, Page 8

The management that recognises the risk of fraud takes action to resolve this problem and introduces that into its acts or makes a special act which could be defined as, for example, the policy of frauds treatment[11]. However, it is a common situation that companies avoid dealing with the possibility of frauds because they believe that in that way they acknowledge the existence of frauds, which puts their reputation at risk, and reputation is very important in business[12].

In the situation when mechanisms of the first line of corporate security function well, companies will be organised and do business in accordance with laws. This will be primarily the responsibility of the management and administration. If certain irregularities in business are noticed the mechanisms of the first line of protection can resolve them. However, what presents the potential risk of the first line of protection is the fact that if a crime is committed and if it is detected by internal controls, companies tend to hide them and fail to inform competent organs to avoid the risk of damaging the reputation since fraud is one of three reasons for reputation risk[13]. Such corporate behaviour should be prevented with clear legal regulations, but also with continuous supervision of companies conducted within the second line of business security protection, as well as within an extra line of protection.

THE SECOND LINE OF PROTECTION

The second line of business security protection refers to external mechanisms of supervision and control which are established in the environment with an aim to ensure that all business entities are founded and operate in line with the law. Mechanisms of the second line of protection are regulated by laws, both if they were founded according to laws (Business Registers Agency, Securities Commission, Stock Exchange, Tax Authority, etc), or they stem from legal obligation (external auditors, bankruptcy estate managers). Except for legal authority, the mechanisms of the second line of protection have, among other things, the function to protect the public interest, which is often not a priority within the first line of protection. Within the second line of protection the tax administration has a specific position, because it is competent for tax offences and violations, but when we talk about criminal acts, the investigation is conducted by organs from the third line of defence. Functioning of elements of the second line of protection has a considerable influence for establishment and organisation of business environment, as well as on the economy itself.

The second line of protection is specific in the sense that its functioning or the lack of it can have a considerable influence on the whole economy, as well as on the presence of foreign investments. In order to encourage the inflow of foreign investments and economic activity the countries in transition have considerably simplified the process of company registration by reducing the factors of business security, such as equity. Such policy resulted in a lot of companies being registered with the minimal capital prescribed by the law. This amount of capital is insufficient to enable continuous and free business activities[14], which results in founding a big number of "one off" companies whose aim is to accomplish the short-term ob-

11 Ibidem, Page 41

12 2014 Global Survey on Reputation Risk, (2014), Deloitte https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Governance-Risk-Compliance/gx_grc_Reputation@Risk%20survey%20report_FINAL.pdf, Page 4 and Association of Certified Fraud Examiners – 2014 Report to the Nation on Occupational Fraud and Abuse 2014, http://www.acfe.com/rttn/docs/2014-report-to-nations.pdf , Page 65

13 Ibidem, Page 4 and 7

14 Minimal equity for a limited liability company amounts to 100 RSD. – Article 145 Law on Business Entities , Official Gazette Of The Republic of Serbia number 36/2011, 99/2011, 83/2014 – another law 5/2015

jectives of founders (money laundering, getting loans). Such companies often face bankruptcy or liquidation, but that happens after the whole property is transferred to other companies, so the creditors suffer damage. Such practice is especially harmful for stability and growth of economy. However, legal regulations in Serbia allow establishment and business operations of such business entities.

What poses the problem of the second line of protection is the fact that certain actions which can be potentially detrimental for the economy are legal, so from that aspect the second line of protection can be dysfunctional, including the possibility of overlooking the risk of financial crime.

The economic practice shows that countries in transitions, including Serbia, did not organise newly created social-economic relations in a good way, which resulted in increased financial crime rate in all segments of business. The economic practice in Serbia caused creation of a large number of companies whose structure, ownership and business are falsely transparent[15]. Companies are founded with minimal shareholders' equity often with an aim to achieve some short-term aims. Companies often do business for a long time with loss above capital, which indicated that the company is using somebody else's capital, the capital of its creditors, which inflicts damage to them. Economic illiquidity is high and there is no functional economic mechanism which will oblige debtors to pay their liabilities, so this is often achieved by court proceedings, sometimes too late when companies are completely ruined. Those who previously committed some fraud or brought the company to bankruptcy by its management, which means that they have already inflicted damage to other participants in business, can without limitations become founders or managers of companies. The mechanisms of protection do not provide sufficient protection to participants in business because such situations are not part of an organised economic system and among numerous factors, can be discouraging for investors.

Organs of the second line of business security protection perform supervision and control within their line of authority. However, the way it is done does not contribute to the improvement and organisation of economy, because their role is often formally understood. The second line of business protection can be extremely functional in organising economy because organs which perform it can achieve results with their work. However, conditions in the country are such that one cannot realise the size of capacity which is at disposal of the whole economy, the public and investigation specialists.

THE THIRD LINE OF PROTECTION

Financial crime can be committed in different ways, such as tax evasion, financial fraud, money laundering, illegal practices affecting stock exchanges, etc. Investigation as a third line of defence should maximize the benefits of information material of the first two lines of defence (internal supervision and external supervision), but there is appearing a problem as lack of coordination of information (for example, do not have a complete access into the organizational weaknesses and failures that caused the company does not introduce internal control, and the absence of internal controls maybe cause the criminal activities in the company). Therefore, in order to conduct an efficient investigation, it is important to make use of strategic partners such as customs, inland revenue, stock exchange, and fair trade commissions and to utilize the expert knowledge they possess in their respective fields. There should be clear

15 Business Registers Agency provides numerous records of companies, founders, financial statements, etc, but owners who do not want the ownership structure of their company to be completely transparent, establish companies to other names or companies.

understanding between the investigative authorities because their end goal is to deal with the crime and their co-operation, co-ordination and information sharing is of vital importance, especially in huge corporate crimes. This line should be composed by police services who are dealing with economic crime, prosecutors and anti money laundering officers and all other law enforcement agencies. This line should cooperate with all necessary entities because of the complexity of this type of crime and examination of material available in the banking, financial and commercial systems should be available.

Police officers or detectives for financial crimes should employ experts in document examinations and handwriting comparisons, as well as a team of detectives who are called upon to prioritize hundreds—often thousands—of cases received each year, particularly among larger departments. Also forensic auditors (Certified Fraud Examiners) should be important members of a police department's financial crimes unit, as they are responsible for providing the financial analysis services used in criminal investigations. They may utilize their accounting, computer, auditing and investigative skills to examine financial evidence. Their extensive training and education allows them to handle complex financial investigations, which may include insurance fraud, embezzlement, and mortgage fraud, among others. According Michael L. Benson and others most local prosecutors did not regard financial crime as a serious problem, their willingness to prosecute increases if an offense causes substantial harm and other agencies fail to act. Despite repeated calls for coordinated responses to financial crime, relatively few local prosecutors participate in interagency control networks. Those in control networks, however, conducted more prosecutions and expressed greater concern over financial crime. The commitment of organizational resources and resulting career opportunities thereby created may explain differences between network and no-network districts[16]. So the prosecutors must recognize and prove and to be a network with all others crime as third line of protection. Also Regulators and Law Enforcement Agencies must equally be focused on ensuring that both their standards and also those of the financial institutions they regulate are set at the highest level.

ADDITIONAL LINE OF PROTECTION

In the model three lines of business security protection there is an additional line of protection called The Agency for Economic Supervision and Information. This line of protection, as well as the Agency, does not exist in the system, but its establishment can be purposeful in order to coordinate the before mentioned lines of protection and enable their functioning in the best possible way. The Agency for Economic Supervision and Information would be an agency which would perform the function of economic supervision which is not performed by other organs, as well as the function of collection of data of participants in business (legal entities and individuals) and establishment of information base which would be the basis for providing economic information.

The function of economic supervision refers to the legality of the business of legal entities, which means that legal entities would immediately register in the Agency in the process of company registration, and from that moment all the relevant data would be recorded in the register. Relevant data would range from basic data to the records of unprofessional dishonest business activities, causing of bankruptcy, failure to pay dues, tax offences and violations, disharmony with the law, auditors' remarks about inconsistent financial statements, etc. Also, data about founders and managers who inflicted damage to their companies and business partners should be recorded here. This data can be useful to all the participants in business so they could be acquainted with a potential business partner and be able to make right decisions.

16 Michael L. Benson, Francis T. Cullen, William J. Maakestad, Local Prosecutors and Corporate Crime, http://cad.sagepub.com/content/36/3/356.short(accessed 06.12.2015)

The Agency should be authorised to issue orders to organise or correct the organisation of a company, administration, business, financial reporting, and all relevant questions. Otherwise, a company or an individual could be penalised accordingly. If the Agency within its authority established that a certain individual (owner, manager) inflicted certain damage by his/her bad management, such as indebting the company and other actions, then a certain mark should be put next to their name, or impose high guarantees or restrictions if that person or business entity wants to participate in business activities. Furthermore, if a company has had auditor's remarks on financial statements for a number of years and did nothing to correct them, continuing to present incorrect business information, the Agency should issue an order to the company, within its authority, stating that it is obliged to show business information in a true and fair way. Business reality is considerably broad and varied, so there are plenty of situations in which the Agency could act, but it also implies that there is a considerable number of ways in which it could act in order to improve and regulate business. What should exist as an option is that if a company or an individual do not act upon the order for reconciliation or correction, the Agency should have a possibility to inform investigation bodies which would investigate the company's business activities. By performing this function the Agency would act as a coordinator of all relevant information on the basis of which it would react timely and consequently fulfil its function of prevention and protection of business security.

The function of data collection and establishment of database would be based on data which can already be found in the previous lines of protection, above all in the first and second, as well as in the third. Single lines of protection and their mechanisms which exist within them are not mutually coordinated, so one function of the Agency would be coordinating mechanisms which already exist within the economic system. An example to illustrate this would be if a shareholding company has an annual obligation through Auditing Commission or Supervising Board to submit reports on findings of internal auditors and if the errors and misstatements have been rectified, as well as if the remarks from the external auditor's report have been settled. If there are some irregularities and they have not been corrected, then a record should be made until they are corrected or inform investigation bodies. There is plenty of information that the Agency can collect and the benefits that can be gained in business owing to the information gathered are also numerous. A part of the Agency database can be open to public, but a part of it could be used with a certain compensation, especially when special data is required for special purposes, as for example in the process of public procurement or checking a business partner before starting business cooperation or in case of establishing new companies, etc.

Setting up the Agency for Economic Supervision and Information is a major organisational venture, however a significant part of it already exists, so the available resources would be utilised, but the whole project should be set up from the start. Mere establishment of such an organisation requires certain initial investments, but the benefits that can be reaped thanks to its functioning will soon compensate for investments. Setting up the Agency can be especially important for increasing financial discipline which is a preventive function, and also the investigation of financial crime could be timely initiated, at the first warning of irregularity, which would shorten the investigation procedure, and consequently reduce the investigation costs. The greatest benefit which can be expected from such a body is a gradual establishment of business security through the system of collecting information, supervision and providing information which will contribute to the increase of investment on one hand and on the other hand potential damage or company bankruptcy would be reduced with timely reaction, because spreading of financial crime would be prevented.

CONCLUSION

Financial frauds prevention is a crucial part of an organised economic system and it materialises through the structures of controls. It is in the interest of every national economy to decrease and prevent financial crime which can be done by establishing the system of control structures called "three lines of business security protection". Establishing and functioning of 'the three lines of business security protection" could have a significant benefit for the economic system as a whole. Functioning of modern states and economies relate to the gathering of reliable information in respect to the principle of cost efficiency and the functional system of "three lines of business security protection" can contribute to that aim. All elements of the structure need to function on their own and mutually in order to achieve business security, an in order to achieve that in an effective and efficient way it is necessary to introduce an additional line of protection which would coordinate all three lines of protection by means of The Agency for Economic Supervision and Information. The most important contribution of the model is that it can provide business security to all the participants in the economy. What is more, it can contribute in attracting foreign investments, since business security is a fundamental principle of attracting investors into the state's economy. Therefore, an efficient system where the "three lines of business security protection" function properly can contribute to the national economy in total and at the same time be a part of an efficient system of financial fraud prevention.

REFERENCES

1. Association of Certified Fraud Examiners – *2014 Report to the Nation on Occupational Fraud and Abuse 2014*, http://www.acfe.com/rttn/docs/2014-report-to-nations.pdf
2. Bologna, G. J., Lindquist, R.J., Wells, J. (1996) *The Accountant is Handbook of Fraud & Commercial Crime*, John Wiley & Sons, Inc., New York;
3. *Ekonomski rečnik* (2006), Ekonomski fakultet Univerziteta u Beogradu, Beograd;
4. *2014 Global Survey on Reputation Risk* (2014), Deloitte https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Governance-Risk-Compliance/gx_grc_Reputation@Risk%20survey%20report_FINAL.pdf
5. *Managing Responsible Business 2015 Edition: The Ethical Challenges Organisations Must Navigate to Succeed in a Connected World* (2015), CGMA Report, http://www.cgma.org/Resources/Reports/DownloadableDocuments/2015-07-21-Managing-Responsible-Business.pdf
6. Rezaee, Z., Riley, R. (2010), *Financial Statement Fraud; Prevention and Detection*, John Wiley & Sons, New Jersey, USA;
7. Slović J., (2014) – *Finansijska forenzika; Istraživanje korporativnog kriminala*, Visoka škola strukovnih studija za ekonomiju i upravu, Beograd;
8. Stojanović, M., Pavlović, D., (2014), *Ekonomska bezbednost poslovanja*, Škola Plus, Beograd, Srpska Asocijacija Menadžera, Beograd;
9. Zakon o privrednim društvima, Službeni glasnik RS br. 36/2011, 99/2011, 83/2014 - dr. zakon i 5/2015
10. Michael L. Benson, Francis T. Cullen, William J. Maakestad, Local Prosecutors and Corporate Crime, http://cad.sagepub.com/content/36/3/356.short(accessed 06.12.2015)

UDC: 656.1.08
351.811

NATIONAL STRATEGIES FOR IMPROVING ROAD TRAFFIC SAFETY VS. REAL OPPORTUNITIES AND CHALLENGES IN REDUCING ROAD TRAFFIC ACCIDENTS

Kire Babanoski, PhD[1]
MIT University, Faculty of Security Sciences, Skopje

Abstract: Traffic accidents on the roads, in modern conditions of life, particularly in underdeveloped countries (locally, nationally and globally), represent a serious security and public health problem, and special challenges in their contemporary growth and development. In the past, the responsibility for the occurrence of accidents and their consequences fell mainly on direct individual road users. Today, it is increasingly pointing to the fact that the responsibility should be shared among the entities that provide and maintain the traffic system and its participants. In order to demonstrate this commitment within the traffic-safety policy the competent authorities in the country which shaped the traffic activities prepare national strategies and visions for reducing traffic accidents and improvement of the road traffic. Lately, through the "Vision Zero", developed and adopted in Sweden in 1997, the European Road Safety Charter, the platforms and plans of action of the European Union, the United Nations and the World Health Organization, the national strategies for road traffic safety and other acts, are clearly set mission, goals and targets for improving traffic safety on the roads for all participants. But the main issue is whether their goals are realistic. The paper makes an attempt, through synthetic and analytic approach and empirical examples, to answer the question whether and to what extent the strategic documents are applied in road traffic safety area and how they help towards reducing the number of traffic accidents, with particular focus on the case of the Republic of Macedonia.

Keywords: national strategies, traffic accidents, road traffic safety

INTRODUCTORY REMARKS

Road traffic safety refers to methods, measures and activities for reducing the vulnerability of a person using the road network (road user) and the risk of being killed, seriously or slightly bodily injured. Road traffic safety[2] can be defined as a state of responsible, conscientious and disciplined behavior of people without the presence of danger arising from their participation in order to achieve an optimal level of functioning in road traffic. Best-practice road safety policies and strategies focus upon the prevention of serious injury and death crashes by proposing and recommending measures and activities for improving the road traffic safety level. This goal is contrasted with the old road safety paradigm of simply reducing road traffic accidents and crashes assuming road user compliance with existing traffic regulations. Huge number of experts, leaders, politicians on various conferences, meetings, events and documents[3] that arose from them advised all countries in the world to adopt and promote a

1 E-mail: kbabanoski@gmail.com.
2 Babanoski, K., Security and responsibility of road traffic users in the Republic of Macedonia, doctoral thesis, Faculty of security, Skopje, 2014, p. 18
3 Transport Research Centre, Towards zero: Ambitious Road Safety targets and the Safe System Approach, Summary document, OECD, International Transport Forum, 2008, p. 5

level of ambition that seeks in the long term to eliminate death and serious injury while using the road transport system. This vision in the achievement of safer road traffic and transport will require interventions that are some steps removed from prevailing best practice and will require the development of altogether new, more effective interventions.

The Vision Zero[4] is a multi-national road traffic safety project that aims to achieve a highway system with no fatalities or serious injuries in road traffic. A core principle of the vision is that 'Life and health can never be exchanged for other benefits within the society' rather than the more conventional comparison between costs and benefits, where a monetary value is placed on life and health, and then that value is used to decide how much money to spend on a road network towards the benefit of decreasing how much risk. The Vision Zero is the Swedish approach to road safety thinking. It can be summarised in one sentence: No loss of life is acceptable. Vision Zero is relevant to any country that aims to create a sustainable road transport system.

In its resolution A/RES/64/255[5] of 10 May 2010, the UN General Assembly proclaimed the UN Decade of Action for Road Safety 2011-2020 in a landmark resolution agreed by 100 countries. The goal of the Decade of Action is to "stabilise and reduce", from a 2010 baseline, the forecasted level of global road fatalities by 2020. Governments are recommended to develop national action plans for the decade 2011-2020. To support these, a Global Plan for the Decade of Action[6] was developed around the five pillars of the "Safe System" approach. In this context, several countries released national road safety strategies in 2011 or updated existing strategies. These include quantitative targets, interim targets, sub-targets and performance indicators. Some countries set targets for reducing serious injuries alongside the goals of reducing fatalities.

Recommendation 3 of the World report on road traffic injury prevention[7] encourages countries to prepare a road safety strategy that is multisectoral and multidisciplinary. The strategy should take into account the needs of all road users, including vulnerable road users. The road safety strategy needs to set ambitious, but realistic targets for at least five or ten years. Once the road safety strategy has been prepared, a national action plan, scheduling specific actions and allocating specific resources, should be developed.

Today, there is the European Union's document on policy orientations on road safety 2011-2020[8], which aims for zero and reducing the number of fatalities by 2020 (base year: 2010). In view of achieving the objective of creating a common road safety area, the Commission proposes to continue with the target of halving the overall number of road deaths in the European Union by 2020 starting from 2010. Such a common target represents a significant increase of the level of ambition compared to the unmet target of the previous action plan, considering the progress already achieved by several Member States during the past decade,

4 The concept of Vision Zero first originated in Sweden in October 1997, when the Swedish parliament adopted it as the official road policy. For the Vision Zero more in Tingvall, C., Haworth, N., Vision Zero: and ethical approach to safety and mobility, 6th Institute of Transport Engineers International Conference on Road Safety and Traffic Enforcement: Beyond 2000, Melbourne, 6-7 September, 1999, Peden, M., Scurfiled, R., Sleet, D., Mohan, D., Hyder, A., A., Jarawan, E., Mathers, C., World report on road traffic injury prevention, World Health Organization, Geneva, 2004, pp. 19-21 and Schermers, G., Cardoso, J., Elvik, R., Weller, G., Dietze, M., Reurings, M., Azeredo, S., Charman, S., Guidelines for the development and application of evaluation tools for road safety infrastructure management in the EU, Road Infrastructure Safety Management Evaluation Tools, 2011, pp. 21-23

5 http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/64/255

6 OECD/ITF (2015), Road Safety Annual Report 2015, OECD Publishing, Paris, p. 13, 26

7 Peden, M., Scurfiled, R., Sleet, D., Mohan, D., Hyder, A., A., Jarawan, E., Mathers, C., World report on road traffic injury prevention, World Health Organization, Geneva, 2004, p. 161

8 Towards a European road safety area: policy orientations on road safety 2011-2020, {SEC(2010) 903}, Brussels, 20.7.2010

which will give a clear signal of Europe's commitment towards road safety. Seven objectives have been identified for the next decade. For each of these objectives[9], actions at EU and national levels have been proposed.

NATIONAL STRATEGY OF THE REPUBLIC OF MACEDONIA FOR IMPROVING TRAFFIC SAFETY ON ROADS – THREATS AND CHALLENGES

The Law Amending the Law on Traffic Safety on the Roads[10] added a new article (Art. 416-a) which refers to a new and very important aspect of improving the road traffic safety. So, in order to promote traffic safety on the roads, the Parliament should adopt the National Strategy for Road Traffic Safety, for a period of five years. At the same time, the National Strategy of the Republic of Macedonia was prepared by the Coordination body which was established by the Government of the Republic of Macedonia, for a term of six years, and which was composed of 11 members – representatives of state bodies, the National Council for Traffic Safety on the Roads[11], institutions and legal entities in the area of road traffic safety. This Coordination body was responsible for monitoring the implementation of the National Strategy for Road Traffic Safety.

The Strategy was the first strategic document for improving traffic safety on roads in the Republic of Macedonia and its aim was to contribute to safer road traffic in the period 2009-2014. The main objective of the Strategy was the number of deaths in road traffic in the Republic of Macedonia until 2014 to be reduced by 50 % and 0 (zero) children – victims involved in road traffic (forecast made following the plans and acts of the European Union).[12] The National Strategy provided proposed solutions to achieve the main goal. Measures related to preventive police action aimed at increasing road safety related to the number of controls for exceeding the speed and respecting the red light at intersections, reducing accidents resulting from participation in traffic under the influence of alcohol drugs and other psychotropic substances and their consequences through the action of traffic police, control of using safety belts, ensuring full respect for the legislation by all road traffic users by improving efficiency in the work of traffic police and administrative authorities in it, etc.

9 Those seven objectives are: Improve education and training of road users, Increase enforcement of road rules, Safer road infrastructure, Safer vehicles, Promote the use of modern technology to increase road safety, Improve emergency and post-injuries services, Protect vulnerable road users.

10 Official Gazette of the Republic of Macedonia, no. 64/09 of 22.05.2009

11 The jurisdiction of the National Council is to monitor the implementation of the National Strategy, to monitor the preparation of the national programmes and action plans for road traffic safety and to coordinate the preparation and drafting of the yearly action plans and reports for the implementation of the Strategy, as well as to suggest further development steps through the coordination body for the preparation, planning and monitoring of the National Strategy. Within its own mechanisms the National Council shall assist and support activities and measures for the implementation of the Strategy. The Council is reporting on the implementation of the National Strategy to the Parliament of the Republic of Macedonia on a yearly basis. More information about the role and function of the Council on its official website http://www.rsbsp.org.mk

12 Main aims of National strategy for road safety were: Decrease of number of accidents and the consequences caused by speeding; Decrease of number of accidents and the consequences caused by not giving way; Decrease of number of accidents and the consequences caused when driving under the influence of alcohol and other drugs; Decrease of severity of road accidents` consequences by increasing the rate of wearing restraint devices; Better protection of vulnerable road users; Providing safe road environment; Improving of post-accident care; Complete law enforcement by all road users and Coordination of all activities. National Strategy of the Republic of Macedonia for improving traffic safety on roads for the period 2009-2014, Skopje, 2008

In order to compare the goals of the Strategy with the real situation in the road traffic safety in the Republic of Macedonia, some indicators about road traffic accidents and casualties (deaths and injuries) in the Republic of Macedonia in the last 10 years will be analyzed below.

Table 1: *Review of road accidents and casualties in the Republic of Macedonia in the period 2005-2014*[13]

	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
Road traffic accidents	2,821	3,313	4,037	4,403	4,353	4,223	4,462	4,108	4,230	3,852
Deaths	143	140	173	162	160	162	172	132	198	130
Injuries	4,176	4,936	6,133	6,724	6,731	6,375	6,853	6,149	6,484	6,056

According to data given in table 1, during this analyzed ten-year period of time, a total of 39,802 road traffic accidents occurred. There is a noticeable steady increase in the number of road traffic accidents, and after 2007 their number is constantly over 4,000 (an exception is 2014). Spreads range from 2,821 (in 2005) to 4,462 (in 2011) road traffic accidents, and the average over the analyzed period is 3,980. This means that, on average, 11 road traffic accidents occurred every day. The number of deaths in road traffic accidents range from 132 to 198, with the average for this period of 157 persons. This means that every 56 hours one citizen was killed in the country as a result of traffic accident. The number of severely and slightly injured persons especially after 2007 consistently exceeds 6,000. According to the trends of deaths in road traffic accidents, no decline can be seen, so that the main goal of the National Strategy for reducing the number of deaths in road traffic by half seems far from viable. Each year there were approximately 5 % children (persons under the age of 14) who died in traffic accidents. The most numerous category of road users who died in traffic accidents were car drivers and their passengers, followed by pedestrians and drivers of bicycles, motor bikes and motorcycles, and much fewer drivers of heavy vehicles, tractors, etc. There is a similar distribution for seriously and slightly injured people in road traffic accidents. Most of the people who suffered from road traffic accidents were involved in mutual collisions of vehicles in motion followed by traffic accidents with pedestrians, vehicles thrown off the road, crash into the object on the road, crash in a stopped vehicle or turning the vehicle off the road.

Recent amendments to the Law on Traffic Safety on the Roads envisage that the driver of the vehicle must drive at a speed lower than 50 km/h on a public road in the urban areas. A lot of sanctions are provided for within this Law, which can apply not only to drivers and pedestrians, but also to legal persons, taxi drivers, cyclists. Changes in the law have been drafted according to Croatian and Slovenian experiences.

The National Council for Traffic Safety on the Roads organizes a number of preventive campaigns through lectures, debates, forums, workshops, public events, distribution of educational materials, and one of the last campaign that was realized was "Let's protect children in the traffic". It was undertaken, because of the developments of the past few years, when several accidents occurred on pedestrian crossings where the victims were children. It is a worrying phenomenon that more victims in traffic suffered injury in urban areas. There are many victims on pedestrian crossings and bicycle paths. This means that we do not have enough bicycle infrastructures[14], coherence of vertical and horizontal light signalization. There are a lot of junctions that are not well resolved, and there is chaos in the parking areas.

13 Statistic data are listed from State statistical office of the Republic of Macedonia, Statistical review: transport, tourism and other services (2005-2014), Transport and other communications, Skopje, 2006-2015

14 One part of the problem lies in infrastructure, because the infrastructure in Skopje and other cities around the country is auto centric, and vehicles are more privileged than pedestrians and two-wheel users.

The data presented in the paper clearly indicate the alert and the unfavourable situation and negative trends in un/safety in road traffic. This implies the need for additionally enhanced engagement, profound interdisciplinary research on the traffic factors and more effective coordination of all authorities, institutions and entities involved in and responsible for implementing the National Strategy for improving traffic safety on roads in the Republic of Macedonia. In this context, the Ministry of Interior and, in particular, traffic police as a professional entity in the police organization for traffic safety, based on thorough analysis of the phenomenological and etiological characteristics of traffic offenses, should work continuously on problems related to prevention (education, campaigns, etc.), but also effective repression of the causes of the most serious types of traffic violations. In this sense it is necessary to increase the intensity of control on the roads in order to achieve effective prevention and repression of traffic offenders. In this way positive and larger effects could be achieved in the field of special and general prevention among road traffic users, improving traffic discipline, awareness and responsibility for developing traffic culture in general.

The current (second) National Strategy which covers the period 2015-2020 year is not significantly different from the previous one. Regarding the fact that the main objective of the First Strategy was too ambitious, the objective of the second National Strategy on improving road safety 2015-2020[15] is a little bit different: by 2020, the number of fatalities of road accidents should be reduced to the average number of causalities in EU countries, road traffic deaths amongst young drivers should drop by 30%, of those severely injured by 40% and the number of child fatalities to be reduced to zero. By fulfilling the goal in the next five to six years, the lives of 250-300 citizens would be saved, i.e. there would be fewer road traffic deaths per year.

Every traffic accident that results in the loss of lives or severe injury must be regarded as a failure of the entire society, not only as a mistake of the individual, which in fact is a misconception. The success in meeting the goals of the new strategy means that many lives will be saved and that financial losses will be significantly reduced for the entire society. Previous experience has shown that finances invested in adequate traffic safety elements represent, in fact, an investment, not a financial cost.

Preventative activities, coordinated and supported by frequent controls of the traffic police, accompanied by media support should play a significant role in decreasing the trend of road accidents and road deaths or injuries in future.

The second National Strategy defines ten priorities for road safety, including children, pedestrians, cyclists, motorcyclists, young drivers and drivers-beginners, senior drivers, speeding, driving under the influence and driving while using mobile phones and smart devices.

The Republic of Macedonia has adopted the National Transport Strategy for the period 2007-2017[16]. By the preparation of the National Transport Strategy of the Republic of Macedonia the Ministry of Transport and Communications has committed itself to implement the necessary reforms in the transport sector in accordance with the obligations of the "National Program for adoption of the European Union" in the period from 2007 to 2017. Its vision is:

- To have a modern, well maintained and integrated transport network system in place adapted to the needs of the country and in support to the sustainable development and growth of the national economy as well as the regional and international trade exchange.
- To offer a modern, safe, reliable an affordable integrated transport system to the public and ensure the mobility of the citizens, especially the young, older and special care needing ones.
- To care for the well-being of future generations regarding financial burdens, respect for the environment and cultural heritage of the country.

15 The National Strategy of the Republic of Macedonia for improving traffic safety on roads for the period 2015-2020, Skopje, 2014
16 The National Transport Strategy of the Republic of Macedonia for the period 2007-2017

The mission is: to fulfil the mandate as a public administration with excellence in accordance with the regulations in place; to establish the necessary institutions to provide effective transport for passengers and freight; to provide and maintain the necessary transport infrastructure and operations by gearing private public partnerships; to enable high quality transport service to the public including high level of safety.

All Ministries[17] in the Republic of Macedonia prepared their programs in accordance with the National Strategic documents in traffic safety area. It means that a lot of attention is paid to giving political and expert support for increasing the level of road safety. There are some weaknesses[18] in improving road traffic safety in the Republic of Macedonia. First of all, non-existence of a national agency for traffic safety can be the limiting factor for upgrading the level of traffic safety. It means that there could be a need for an official body (Agency) which will coordinate all activities. Another weakness is the financial framework of the National Council for Traffic Safety on Roads. In recent years, especially after 2007, there has been a constant decrease, so that its finances are reduced by half. That is a fact that reveals why the measures and activities of the Council have been continually decreasing in recent years. Also, it is notable that there is low level of sharing best practices and experiences between the municipalities in the sphere of road safety, bearing in mind that they have great responsibility for road traffic safety in local communities. There has, until now, been no legal background for mandatory usage of Road Safety Management (usage of road safety tools such as: Road Safety Impact Assessment, Road Safety Audit/Road Safety Inspection, only partly High Risk Road Section -Black Spot- Management, Network Safety Management), but some parts are mentioned in the adopted National Road Safety Strategy (so, they should be implemented in the next years). The introduction of Road Safety Audit/Road Safety Inspection gives opportunity, in addition to the strong enforcement and education program, to decrease the number of deaths and injuries in road traffic accidents. An improvement of the accident database could be reached by an introduction of GPS – based data usage, so there will be more useful data for state bodies to create preventive activities and measures.

CONCLUSION

According to the absolute indicators of traffic safety in the Republic of Macedonia, the situation is worrying and alarming. It confirms the thesis that the negative phenomena arising from the traffic accidents are latent, dangerous and real. The data and observations about challenges in the national strategies are an excellent base for further etiological-phenomenological analysis and detailed scientific research of the problem of optimal functioning of traffic in the city, for taking concrete measures through the creation and adoption of action programs, plans and strategies for managing road traffic safety. However, if the road traffic users are not aware of and responsible for the safety, such activities cannot be useful. So, in parallel with the development of road traffic, which has been especially rapid lately due to technological advances, it is necessary to enhance a sense of responsibility in the community and among the relevant state institutions and organs. Namely, many traffic offenses and accidents would not occur if the participants in traffic were more responsible.

On the other hand a wider social action in which there will be involvement and mutual cooperation, coordination and responsibility of many social entities, authorities, state bodies and

17 For instance, the Ministry of Interior has a functional database of traffic accidents which are presented publicly on its website and they present an impressive report for further researches. Also, this Ministry has usable penalty point system for drivers, which has given good results in recent times.

18 Annex to Regional Road Safety Strategy (RRSS) Explanatory Report (document for Road Safety Experts) Final, July 2009

institutions whose projects, campaigns and activities should be thoroughly analyzed before they are applied in reality. Traffic safety should be made a political priority. It is vital to appoint a lead agency for road traffic safety as been done in many countries in our neighborhood and in western countries. This agency should have financial assets and Parliament should demand accountability from it. The only body comprised of competent experts in this area and chosen by the Parliament of the Republic of Macedonia is the National Council for Traffic Safety on the Roads. It is an advisory body, whose financial resources are constantly decreasing, so there is no possibility of performing the full scope of its preventive function through promotional measures and activities. An agency for traffic safety on the roads would be primarily responsible for the prevention and elimination of consequences arising from the operation of road transport, i.e. strategic management of traffic safety situations on the roads. It should have constant cooperation with the National Council, so that the advice and expert opinions given by the Council should be implemented in practice by the Agency. The appointment and establishment of such a body would be provided for in a special legal act, and according to its organizational structure, its position would be under government control, before which it should be responsible for all undertaken actions. The Agency would deal with professional matters related to traffic safety on the roads, in terms of monitoring the road infrastructure and special dangerous sections by proposing concrete measures for their removal; supervision over technical inspection of motor vehicles, homologation, the issuance of international drivers licenses and green cards; supervision over the process of training and examination of candidates for drivers and monitoring the work of instructors and examination committees; as well as organizing seminars, workshops and training for the responsible persons in various areas of safety, because of unification and modernizing their operations. The main activity in the scope of operations of the Agency would be collecting statistics for road accidents from the relevant institutions and their presentation by printed publications, reports and reviews, as well as posting on its official website. Apart from the professional activities, the Agency would be responsible for the implementation of scientific research and surveys of the road traffic safety issues, such as: continuous and periodic monitoring of traffic safety situation on the roads in the country, measuring the traffic-safety level on roads (absolute and relative indicators), conducting monthly, quarterly, semi-annual and annual surveys of etiological and phenomenological aspects of traffic accidents and their consequences, initiating and organizing scientific and professional meetings and conferences for the latest achievements of scientific thought on road traffic safety, monitoring and application of international experiences in this field through membership in international and regional organizations.

REFERENCES

1. Annex to Regional Road Safety Strategy (RRSS) Explanatory Report (document for Road Safety Experts) Final, July 2009
2. Babanoski, K., Security and responsibility of road traffic users in the Republic of Macedonia, doctoral thesis, Faculty of security, Skopje, 2014
3. European Commission: White paper, European transport policy for 2010: Time to decide, Brussels, 2001
4. Improving global road safety, Resolution adopted by the General Assembly on 2 March 2010 64/255, available on http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/64/255
5. Law Amending the Law on Traffic Safety on the Roads, Official Gazette of the Republic of Macedonia, no. 64/09 of 22.05.2009
6. National Strategy of the Republic of Macedonia for improving traffic safety on roads for the period 2009-2014, Skopje, 2008

7. National Strategy of the Republic of Macedonia for improving traffic safety on roads for the period 2015-2020, Skopje, 2014
8. National Transport Strategy of the Republic of Macedonia for the period 2007-2017
9. OECD/ITF (2015), Road Safety Annual Report 2015, OECD Publishing, Paris
10. Official website of the National Council for Traffic Safety on the Roads http://www.rsbsp.org.mk
11. Peden, M., Scurfiled, R., Sleet, D., Mohan, D., Hyder, A., A., Jarawan, E., Mathers, C., World report on road traffic injury prevention, World Health Organization, Geneva, 2004
12. Schermers, G., Cardoso, J., Elvik, R., Weller, G., Dietze, M., Reurings, M., Azeredo, S., Charman, S., Guidelines for the development and application of evaluation tools for road safety infrastructure management in the EU, Road Infrastructure Safety Management Evaluation Tools, 2011
13. State statistical office of the Republic of Macedonia, Statistical review: transport, tourism and other services (2005-2014), Transport and other communications, Skopje, 2006-2015
14. Tingvall, C., Haworth, N., Vision Zero: and ethical approach to safety and mobility, 6th Institute of Transport Engineers International Conference on Road Safety and Traffic Enforcement: Beyond 2000, Melbourne, 6-7 September, 1999
15. Towards a European road safety area: policy orientations on road safety 2011-2020, {SEC(2010) 903}, Brussels, 20.7.2010
16. Transport Research Centre, Towards zero: Ambitious Road Safety targets and the Safe System Approach, Summary document, OECD, International Transport Forum, 2008

UDC: 343.143:343.9.02
341.45

INTERNATIONAL COOPERATION IN THE PROTECTION OF WITNESSES IN CRIMINAL PROCEEDINGS FOR THE CRIMINAL ACTS OF ORGANIZED CRIME

Maja Miladinović[1]
Misdemeanour Court, Belgrade
Miroslav Terzić, PhD
University of Defence, Military Academy, Belgrade
Stefan Miladinović
Serbian Armed Forces General Staff, River Flotilla

Abstract: The processing of offenders is not possible without relevant facts and evidence of committed criminal offenses. Criminal offenses related to organized crime are often covered by a veil of secrecy, and the role of witnesses in their detecting and proving is crucial, as a rule.

Perpetrators of offenses related to organized crime are characterized by vengeful attitude towards all participants in criminal proceedings, the official actors, police officers, criminal justice authorities and witnesses, and even members of their families and persons close to them. It is therefore understandable why it is difficult to implement the criminal proceedings successfully.

Individuals who have some knowledge and information about the offense and/or the offender, either because they were eyewitnesses, the participants in the crime, the victims or acted covertly, are at risk because the perpetrators of these crimes have great power, and it is in their interest that the person does not appear as a witness in court. Therefore, they use a variety of methods, i.e. threats and endangering the safety of witnesses and their family members, in order to dissuade a witness from giving evidence.The role of government is to guarantee the safety of witnesses and protection from any kind of threat, because every legal state is obliged to guarantee their citizens basic human rights, and for reasons of effective crime prevention. By providing a guarantee to witnesses to provide them and their families the adequate protection, they should be obtained for cooperation with criminal authorities and encouraged to make a statement of the facts known to them.

Since the organized crime acts often have an international character, international cooperation is therefore necessary, both in criminal proceedings and in the area of witness protection.

The emphasis in this paper is given on the international regulations in the area of witness protection, witness protection forms and comparative solutions in the field of protection of witnesses in criminal proceedings for the criminal acts of organized crime.

Keywords: witness, international legal cooperation, prosecution, organized crime.

1 E-mail: majcikm@yahoo.com.

INTRODUCTION

Criminal acts of organized crime are often covered by a veil of secrecy, and the prosecution of their perpetrators is, as a rule, almost impossible without witnesses.

Loyalty to the organization to which they belong, power and brutality in relation to the persons who estimate that they represent a threat or are potential witnesses against them, are the essential characteristics of perpetrators.

Bearing in mind the fact that the offenders, particularly in the field of organized crime, are in a vengeful mood towards all participants in criminal proceedings, the official actors, police officers, criminal justice and witnesses, and even to the members of their families and persons close to them, the difficulty in the successful implementation of the criminal proceedings is understandable. Due to the above the problem of fluctuations of potential witnesses or abandonment of testimony in criminal proceedings can be overcome by providing a high level of protection of witnesses. It is indisputable that crimes such as organized crime often have an international character, and international cooperation is certainly necessary in witness protection in criminal proceedings that are being implemented because of these crimes.

CONCEPT AND TYPES OF WITNESSES

In Article 91 of the Criminal Procedure Code of the Republic of Serbia a witness is defined as a person who is likely to provide information of the offense, the offender or other facts that are determined in the process.[2] In the available literature there are several definitions of witnesses, but they are not substantially different. The characteristics that distinguish the concept of witnesses are: witness is a natural person, the witness is not the defendant and is not an expert in criminal proceedings,[3] it is likely that the witness has knowledge about certain legally relevant facts to be proved and in connection with which the competent authority calls him to make a statement.

The types of witnesses who need protection are called particularly vulnerable witnesses, which include the victims of crime (the damaged party), children and juveniles, women, the elderly and the mentally ill, undercover agents and members of criminal groups (the defendant associate in our law, penitents, "crown witnesses" in comparative law). In addition to general witness protection enjoyed by all witnesses in criminal proceedings, the category of particularly vulnerable witnesses shall also require application of special witness protection.[4]

RATIO LEGIS OF INTERNATIONAL COOPERATION IN THE PROTECTION OF WITNESSES

At the present time we have to deal with the increase in the commission of offenses of organized crime. Given the nature of these crimes in practice, there is a need for witness protection in criminal proceedings the subjects of which are the criminal acts of organized crime.

2 Criminal Procedure Code, *the Official Gazette of RS*, No. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013 and 55/2014.
3 Procedural able to protect victims of criminal offenses related to trafficking in human beings, http://www.vds.org.rs/File/Tem0207_0.pdf, visited on 29/10/2015.
4 Knezevic S., Ilic I. (2013), "International standards of protection of witnesses in the process of war crimes", the text in the thematic collection of *The Twelfth international conference-International Crimes* (ed. S. Nogo), Association for International Criminal Law and "INTERMEX", Belgrade, p. 403.

The need to protect witnesses arises, on the one hand, because of the potential danger threatening the witness because it is based on his testimony that the accused is charged and, on the other hand, because it is a special category of witnesses (i.e. particularly sensitive witnesses), particularly if they are damaged by crimes, there is a possibility of a high degree of secondary victimization of the damaged or a victim due to their participation in criminal proceedings.[5]

Witness protection has become one of the most important issues in the criminal procedural systems of many countries and the subject of international cooperation. There are several factors that have contributed to this, and they are the following:

1) Criminal offenses such as organized crime are significantly increasing and as a rule it is very difficult to prove them without the use of special investigative actions and witnesses. Witnesses are at risk of intimidation and violence because of the great power of the perpetrators of these criminal acts,[6] and intimidation and retaliation for their testimony became a serious impediment to the administration of justice, and there is a heightened need for witness protection in order to protect their interests and ensure effective criminal justice system;[7]

2) In the case of hiring an undercover investigator, it is possible to question him as a witness in connection with the undertaken special investigative action. Given the risk that these special investigative actions carry with them, the undercover agent as a special witness is examined in a special way in the criminal proceedings, which involves the application of procedural measures of protection, and in case of need it is possible to use nonprocedural witness protection measures;

3) Criminal offenses of organized crime are difficult to detect and prove without a so-called insider information, and that includes the participation of "cooperating witness" (the accused collaborator, "crown witnesses", so called penitents, etc.).[8] Given the closed nature of criminal organizations, the testimony of these entities is often crucial for obtaining evidence of criminal acts committed by some members of the group, as well as on the functioning of the group in general. As these witnesses themselves are associated with crime and offenders, it is clear that due to the testimony they and the persons close to them would be threatened[9] and the need is therefore understandable to provide them with adequate procedural and nonprocedural protection.

INTERNATIONAL LEGAL DOCUMENTS IN THE FIELD OF PROTECTION OF WITNESSES

United Nations Convention Against Transnational Organized Crime And Protocol To Prevent, Suppress And Punish Trafficking In Persons, Especially Women And Children

In the framework of the Convention, the most important are the provisions concerning the protection of witnesses, and the insistence on predicting criminal procedural mechanisms

5 Skulic M. (2015), "The main institutional forms of international cooperation in combating organized crime", the text in the thematic collection of *The Fourteenth International Conference - International judicial, prosecutorial and police cooperation in the fight against crime* (ed. S. Nogo), Association for International Criminal Law and "INTERMEX", Tara, p. 275.
6 Skulic M., *op. cit.,* p. 275.
7 Gluscis S. *et al.*(2007), *Procedural witness protection measures: a handbook for police and justice,* Council of Europe, Office in Belgrade, Belgrade, p.34.
8 Skulic M., *op. cit.,* p. 275.
9 Gluscis S. *et al.*, *op. cit.,* p. 35.

for the protection of witnesses in proceedings for criminal acts of organized crime in national legislation.[10]

Article 24 of the Convention obliges States Parties to take appropriate measures within its means to provide effective protection from potential retaliation or intimidation for witnesses who testify in criminal proceedings concerning the offenses covered by this Convention, and, where appropriate, for their relatives and other persons close to them (paragraph 1). The measures from paragraph 1 may include, without prejudice to the rights of the accused and with the obligation to respect the law: a) establishing procedures for the physical protection of such persons, i.e. to the extent necessary and feasible, relocation of witnesses and permission that information about their identity and their current location cannot be discovered or that the disclosure of such information is limited if there is a need; b) the adoption of evidentiary rules that allow the testimony to be given in a way that guarantees the security of witnesses, for example the use of communications technology (video links or other adequate means) (paragraph 2).[11] Article 24, paragraph 2 expresses that witness protection measures should not affect the rights of the defendant, at the same time respect for the law must be provided, which introduces a limit of application of witness protection measures in a functional way.[12] States Parties are required by an obligation to consider the need for the conclusion of agreements or arrangements with other States for the relocation of persons referred to in paragraph 1 of this Article (paragraph 3). The provisions of this Article shall also apply to victims if they are witnesses (paragraph 4).

According to Article 25 of the obligations of each State Party to take appropriate measures within its means to provide assistance and protection to victims of offenses covered by the Convention, in particular in cases of threat of retaliation or intimidation (paragraph 1). Each State Party shall establish appropriate procedures to provide access to compensation and restitution for victims of offenses covered by this Convention (paragraph 2). Each State Party shall, subject to its domestic legislation, provide that views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings against offenders in a manner not prejudicial to the rights of the defence (paragraph 3).[13] Here again we see a tendency to protect the interests of victims and witnesses without collision with the rights of defence of the accused. Since it is inevitable that criminal process solutions which provide certain protection of victims and witnesses, to some extent modify the elements of the right to defence, in specific legal provisions, however, must exhibit certain elasticity, but it is important that the right of defence is not too narrowed substantially.[14]

Article 6 of the Protocol requires the obligation of States Parties, in appropriate cases and to the extent possible under their domestic laws, to protect the privacy and identity of victims of trafficking in persons, including the confidential conduct of legal proceedings relating to this offense (paragraph 1),[15] which in criminal proceedings must be carried out by applying the rules relating to the exclusion of the public and protection of victims as witnesses.[16] State Party shall ensure that its domestic legal or administrative system contains measures that ensure the protection of victims of trafficking, which are particularly related to: a) Information on relevant court and administrative proceedings; b) Assistance to enable their views

10 Skulic M., *op. cit.,* p. 276.
11 Boskovic M. (2004), *Organized crime and corruption,* College of Internal Affairs Banja Luka, Banja Luka, p. 473-474.
12 Procedural able to protect victims of criminal offenses related to trafficking in human beings, http://www.vds.org.rs/File/Tem0207_0.pdf, visited on 29/10/2015.
13 Boskovic M., *op. cit.,* p. 474.
14 Skulic M., *op. cit.,* p. 278.
15 Boskovic M., *op. cit.,* p. 488.
16 Skulic M. (2015), *Organized crime: concept, forms, criminal offenses and criminal proceedings,* Official Gazette, Belgrade, p. 567.

and concerns to be presented and considered at appropriate stages of criminal proceedings against the perpetrators of the crime, in a manner not prejudicial to the rights of the defence (paragraph 2). It is for each State Party to consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking, including cooperation with non-governmental organizations and other elements of civil society, in particular the provision of: a) Appropriate housing; b) The provision of advice and information, in particular as regards their legal rights, in a language that the victims of trafficking in persons can understand; c) Medical, psychological and material assistance; d) Employment, educational and training opportunities (paragraph 3). States commit to, when applying the provisions of this Article, take into account age, gender and special needs of victims of trafficking in persons, in particular the special needs of children, including appropriate housing, education and care (paragraph 4). States Parties are urged to seek to ensure the physical safety of trafficking victims while they are within its territory (paragraph 5). Each State Party shall ensure that its domestic legal system contains measures that offer the victims of trafficking the possibility of obtaining compensation for the damage suffered (paragraph 6).[17]

RECOMMENDATION REC (97) 13 ON THE INTIMIDATION OF WITNESSES AND THE RIGHTS OF THE DEFENCE FROM 10 SEPTEMBER 1997

This document is perhaps the most important and most comprehensive European instrument in the area of witness protection, because it gives clear guidelines for the protection of witnesses in general, and particularly intimidated witnesses.[18] It expresses the need to develop a common policy in the field of protection of witnesses by the Member States.

Some of the basic principles of the Recommendation are as follows: 1) The need to take appropriate legislative and practical measures to ensure the free testimony without intimidation; 2) Apart from the witness, protection it should also be provided for their relatives and persons close to them before, during and after the trial, while respecting the rights of the defendant, 3) Taking into account the principle of free evaluation of evidence, procedural law should allow consideration of the impact of intimidation on the evidence; 4) With respect to the defence, witnesses should be allowed to give their testimony in a manner that protects them from intimidation that results from the confrontation with the defendant, for example permit giving testimony from a separate room.

Measures that should be taken in connection with organized crime, while respecting the rights of the defence, are: 1) audio-visual recording of witness statements in preliminary investigation proceedings; 2) use of such statements as evidence in court when it is not possible that the witness appears in court, if this appearance may cause serious and real threat to the lives and security of witnesses, their relatives or other persons close to them; 3) revealing the identity of witnesses in the latest possible stage of the proceedings and/or disclose only certain data; 4) exclusion of the public and/or media from all or part of the trial. Anonymity is also one of the possible measures, but it should be exceptional. When this measure is applied, it must ensure the verification procedure to maintain a balance between the needs of the proceedings and the rights of the accused. This means that the defendant must have the right to challenge the need for providing anonymity to the witness, to challenge his/her credibility and the origin of his/her knowledge. To give witness anonymity all the following conditions

17 Boskovic M., *op. cit.,* p. 489.
18 *Ibidem.*

must be met: life or freedom are seriously threatened or, in the case of the undercover agent, his/her ability to further engagement in the future is seriously endangered; evidence is likely to be significant and the person appears to be credible. In order to prevent the identification of the witness by the defendant evidence should be used through the screen with the use of face or voice distortion of witnesses. In the case of an anonymous witness, the judgment should not be based solely or to a decisive extent on the testimony of that witness.

There are also the programs for witness protection as a special measure. They should be available to witnesses, their relatives or other persons close to them, which is necessary to safeguard the life and personal security. Within the protection program there should be different protection measures: the change of identity, relocation, the assistance in finding a new job, providing physical protection. Given the prominent role of collaborators of justice in the fight against organized crime, they should be provided with adequate protection, including the measures that fall under the protection programs, and these programs may include, where necessary, specific arrangements, for example special arrangements to serve their prison sentence.

Regarding the international cooperation, the instruments that are intended to encourage international cooperation and national law should be amended to facilitate the examination of witnesses at risk of intimidation and to allow witness protection programs are applied across the border. The following measures should be considered, exempli causa: the use of modern means of telecommunication, such as video-links, to facilitate simultaneous examination of protected witnesses or witnesses whose presence at the court in the requesting state is not possible or is difficult and expensive, while preserving the rights of the defence; assistance in relocation of protected witnesses abroad and ensuring protection; exchange of information between the authorities responsible for witness protection programs.[19]

RECOMMENDATION REC (2005) 9 ON THE PROTECTION OF WITNESSES AND COLLABORATORS OF JUSTICE FROM 20 APRIL 2005

Calls on the Recommendation No. R (97) 13, strengthened and expanded its provisions, especially in that it specifically refers to the criminal acts of organized crime and terrorism, as well as in the field of international cooperation. Some of the basic principles, in addition to the already mentioned in the context of Recommendation No. R (97) 13, are as follows: 1) with respect to legal privileges that allow some individuals the right to refuse testimony, witnesses and collaborators of justice should be encouraged to report all relevant information on crimes to the authorities, and that testify about them in court; 2) all the stages of the procedure in connection with the acceptance, application, modification and denial of protection measures or programs should be confidential, and the unauthorized disclosure of this information must be punishable as a criminal offense where appropriate, especially to ensure the security of protected persons; 3) when accepting protection measures or programs the need should be born in mind to achieve an appropriate balance with the principle of preserving the rights and expectations of victims.

The need stands out of adopting the appropriate measures for the protection of witnesses and collaborators of justice against intimidation. When deciding on the justification for

19 Recommendation Rec (97)13 of the Committee of Ministers to member states concerning intimidation of witnesses and the rights of the defence, http://www.coe.int/t/dghl/standardsetting/victims/recR_97_13e.pdf, visited 03/11/2015.

providing protection to the witness/collaborator of justice, as criteria are taken, for example: the way the person in need of protection is included in the investigation and/or object (like a victim, a witness, an accomplice, etc.), the importance of the contribution, the seriousness of the intimidation, the compliance and suitability of the person to implement measures or protection programs. Care must be taken also whether there are other available evidence which would be sufficient to make them a basis for the procedure in connection with serious crimes. Proportionality between the nature of protection measures and seriousness of intimidation of witnesses/collaborators of justice must be provided. Witnesses/collaborators of justice exposed to the same kind of intimidation should be entitled to a similar type of protection. However, any protection measures/programs must be adapted to the specific characteristics of the case and the individual needs of the person to be protected. Procedural rules for the protection of witnesses and collaborators of justice must ensure balance necessary in a democratic society between the prevention of crime, the needs of victims and witnesses and the preservation of the right to a fair trial. Recommendation proposes the measures to prevent the identification of witness, without interfering the parties' rights to have an adequate opportunity to challenge the testimony of witnesses/collaborators of justice. Giving witness anonymity should be an exceptional measure. For the implementation of these measures it should apply everything that was said in the context of Recommendation No. R (97) 13.

Where appropriate, it should establish and make available programs for protection of witnesses and collaborators of justice in need of protection. The main objective of these programs should be the preservation of life and personal security of witnesses/collaborators of justice, as well as their family members, particularly to ensure the appropriate physical, psychological, social and financial protection and support. Protection programs that include radical changes in the life/privacy of protected persons (such as relocation or change of identity) should be applied to witnesses/collaborators of justice, who need this protection even after the completion of judicial proceedings in which they appear as witnesses. Such programs, which can last for a while or for life, should be applied only if it is estimated that other measures are not sufficient to protect witnesses/collaborators of justice and persons close to them. In this case, the consent of the person to be protected and an adequate legal basis are needed, i.e. the existence of appropriate mechanisms for the protection of witnesses and collaborators of justice in accordance with national law. When appropriate, the protective measures should be implemented urgently and on an interim basis until formal adoption of the program of protection. If necessary, and taking into account the crucial role that collaborators of justice can have in the fight against serious crime, the protection programs for collaborators of justice serving a prison sentence may also include specific arrangements such as special prison regimes.

In the framework of international cooperation, the recommendation states that a unique approach to international issues related to the protection of witnesses and collaborators of justice should be followed, with due respect for the different judicial systems and the fundamental principles of administrative organization of each country. This unique approach aims to ensure the proper professional standards, at least in key aspects such as the confidentiality, integrity and training. In addition to what was said in the context of Recommendation No. R (97) 13, it is added that Member States should ensure the exchange of information and cooperation among the bodies responsible for the implementation of protection and to contribute to the protection of witnesses and collaborators of justice in the context of cooperation with international criminal courts .[20]

20 Recommendation Rec (2005)9 of the Committee of Ministers to member states on the protection of witnesses and collaborators of justice, https://wcd.coe.int/ViewDoc.jsp?id=849237&Site=CM, visited 03/11/2015.

RESOLUTION OF THE COUNCIL OF 23 NOVEMBER 1995 ON THE PROTECTION OF WITNESSES IN THE FIGHT AGAINST INTERNATIONAL ORGANIZED CRIME

Calls on the Member States to guarantee adequate protection of witnesses against all forms of direct or indirect threat, pressure or intimidation. Adequate and effective protection must be provided before, during and after the trial, when the competent authorities consider it necessary. The protection extends to parents, children and other close relatives of witnesses, if necessary, in order to avoid any form of indirect pressure on witnesses. The competent authorities may decide that addresses and details that identify the witness can only be known to them. If the threat is extremely serious, changing the identity of the witness and, if necessary, the members of his/her immediate family could be allowed. The possibility should be provided for of giving testimony from the place separated from the place where the accused is, for example audio-visual equipment. It calls on the Member States to promote international judicial assistance in this field, even if some of the measures do not exist in the national law of the requested State, unless the assistance would be contrary to the fundamental legal principles of that country. To facilitate the use of audio-visual methods during the interrogation, the following is recommended: 1) In principle, it should provide that the test can be conducted under the legal and practical conditions of the requesting State; 2) If the legislation of the requesting State or the requested State allows advisor to help to the witness during the test, it should be possible to organize such assistance in the territory of which the witness was placed; 3) The costs of translation and the use of audio-visual methods should be borne by the requesting State, unless otherwise agreed with the requesting State.[21]

COUNCIL RESOLUTION OF 20 DECEMBER 1996 ON INDIVIDUALS WHO COOPERATE WITH THE JUDICIAL PROCESS IN THE FIGHT AGAINST INTERNATIONAL ORGANIZED CRIME

It calls on the Member States to adopt the appropriate measures to foster cooperation of persons who participate or have participated in a criminal group or any type of criminal organization or in organized crime offenses. For the purposes of this resolution, the cooperation includes: 1) providing useful information to the competent bodies for the purposes of investigation or proof of: composition, structure or activities of criminal organizations, their links, including international links, with other criminal groups, as well as the previously committed criminal works by organizations or those whose execution is planned; 2) providing practical, concrete help to competent bodies, which may contribute to depriving criminal organizations of illicit resources or of the proceeds of crime. Member States are invited, in accordance with the basic principles of their national law, to estimate the possibility of giving benefits to people who leave the criminal organization and who do their best to prevent further criminal activity, or provide special assistance to the police or judicial authorities in gathering evidence of crucial importance to the reconstruction of the facts and to identify the perpetrators and their arrest. Protection measures include parents, children and other people close to persons who cooperate with the competent bodies, which are, or are likely to be exposed to serious

21 Resolution of the Council of 23 November 1995 on the protection of witnesses in the fight against international organized crime, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31995Y1207(04)&from=EN, visited 03/11/2015.

and immediate danger, due to the individual's readiness to cooperate with the judicial bodies.

In the field of international cooperation, it calls on Member States to facilitate judicial assistance in the fight against transnational organized crime in cases involving individuals who cooperate with the judicial authorities, in particular by making it adhere to formalities and procedural requirements of the requesting State when to take statements from the individuals who cooperate with the judicial authorities, even in the absence of such provisions in the laws of the requested State, unless this would be contrary to the general principles of law of the requested State.[22]

CONCLUSION

There is no doubt that the interest of every country and the international community is to detect and prove criminal offenses, especially serious crimes such as organized crime, as well as the detection and punishment of their perpetrators. However, we cannot require that an individual unconditionally exposes himself or herself or persons close to him/her to danger to life, physical and mental integrity, liberty or property, in order to combat these crimes. The individuals who have some knowledge and information about a criminal act and/or an offender, either because they were eyewitnesses, the participants in the crime, the victim or acted covertly, are at risk because the perpetrators of these crimes have great power, and it is in their interest that the person does not appear as a witness in court. Therefore, they are using a variety of methods, i.e. threats and endangering the safety of witnesses and their family members, in order to dissuade a witness from giving evidence.

The role of government is to guarantee the safety of witnesses and protection from any kind of threat because every legal state is obliged to guarantee their citizens basic human rights, and for reasons of effective crime prevention. By guaranteeing to the witness that he and his family will be provided the adequate protection, he should be obtained for cooperation with the criminal authorities and encouraged to make a statement of the facts known to him.

It is undisputed that at the international level, there is a high degree of awareness of the need to protect witnesses and the problems they face when the witnesses should appear in the proceedings and give testimony. This is witnessed by numerous international documents adopted in order to protect witnesses. Although some of them are not binding, it is important that the international community agrees that adequate protection for the witnesses should be provided. Without international cooperation, the implementation of some measures of protection would not even be possible, but these measures would be just a dead letter on paper, for example witness relocation to another country or examination of witnesses who cannot appear at the trial, and is located on the territory of another country. International cooperation is also important in the sense that the exchange of experiences between countries can contribute to finding the best practical solution for providing protection to witnesses, i.e. it can improve the legal provisions on the protection of witnesses at the national level, as well as their application in practice.

Of course, the states should not go to extremes, and provide protection to witnesses regardless of the other party to the proceedings, i.e. without taking into account the rights of the accused. States should to the greatest extent possible, provide protection to witnesses, but taking into account the fact that the rights of the defendant restrict as little as possible. Main-

22 Council Resolution of 20 December 1996 on individuals who cooperate with the judicial process in the fight against international organized crime, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997G0111:EN:HTML, visited 03/11/2015.

taining this balance between the rights of the opposing party to the criminal proceedings is undoubtedly difficult, but it is necessary to safeguard the basic human rights and freedoms of every individual.

REFERENCES

1. Boskovic M., *Organized crime and corruption,* College of Internal Affairs Banja Luka, Banja Luka, 2004.
2. Gluscis S. *et al.*, *Procedural witness protection measures: a handbook for police and justice,* Council of Europe, Office in Belgrade, Belgrade, 2007.
3. Knezevic S., Ilic I., "International standards of protection of witnesses in the process of war crimes", the text in the thematic collection of *The Twelfth international conference-International Crimes* (ed. S. Nogo), Association for International Criminal Law and "INTERMEX", Belgrade, 2013.
4. Skulic M., "The main institutional forms of international cooperation in combating organized crime", the text in the thematic collection of *The Fourteenth International Conference - International judicial, prosecutorial and police cooperation in the fight against crime* (ed. S. Nogo), Association for International Criminal Law and "INTERMEX", Tara, 2015.
5. Skulic M., *Organized crime: concept, forms, criminal offenses and criminal proceedings,* Official Gazette, Belgrade, 2015.

REGULATION

6. Code of Criminal Procedure, *the Official Gazette of RS*, No. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013 and 55/2014.

INTERNET SOURCES

7. Resolution of the Council of 23 November 1995 on the protection of witnesses in the fight against international organized crime, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31995Y1207(04)&from=EN, visited 03/11/2015.
8. Council Resolution of 20 December 1996 on individuals who cooperate with the judicial process in the fight against international organized crime, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997G0111:EN:HTML, visited 03/11/2015.
9. Recommendation Rec (2005)9 of the Committee of Ministers to member states on the protection of witnesses and collaborators of justice, https://wcd.coe.int/ViewDoc.jsp?id=849237&Site=CM, visited 03/11/2015.
10. Recommendation Rec (97)13 of the Committee of Ministers to member states concerning intimidation of witnesses and the rights of the defence, http://www.coe.int/t/dghl/standardsetting/victims/recR_97_13e.pdf, visited 03/11/2015.
11. Procedural able to protect victims of criminal offenses related to trafficking in human beings, http://www.vds.org.rs/File/Tem0207_0.pdf, visited on 29/10/2015.

UDC: 342.22(497.11)"18/19"
340.131(497.11)"18/19"
94(497.11)"18/19"

THREATENING THE INSTITUTIONS OF LEGAL STATE IN SERBIA DURING THE REIGN OF PRINCE/KING MILAN AND KING ALEKSANDAR OBRENOVIC

Predrag Terzić. PhD[1]
Institute for Political Studies, Belgrade

Abstract: The author of the study wants to determine the main ways of threatening the legal state in Serbia during the rule of Milan and Aleksandar Obrenovic. The ways of threatening the institutions of legal state in Serbia in this study period relate to, on the one hand, the nation which does not follow the lawful orders of authority, and on the other, the number of the king's coups. Commands to make the lists of livestock given by the authorities, to seize weapons, attempts to determine the financial condition of the population, and even to take measures to protect the vines from phylloxera, provoked great opposition among the people. Particularly strong was the opposition to the seizure of weapons that was conducted in accordance with the Law on the handing over the weapons, and on the Law on the standing army. The result of this opposition is the Timok rebellion in 1883. At the time of King Aleksandar Obrenovic's rule, four coups were carried out, and one imposed Constitution was adopted, which also can be considered a coup. All of them were directly aimed at the collapse of the institutions of the rule of law. If the coup of April 1, 1893, represented a way for the king to start ruling by himself before reaching the age of maturity, the coup of 9 May 1894 has been taken with an aim to terminate the validity of the Constitution of 1888. The similarity with the second, fourth and fifth state's coup by King Aleksandar Obrenovic (the fourth and fifth attack occurred in the night between 24 and 25 March 1903) is reflected in an interruption of dominance in the power of the Radical Party. However, while the impact of 1894 abolished the parliamentary regime, in which the radicals achieved the supremacy thanks to the Constitution of 1888, state of dominance of the Radical Party, created after the adoption of the new Constitution in 1901, has emerged from the popular support to the radicalism, as well as from King's appointment of radicals in the places in the Senate and the State Council. Thus, the coups during the reign of Alexander Obrenovic represented a tool for coming to power, the way to abolish the constitution, but also an instrument for creating a new constitutional solution.

Keywords: rule of law, a coup, Timok rebellion, Milan Obrenovic, Aleksandar Obrenovic.

INTRODUCTION

A legal state in practical and and historical sense occurs in European countries during the nineteenth century. Practically historical emergence of "state based on law" was preceded by different theoretical and philosophical considerations and discussions, which occured even in

1 terzic84p@yahoo.com

ancient times. In this regard, most ancient thinkers who dealt with the issue of the methods used to rule the state, sought to answer the question of whether a political collectivity should be managed by people or should the laws rule it. While some thought the rule of law is necessary, others have emphasized the benefits of the rule of the people.

Even Plato in the *Republic* emphasized the necessity of establishing social division of labor that corresponds to the social stratification distinguished as three classes. Artisans and farmers provide the material needs of society, the guards defend the country, and the wise men or philosophers run the country. The idealistic and utopian theory of state shown in the book *Republic* is abandoned by Plato in *Laws*. Contrary to the rule of the wise men in the ideal ordered state, in *Laws* the rule of law is defined as the best possible arrangement in existing countries.

The debate about the benefits of the rule of law or the rule of the people continues to modern times. Among contemporary theorists, Niccolo Machiavelli represents a small group of those who have pointed out the advantage of the rule of people over the rule of law.

ESTABLISHMENT OF LEGAL STATE

In modern political theory, the legal state is defined as a triple level: as a normative ideal, through the formal notion of the rule of law and, third, on the level of the material notion. In the form of normative ideal, the legal state implies the government limited by law, the rule of law and not rule of men. The formal concept of the legal state is narrower and includes a state that is based on the universality, formality and impartiality of the law. As such, the legal state arises as opposed to tyranny, despotic governments and paternalistic arbitrariness. In the third, material sense, the state is a state that protects certain values in a society.[2]

Rule of law is based on the establishment of many principles and legal institutions, which include: legality, legitimacy, separation of powers, an independent judiciary, judicial control of administrative action, constitutional and judicial control, freedom and human rights and free economic activity. The purpose of the legal state is to protect the freedom and the law is just a means of protection.[3]

Modern understanding of the rule of law comes from seventeenth-century England, where the importance of individual rights and freedoms was emphasized and the rights of the monarch were limited by the rule of law principle and the sovereignty of parliament. Individual rights and freedoms are confirmed through several important (basic) sixteenth-century English texts, such as *The Petition of Rights* (1628), *Habeas Corpus Act* (1679) and *Bill of Rights* (1689). [4] "From England the rule of law principle was transferred to the legal doctrine of European countries, which in the origin of now truly universal teaching (in the sense that no one does not dispute it, and to the extent that when it is not recognized, the state of emergency is declared) on the `legal state`, i.e. state whose initial principle is the subordination of every government to the law, from the lowest to the highest level, through the process of legalization of every government action that is called 'constitutionality' ('constituzionalismo') by the first modern written constitution ."[5]

Legal state formally and substantively limits state power by determining, on the one hand, not only how and using what the authority is exercised (formal normative limit) but, on the

2 Milan Podunavac, *Politički sistem: teorije i principi*, Faculty of Political Sciences, Belgrade, 1997, p. 224.
3 Vladan Kutlešić, *Osnovi prava, drugo izmenjeno i dopunjeno izdanje*, Official Gazette SCG, Beograd, 2005, p. 303.
4 See: Filip Lovo, *Velike savremene demokratije*, Izdavačka knjižarnica Zorana Stojanovića, Sremski Karlovci, 1999, p. 38.
5 Norberto Bobio, *Budućnost demokratije: odbrana pravila igre*, Filip Višnjić, Belgrade, 1990, p. 167.

other hand, and what can be achieved with the exercise of power (content-value limit)[6]. Secondly, it is important to determine what kind of power, personified in a particular mode of governance, legal norms impose limitations on the possibilities of the government. They are double. On the one hand they have to do with the legal restrictions of absolutist powers of rulers, and on the other, they require democratic governance restrictions. In the first case, the rule of law limits a ruler or a group of them, and in the second, the majority of population or the representatives elected by the majority of the population.

In the European absolutist states during the sixteenth, seventeenth and eighteenth century, the domain of ruler's prerogatives gathered in itself the jurisdiction over the various branches of government. Differentiation of the armed forces and the changes in the administrative bureaucracy related to the change of functioning of the existing state system, and did not imply the beginnings of its political modernization. The entire responsibility for the absolutist state belonged to the single ruler, and all other functions were auxiliary or, an advisory in character, like the parliament. In this connection, the basic aspiration of the citizens on the rise referred to the necessity of placing a ruler in the framework of the constitution and the law.

THE EMERGENCE OF LEGAL STATE IN SERBIA

Attempts to establish Karadjordje's absolute power were accompanied by opposite tendencies of nahija elders emerged as a product of action Neolithic social organization, oriented toward limiting the power and authority of the uprising (war) leader.[7] As a result of such action, Karađorđe's government was not all embracing, but fragmented, or limited to certain areas.

Later strengthening of the central government during the first reign of Prince Milos Obrenovic was followed by the requirements for constitutional limiting of the ruler's power, most notably Mileta's uprising of 1835. However, significant efforts of the authorities towards the establishment of a system of legal state in Serbia occur only during the rule of constitutionalists. "The objective of 'constitutionalists' was the establishment of a system of government in which the old local autonomies, coupled with superstition, backwardness and active or passive resistance to the authorities, will be replaced by natural law principles of personal responsibility and equality before the law."[8]

Two key questions relating to the establishment of modern legal state in Serbia. The first is that whether the process of adoption of the Constitution and laws are directly or indirectly involved everyone to which these normative acts were related? It is a question of legitimacy. The second issue involves the application of these laws. Did it, even in cases where laws were passed in proper procedure, come to their failure to comply? The issue of the quality of these laws are not discussed here.

In the political processes in Serbia during the first half of the nineteenth century, there was hardly any space for the participation of the people. Egalitarian in equality and poverty, people stayed aside political events. The first changes in this field were seen as the reception Revolution of 1848, and they came to Serbia through lyceum youth and their professors, Dimitrije Matic and Kosta Cukić. St. Andrew's Assembly in 1858 and the beginning of the period of the reign of Prince Mihailo meant the re-emergence of these processes and the strong emphasis on the principle of popular sovereignty. However, the young liberals were soon disappointed in Mihailov absolutist way of governance.

6 Vladan Kutlešić, *Osnovi prava*, second and revised edition, Službeni list SCG, Belgrade, 2005, p. 304.
7 For the graphic display of social organizations in the Neolithic period see: Trajan Stojanović, *Balkanski svetovi: Prva i poslednja Evropa*, Equilibrium, Belgrade, 1997, p. 199.
8 Trajan Stojanović, *Balkanski svetovi: Prva i poslednja Evropa*, Equilibrium, Belgrade, 1997, p. 301-302.

In the relation of Prince Mihailo towards liberalism, and the attitude that people is unfit for freedom and democratic institutions, the following Mihailo's words testify well:

"I can count using my fingers all the European-educated people in my country, there are no more than ten or twelve. Institutions of a country are not made for the twelve most educated people; they must be adjusted according to the general level of the people. Give parliamentarism only with that so that Milovan Jankovic and several of them similar to him could hold parliamentary words would be frivolous."[9]

Wide right to vote, realized by adopting the Regency Constitution of 1869, allowed the participation of majority of people in law-making, to which these laws were applied. However, the legislative power was divided between the Prince and the National Assembly, where the ruler was a stronger factor in the legislative process.

However, coming to power of the young conservative group in 1880, from which a year later will emerge the Progressive Party, promoted the principle of the rule of law. In connection with that *Videlo* says: "There is no doubt that the personal and the financial security is safe and civil liberties guaranteed enough only in a country where the laws are respected like they are sacred, and where the authority of the national government is kept to pamper everyone." [10] In the early years of the reign of the progressives, several liberal laws were brought, most notably the Press Law and the Law on assemblies and associations in 1881.

Despite the fact that during the reign of the progressives made a significant step towards establishing the rule of law, the adoption of the new Constitution is missing. The new Constitution was adopted a year after they ousted from power in late 1888. The Constitution of 1888 brought a democratic and modernization progress in relation to the Governor's Constitution (Namesnički ustav) because it introduced a parliamentary rule, and therefore the government was dependent on a majority in parliament. The king and the National Assembly had the right of legislative initiative. The Constitution of 1888 in terms of democracy, parliamentarism, guaranteed civil and political rights and freedom meant a qualitative progress in terms of the broad masses that, by exercising their passive right to vote, they influenced the selection of members of parliament and the legislative process, but also the realization of legislative initiatives.

The last constitutional act which was brought in time when the Obrenovic dynasty ruled was the April Constitution of 1901. The April ("Octroyed") constitution of 1901 was, however, a step backwards in terms of the sum of the community members who participated in the creation of law. The election threshold for the National Assembly remained 15 pounds and it was counted as direct withholding tax. In addition, for the acquisition of voting rights it was necessary to pay the electoral tax for three consecutive years. Due to the restrictive voting rights of about 600,000 taxpayers, the right to be elected for the lower house of parliament had only about 300,000 citizens. [11] Thus, the discrepancy between the number of voters, who by electing the MPs were indirectly involved in law-making, and all citizens of Serbia, has become too big.

9 Boro Majdanac, *Narodna skupština Srbije: od običajne ustanove do savremenog parlamenta: 1804-2004, second changed i amended edition*, National Assembly of the Republic of Serbia, Archives of Serbia, Belgrade, 2004, p. 27. Compare: Predrag R. Terzić, „*Shvatanje unutrašnje slobode u delu Vladimira Jovanovića*", Srpska politička misao, Belgrade, num. 4/2012, year 19, Vol. 38, p. 449.
10 *Videlo*, num. 18, from February 2nd ,1883.
11 See: Slobodan Jovanović, *Vlada Aleksandra Obrenovića, book three*, Geca Kon, Belgrade, 1936, p. 110-1.

TIMOK REBELLION OTHER NATIONAL COUNTERING THE LEGAL STATE INSTITUTIONS

Commands of authorities related to the listing of livestock, seizing weapons, attempts to determine the financial condition of the population, and even to take measures to protect the vines from phylloxera, provoked great opposition of the masses in Serbia in the second half of the nineteenth century. Under the influence of demagogues and stories that found other purpose to these modernizing aspirations, people opposed to them, and strongly confronted as well. Peasants opposed to listing of animals in the border areas that should have been done in accordance with veterinary convention signed with Austria-Hungary. Against the listing and entering in the cadastre of livestock in accordance with the Law on the protection of livestock against infectious disease, rinderpest, in late 1882 and in the early months of 1883 there was a rebellion of the population in eastern Serbia, firstly in the village of Salas, and later in the villages of Porec.[12]

To resist the cattle listing and branding, residents of Gamzigrad prepared for armed resistance. "They gathered outside the courtroom armed with rifles, pistols, knives and clubs."[13] Not wanting to react against poorly armed but much more numerous masses, the guardians of public security called the Army to help them. At the request of the Minister of the Interior, the Minister of Defense sent a battalion of infantry from Nis to Gamzigrad. Thus, on June 7, 1883 the Gamzigrad rebellion was crushed, it lasted for six days.

The masses were opposed to the listing of property, including livestock, which have been carried out under the provisions of the Tax Act of 1864. Refusal to report overall financial situation was accompanied by a disapproving of the peasant masses, as well as the attacks on enumerators, clerks, councilors, serfs, and even the county chiefs. All these events have the same explanation: "It is a negative attitude towards the government, the state and the ruler, if their political or administrative activity is directed towards the modernization of the state and social structures."[14]

Thus, given the territorial extent it encompassed and the number of rebels who participated in the rebellion, the strongest was the opposition to the seizure of weapons that was conducted in accordance with the Law on the surrender of weapons and in connection with the law on the new organization of the army. Under the law on new organization of the army in January 1883, the national army was going to be replaced with the modern standing army under the command of professional officers. As part of the modernization of the armed forces, weapons that had been held at homes had to be handed over to state authorities according to the order of the Defense Minister in July 1883, and military obligors should no longer keep new, modern weapons in their homes, but in military depots. However, military obligors massively refused to surrender their weapons to recruit committees, believing that the weapon is significant for their safety, but also that it represents the means by which people can resist possible king's undemocratic decisions. The sole possession of weapons in the hands of military obligors served to avert the authorities from implementing unpopular measures.

Not realizing the importance of establishing modern military organization, the masses agreed to surrender their weapons only if they received new, which they also intended to keep in their houses. Rebellion against the laws for the collection of weapons, and therefore against the principles of the legal state, was started by the peasants from Timok in October 1883.

12 Andrija Radenić, *Radikalna stranka i timočka buna: istorija Radikalne stranke: doba narodnjaštva, book one,* Historical Archives of the Timok region, Zaječar, 1988, p. 410-430.
13 Ibid, p.23.
14 Hans-Mihael Midlih, „*Patrijarhalni mentalitet kao smetnja državne i društvene modernizacije u Srbiji XIX veka*", Historical magazine, Belgrade, book. XXXVIII, 1991, p. 115.

The rebels have concentrated themselves in three centers, Boljevac, Sokobanja and Knjazevac, which were all connected.[15]

In response to the rebellion, King Milan's decree declared a state of emergency in the district of Crna Reka and established a Court Martial. In the whole country the law on assemblies and associations was suspended, as well as Articles 8 and 10 of the Law on press. It soon led to an armed conflict between the rebel mass and the standing army, led by General Tihomilj Nikolic. Better armed and trained standing army won a victory over the rebels in Čestobrodica and Banjska Gorge, after which the Timok rebellion practically stopped. "The operations against the rebels lasted from October 26 to October 31 – i.e. for a week." [16]After the end of the rebellion Court Martial in Zajecar sentenced 567 to prison, 5 to detention, 68 to prison, and 94 to death. However, only 20 of them were actually killed. [17]

Timok rebellion in 1883 represented a conflict of principles of the legal state with a very strong anti-modernist attempts of the masses. In this case, the army, carrying out orders of King Milan and opposing the protesters, only protected the constitutional order. The king's command and the constitutional and legal provisions were in accord. While there have been many individual and collective opposition to lawful orders of the authorities, Timok rebellion remained the most massive and brutal act of the broad masses opposition to the legal state institutions.

MILAN OBRENOVIC'S ATTITUDE TOWARDS THE LEGAL STATE INSTITUTIONS

In addition to the adoption and practical application of the principles and legal institutions that form the legal state, such as the laws on judges, the press, the assemblies and associations, as well as the Law on the standing army, Milan Obrenovic, during his reign, often opposed to legal institutions state. Thus, the additional parliamentary elections in 1882 were repeated several times, until the candidates supported by the monarch won. As a result of such an electoral activity, a majority in the parliament was formed, which suited the king, while the opposition thus emphasized that some government MPs in the elections received only two votes, and therefore they were called "dvoglasci". On the other hand, King Milan greatly opposed the achievements of parliamentary rule in Serbia. "He thought that Serbia does not need parliamentary regime, but a strong ruler. Prince Milan put the parliamentary thought opposite to the state thought.[18] "While the first was embodied in the Constitution of 1888, the second could be used while reigning according to the Governors' constitution. Governors' constitution was in force in the entire period of Milan's rule. It lasted as much as the constitution in the first period of its validity. The introduction of a parliamentary regime also meant the end of Milan's rule.[19]

King Milan and the masses had different views on the future of the country. Milan, due to the overall social modernization of the country, was ready to ignore the institutions of the state, because he thought that the nation is not ready for those. His position especially strengthens

15 Slobodan Jovanović, *Vlada Milana Obrenovića, book three,* Geca Kon, Belgrade, 1934, p. 126.
16 Ibid, p. 128. Andrija Radenić present an information that the Court Martial sentenced to jail, prison or detention for a period of 6 months to 20 years about 650 persons, and that of 24 sentenced to death penalty, only twenty were killed. see: Andrija Radenić, *Radikalna stranka i timočka buna: istorija Radikalne stranke: doba narodnjaštva, book two*, Historical Archives of the Timok region, Zaječar, 1988, p. 719-720.
17 Ibid, p. 129.
18 Milivoje Popović, *Borbe za parlamentarni režim u Srbiji*, Politika, Belgrade, 1939, p. 44-45.
19 Ibid, p. 45.

after the Timok rebellion. Without the sympathy for the people, Milan could not expect people to have sympathy for him: "The Serbian people did not like King Milan. People generally considered him a foreigner of Vlach blood, and King Milan hated the people as well, from the depths of his soul."[20] Opposing, but dependant on one another, King Milan and representatives of the people had a certain similarity. The Milan's dynasty and representatives of the people shared the same aspirations, because " Obrenovics and radicals wanted a dictatorship: the first wanted to rule with dictatorship and the second wanted parliamentary dictatorship." [21]

Even after his abdication in 1889, King Milan often directly opposed the legal state institutions. Thus, in April 1891 he signed an agreement with the government to not return to the country until King Alexander turns eighteen, and to meet with his son abroad. In this agreement, Milan renounced the royal family membership and he lost Serbian nationality. In return, the state helped him improve his unenviable financial situation by paying him a million francs on behalf of the civil list and in addition it helped him to obtain a loan of two million. [22] "To King Milan, and at the expense of the king's civil list, after he gave his first statement that he will not return to Serbia until coming of age of the Kings, two more will be given to him, for the rest of 'rights and duties'". As there was a reason to assume that it may come a moment for the former King to remember that he once had his homeland, where he had some rights, and that he may, under any excuse, come back to Serbia uninvited, it is the selling price formulated as `zajam`, with intabulation on his immovable property in Serbia. [23] "The agreement was signed by Milan, all ministers and governors of King Alexander.

However, although he the signed agreement and committed not to return to the country until Alexander turns 18, in January 1894, Milan came to Serbia, and the government, to protect Milan Obrenovic of attacks in the press, by the decree of April 29th , repeals the Act on exile of King Milan from March 26th, 1892. Due to this command, a conflict occurred between the Government and the Court of Cassation, which ruled that ordinary governmental decree could not abolish the law. [24]

The above mentioned conflict can be considered the reason for the abolition of the Constitution of 1888. [25] Milan Obrenovic had a significant role in this undertaking. In fact, the coup of May 1894 "was primarily the work of King Milan; without his cooperation that the act would not have been possible."[26] The former king, and a former member of the Royal House according to the signed agreement, even former Serbian citizen, i.e. a stranger, Milan Obrenovic without any legal ground was living on Serbian territory, and, in addition, he also directly interfered in the internal political affairs of Serbia.

STATE COUPS OF ALEXANDER OBRENOVIC AS ASPECTS OF ENDANGERING THE LEGAL STATE INSTITUTIONS

During the reign of King Aleksandar Obrenovic state coups became almost a rule of political life. Aleksandar Obrenovic committed his first coup on the first of April (April 13th

20 Milan Piroćanac, specified work p. 470.
21 Slobodan Jovanović, „Dvodomni sistem", in: Slobodan Jovanović, *Političke i pravne rasprave I-III,* Beogradski izdavačko-grafički zavod Jugoslavijapublik, Srpska književna zadruga, Belgrade, 1990, p. 233.
22 See: Slobodan Jovanović, *Vlada Aleksandra Obrenovića,* book one, Geca Kon, Belgrade, 1934, p. 267-268.
23 Živan Živanović, *Politička istorija Srbije u drugoj polovini devetnaestog veka. Book. 3, Kraljevsko namesništvo po abdikaciji kralja Milana i prva polovina vladavine kralja Aleksandra I: 1889-1897*, Geca Kon, Belgrade, 1924, p. 119.
24 See: Slobodan Jovanović, *Vlada Aleksandra Obrenovića, book two,* Geca Kon, Belgrade, 1935, p. 1, 17-21.
25 See: Milivoje Popović, *Borbe za parlamentarni režim u Srbiji*, Politika, Belgrade, 1939, p. 74-75.
26 Slobodan Jovanović, *Vlada Aleksandra Obrenovića*, book two, Geca Kon, Belgrade, 1935, p. 27.

according to the Gregorian calendar) in 1893. Although he wasn't eighteen, he was sixteen and eight months old, juvenile king declared himself an adult and the governorship no longer had any reason to exist. In this endeavor, Alexander had the support of the army and his teacher, and the new Prime Minister, Lazar Dokic. While the future king in the palace received regents and ministers, the army surrounded the Ministry of Internal Affairs, Ministry of Foreign Affairs, city administration and telegraph. When it took over all the important institutions, young king made his decision is in front of guests. [27] All of the people present had to accept it: "Menu stayed inexhaustible, but lunch finished!" [28] Backed by the army, but without the support of the constitution and the law, Alexander becomes the new Serbian king, the second in its modern history.

From the way the Alexander's self-rule commenced, his future attitude towards the legal state institutions could be sensed. Just a year after coming to power, on May 9th (May 21st according to the new calendar) 1894, a new coup occurred. As the first Alexander's attack led to the change of governorship and the establishment of his government, the other changed the legal and political merits of his rule by changing the constitution. The Constitution of 1888 did not replace a new constitutional document, but the ancient, pre-valid Governors' constitution of 1869. It is clear that changing social, political, economic and other circumstances may create a situation to start a process to change certain parts or the whole constitution. However, in accordance with the principles of the legal state, changing the parts of constitutional text or the entire constitutional document are carried out in accordance with the provisions on how to change the constitution, and not through the elimination of the highest state and political act.

In the same way as in 1894, the Constitution of 1888 was abolished. Seven years later, King Aleksandar Obrenovic decided to "give" the country a new constitution. It was, therefore, yet another unilateral act of the ruler. While a coup abolished the constitution of 1888, the same such coup created the April Constitution. The difference between them was that the first attack was abolishing in nature, and the other produced a new constitution, but what was common to both cases was that they directly opposed legal state principles and institutions.

The establishment of the April Constitution (Constitution of 1901) is the work of King Alexander. However, the fact that he "gave" this constitution to his country did not oblige Alexander to follow it in his actions. Thus, in the night between March 24th and 25th (April 6th and 7th according to the new calendar) 1903, approximately at 23:15 he suspended the constitution and all the laws passed after the Constitution of 1901 with the proclamation, he dissolved both houses of parliament and then put new people in the Senate, the Council of State and the courts. Only 45 minutes later, when he did all for which he needed the constitutionless state, the king made a new coup and put the April Constitution into effect again. [29] "Our political life with periodic abolition and the establishment of the Constitution and with the coups that were mutually obliterated, really looked like a farce. The peak of this farce was the dictatorship of the three quarters of an hour."[30]

If the attack on 1 April 1893 represented a way for the king to initiate self-rule before the legal age, attack of May 9th , 1894 has been taken in order to terminate the validity of the Constitution of 1888. The similarity of the second with the fourth and fifth coup of King Aleksandar Obrenovic (fourth and fifth attack occurred in the night between 24th and 25th of March, 1903) reflected an interruption of dominance in the power of the Radical Party.

27 See: Slobodan Jovanović, *Vlada Aleksandra Obrenovića*, book one, Geca Kon, Belgrade, 1934, p. 339-340.
28 Živan Živanović, *Politička istorija Srbije u drugoj polovini devetnaestog veka*. Book. 3, *Kraljevsko namesništvo po abdikaciji kralja Milana i prva polovina vladavine kralja Aleksandra I: 1889-1897*, Geca Kon, Belgrade, 1924, p. 193.
29 See: Slobodan Jovanović, Vlada Aleksandra Obrenovića, Book three, Geca Kon, Belgrade, 1936, p. 297-298.
30 Slobodan Jovanović, *Vlada Aleksandra Obrenovića*, book three, Geca Kon, Belgrade, 1936, p. 299.

However, while the impact of 1894 abolished the parliamentary regime, in which the radicals achieved the supremacy thanks to of the Constitution of 1888, the state of dominance of the Radical Party, created after the adoption of the new Constitution in 1901, emerged from the people's support of radicalism, and from King's appointment of radicals in the places in Senate and State Council.

Coups during the reign of Alexander Obrenovic were means of coming to power, the way to abolish the Constitution, an instrument of creating a new constitutional order, as well as the way to replace the politicians and political parties who did not carry out the policies for which King stood for.

CONCLUSION

Periods of respect for the principles and institutions of the legal state in the study period were often interrupted by their disruption. The oppositions to the legal state institutions came from the two sides, the ruler of Milan and Aleksandar Obrenovic, and also from the people.

Jeopardizing the legal state institutions in Serbia during the rule of Milan and Aleksandar Obrenovic applies to, on the one hand, the refusal of the people to accept their constitutional and legal obligations, and on the other, the opposition to the constitution and laws of Milan Obrenovic and five coups of King Aleksandar Obrenovic. While the masses were opposing to the livestock listing and seizure of weapons, which were in accordance with the laws, as well as the attempts to determine the financial condition of the population, Milan and Aleksandar Obrenovic often had a tendency not to consider the Constitution and laws an obstacle to their own will.

In an effort to endanger the legal state institutions, the nation was under the influence of demagogic stories which found other purpose in the modernizing aspirations. In contrast, Milan and Aleksandar Obrenovic felt that legal state institutions could not be applied in Serbia, dominated by rural and illiterate population. It seems that, gathered around the largest number of important political and social issues, King Alexander and the representatives of the people still agree on one thing. It was a constant striving for the adoption of new legal and political acts, for changing the Constitution and existing laws, and later for non-compliance with the new ones, for the permanent neglect, redrawing and the abolition of all the constitutions and laws that did not suit them for some reason.

REFERENCES

1. Bobio, N. (1990): *Budućnost demokratije: odbrana pravila igre*, Filip Višnjić, Belgrade.
2. Jovanović, S. (1934): *Vlada Aleksandra Obrenovića, book one*, Geca Kon, Belgrade.
3. Jovanović, S. (1936): *Vlada Aleksandra Obrenovića, book two,* Geca Kon, Belgrade.
4. Jovanović, S. (1936): *Vlada Aleksandra Obrenovića, book three*, Geca Kon, Belgrade.
5. Jovanović, S. (1934): *Vlada Milana Obrenovića, book three,* Geca Kon, Belgrade.
6. Jovanović, S. (1990): „Dvodomni sistem", in: Slobodan Jovanović, *Političke i pravne rasprave I-III,* Beogradski izdavačko-grafički zavod Jugoslavijapublik, Srpska književna zadruga, Belgrade.
7. Kutlešić, V. (2005): *Osnovi prava, drugo izmenjeno i dopunjeno izdanje*, Official Gazette SCG, Beograd.

8. Lovo, F. (1999): *Velike savremene demokratije*, Izdavačka knjižarnica Zorana Stojanovića, Sremski Karlovci.

9. Majdanac, B. (2004): *Narodna skupština Srbije: od običajne ustanove do savremenog parlamenta: 1804-2004, second changed i amended edition*, National Assembly of the Republic of Serbia, Archives of Serbia, Belgrade.

10. Midlih, Hans-Mihael (1991): „*Patrijarhalni mentalitet kao smetnja državne i društvene modernizacije u Srbiji XIX veka*", *Historical magazine*, Belgrade, book. XXXVIII, pp. 111-130.

11. Podunavac, M. (1997): *Politički sistem: teorije i principi*, Faculty of Political Sciences, Belgrade.

12. Popović, M. (1939): *Borbe za parlamentarni režim u Srbiji*, Politika, Belgrade.

13. Radenić, A. (1988): *Radikalna stranka i timočka buna: istorija Radikalne stranke: doba narodnjaštva, book one,* Historical Archives of the Timok region, Zaječar.

14. Radenić, A. (1988): *Radikalna stranka i timočka buna: istorija Radikalne stranke: doba narodnjaštva, book two*, Historical Archives of the Timok region, Zaječar.

15. Stojanović, T. (1997): *Balkanski svetovi: Prva i poslednja Evropa*, Equilibrium, Belgrade.

16. Terzić, P. (2012): „*Shvatanje unutrašnje slobode u delu Vladimira Jovanovića*", Srpska politička misao, Belgrade, 19, Vol. 38, pp. 447-463.

17. Videlo, num. 18, from February 2nd, 1883.

18. Živanović, Ž (1924): *Politička istorija Srbije u drugoj polovini devetnaestog veka. Book. 3, Kraljevsko namesništvo po abdikaciji kralja Milana i prva polovina vladavine kralja Aleksandra I: 1889-1897*, Geca Kon, Belgrade.

UDC: 343.27(497.11)

ALTERNATIVE SANCTIONS AND MEASURES IN THE SERBIAN LEGAL SYSTEM

Dijana Jankovic, LLD[1]
Appellate Court in Nis

Abstract: Alternative sanctions, in the broadest sense, are the measures of the criminal law that occur as a substitute for the punishment of the imprisonment. Acceptance of the fundamental principles for implementation of the alternative measures, provides for a more human approach of the criminal law, taking into account personal characteristics of the individuals and in that way arising solidarity of all society members with offenders, as well as for elimination of the criminal offences but with an active concern with a victim and its family, taking into account the respect for personality and dignity of a man.This paper illuminates the main characteristics and results on implementation of alternative sanctions in the Serbian legal system and in the key international documents and we are going to face questions like the following: What alternative sanctions and measures shall be made available? For what offences and for what offenders might they be used? Who will take responsibility for implementing them? The paper discusses practical ways in which law enforcement officials, prosecutors and judges can work together and undertake specific actions to utilize measures other than detention to secure the presence of the defendant and to ensure the unobstructed conduct of criminal proceedings. Finally, the paper analyses the kind of alternative sanctions in the Serbian legal system and the types of offenders for whom different kinds of alternative sanctions will be appropriate, how they will be assessed, by what means and by whom and how their effectiveness will be assessed.

Keywords: alternative sanctions, rehabilitation, reintegration, imprisonment, community service, restorative justice.

INTRODUCTION

The concept of alternative measures is based on the belief that by their implementation multiple goals can be achieved: an imposition of the sanction, rehabilitation of the offender as well as the reparation of the damage and an active policy of social help to a man i.e. offender. The ultimate goal of the alternative measures is to change the measures of the criminal law, namely, to lessen their effect on the offender's human rights and dignity and to enable, to the greatest possible extent, restitution and elimination of the harmful consequences, occurring as the result of the offence, which are harmful for both the victim and the society.[2] In other words, the goal of the alternative measures is to enable balance between the enforcement of the offender's and victim's rights as well as to raise the concern of the society with the issues of security and criminal deterrence. It might be assumed that the reduction of crime and recidivism and thus increasing safety in society is one of the main goals for the implementation of community measures and sanctions.

1 E-mail: dijanaj@open.telekom.rs.

2 Junger - Tas, J, "Alternative sanctions: myth and reality", *European Journal on Criminal Policy and Research*, vol.2, 44-66, 1994, p. 46.

Current trends in the international theory and practice indicate that the penalty policy, on the global level, focuses on recognition that deprivation of liberty should be applied as a last-choice sanction or measure. The standards set by the international documents completely protect human rights of the offenders sentenced on the imprisonment.[3]

These standards emphasize the importance of non-imprisonment measures and insist on application of imprisonment measures only in the situation when no other milder measure can achieve the purpose of the punishment. Likewise, the introduction of restrictions on application of the imprisonment sentences, especially of the short-term imprisonment sentences, should be considered.[4] Imprisonment was therefore considered an option for offenders at risk of relapse into serious crime and in need of (long-term) therapeutic intervention; for low-risk (first-time) offenders, community sanctions or non-prosecution policies should apply.[5] In Austria and Germany the debate on alternatives to imprisonment was particularly focused on short-term imprisonment.[6]

From the 1970s on, a wide range of intermediate penalties have been introduced and put into practice in Europe.[7] At the European level, the development and implementation of these noncustodial sanctions and measures, at pre-trial as well as at post-trial level, have been influenced and stimulated by several European institutions, more specifically, by studies carried out by the European Committee on Crime Problems and the resolutions prepared by the Committee of Ministers of the Council of Europe.[8] Several recommendations and resolutions issued by the Council of Europe over the last 50 years encourage the use of alternatives to imprisonment and provide for a supranational normative framework.[9]

The position of the Council of Europe as regards alternatives to imprisonment can be summarized in the following points:

1. Imprisonment should be the last resort in penal policies,
2. Community sanctions must comply with human rights (and not infringe on human dignity),

3 *White paper on prison overcrowding*, Council for Penological Co–operation (PC-CP), Document prepared by the Directorate General Human Rights and Rule of Law, Strasbourg, 24 September 2015, (on-line) accessed 6 February 2016, available at http://www.coe.int/t/DGHL/STANDARDSETTING/PRISONS/PCCP%20documents%202015/PC-CP%20%282015%29%206_E%20Rev%202%20White%20Paper%2024%20September.pdf

4 Pitts, J.M.A, Griffin, O.H.G., Johnson, W.W., "Contemporary prison overcrowding: short-term fixes to a perpetual problem", *Contemporary Justice Review: Issues in Criminal, Social, and Restorative Justice*, 17, 124-139, 2014, p.132.

5 Franklin, T.W., Franklin, C.A., Pratt, T.C., "Examining the empirical relationship between prison crowding and inmate misconduct: A meta-analysis of conflicting research results", *Journal of Criminal Justice*, 34, 401-412, 2006, p.405.

6 Lappi-seppälä, T.,"Explaining national differences in the use of imprisonment", in S. Snacken, E. Dumortier, (Eds.), *Resisting punitiveness in Europe? Welfare, human rights and democracy*, Oxon: Routledge, 35-72, 2012, p.39.

7 Snacken, S., McNeill, F., "Chapter 2: Scientific Recommendations", in D. Flore, S. Bosly, A. Honhon, J. Maggio (Eds.), *Probation Measures and Alternative Sanctions in the European Union,*561-571, Cambridge: Intersentia, 2012, p.565.

8 Van Kalmthout, A., "Community sanctions and measures in Europe: A promising challenge or a disappointing utopia? " 121-133, in *Council of Europe, Crime and criminal justice in Europe*, Strasbourg Cedex: Council of Europe Publishing, 2000, p.123.

9 See: Recommendation (2006) 2 (hereafter 'EPR'), Recommendation (1992) 16 on community sanctions and measures (hereafter R (1992) 16), Recommendation (1997) 12 on staff concerned with the implementation of sanctions and measures (hereafter R (1997) 12), and Recommendation (2000) 22 on improving the implementation of the European rules on community sanctions and measures (hereafter R (2000) 22). In addition, the assessments draw on the principles set out in the international instruments - European Convention of Human Rights, Council of Europe Recommendation (1999) 22 concerning prison overcrowding and prison population inflation (hereafter R (1999) 22), United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules) and the practice in other European countries, Recommendation (2006)13.

3. Community sanctions should aim at rehabilitation and integration of the offender and cater also to the needs of the victim of a crime,

4. A well-functioning infrastructure is needed for proper implementation of alternatives to imprisonment.

Concern for alternatives to imprisonment and intermediate penalties back in the 1960s and 1970s in Europe was fuelled by an unprecedented rise in crime which certainly was a consequence of a process of modernization affecting social structure, mechanisms of social integration and social control.

The rise in bulk property crime and motor vehicle offences brought also a sharp increase in the share of the population which came to the attention of the criminal justice systems and ultimately was convicted and sentenced.[10] A debate on over-criminalization and over-penalization ensued which pointed especially at the risk to the basic (preventive) function of criminal law resulting from imposing too much punishment.

On 19 April 2001, a major turn took place in the European Court of Human Rights' case law. In response to the case of Peers v. Greece, the Court declared that miserable prison conditions – in this case consisting of a high level of overcrowding resulting in poor living space, inadequate ventilation and a lack of hygiene – could constitute a violation of Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and this without any "positive intention of humiliating or debasing the applicant"[11]. This judgment made clear that many more Member States of the Council of Europe run the risk of being convicted if they fail to take steps to tackle the problem of overcrowding.

According to the above mentioned, the tendency of punitive policy is to consider deprivation from freedom as the last choice measure and consequently an appropriate range of measures should be provided, so that they could be imposed on the offender as the alternatives to prison sentences.

TYPES OF ALTERNATIVE SANCTION IN THE SERBIAN LEGAL SYSTEM

Alternatives to imprisonment in Serbia can be divided into the following groups:

- Alternatives to pre-trial detention. The Serbian Criminal Procedure Code[12] provides following alternative sanctions at pre-trial stage as alternatives to pre-trial detention.

1. Deferring criminal prosecution
2. Prohibition of approaching, meeting or communicating with a certain person
3. Prohibition of leaving a temporary residence
4. Bail
5. The prohibition of leaving a dwelling (house arrest).

- Alternative sanctions which are aimed at replacing prison sentences fully. The Criminal Code[13] in Serbia provides following alternative sanctions at trial and sentencing stage:

1. Community service

10 Gaes, G.G., *The Effects of Overcrowding in Prison*, Chicago: The University of Chicago, 1985, p.55.
11 Peers v. Greece, Application no. 28524/95, 19 April 2001.
12 The Criminal Procedure Code of the Republic of Serbia, ("The Official Gazette of the Republic of Serbia", 72/11, 101/2011, 121/2012, 32/2013, 45/2013, 55/2014) - hereafter CPC.
13 The Criminal Code of the Republic of Serbia („The Official Gazette of the Republic of Serbia", 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013 and 108/2014) - hereafter CC.

2. Home detention
3. Settlement of the offender and victim
4. Revocation of a driver's license
5. Cautionary measure

- Suspended sentence (suspended sentence under the protective supervision) and
- Judicial admonition

1. Fine

- Alternatives which aim at reducing the duration of a prison sentence (parole). The Serbian Criminal Code and the Law on the Execution of Criminal Sanctions at post-sentencing stage provide for:

1. Conditional release (Criminal Code)
2. Early release from prison (Law on the Execution of Criminal Sanctions) [14],

The concept of intermediate, community or alternative sanctions must be understood from the perspective of changes in criminal procedure and a trend towards a simplified, summary and partially also consensual way of determining and imposing criminal penalties.

In order to analyse the legal framework of the probation system in the Republic of Serbia we should refer to four elements:

a) The alternative measures provided in the Criminal Procedure Code.

b) The alternative (community/non-custodial) sanctions and measures provided in the Criminal Code.

c) The legal requirements to implement each of the alternatives envisaged in the Law on the Execution of Criminal Sanctions (LECS) Law on Execution of non-custodial sanctions and measures[15], Ordinance on the Execution of Community service.[16]

d) The provisions specifying the mission, responsibilities and tasks of the Service in charge of implementing alternative sanctions and measures.

The main motive for the introduction of alternative sanctions in the system of criminal law of the Republic of Serbia was to minimize the application of institutional sanctions and avoid all the negative consequences of imprisonment, including overcrowded institutions, deprivations and budget expenses. Of course, another important motivational factor was the effort to harmonize our legislation in this field with the standards proclaimed on the global and European levels in the sphere of enforcement of criminal sanctions, probation and human rights protection. There is a potential for Serbia to develop practice with the result of diverting minor offenders from sentences of imprisonment, improving the management of prisoners and enhancing the rehabilitation of offenders.

NON –CUSTODIAL OPTIONS AT PRE-TRIAL STAGE

All systems try to develop procedural mechanisms which enable criminal justice systems to cope with growing caseloads and more complex criminal cases (in particular economic crimes) and to improve performance of the system as regards goal attainments.

14 Law on the Execution of Criminal Sanctions, ("The Official Gazette of the Republic of Serbia", 55/2014) - hereafter LECS.
15 Law on Execution of non-custodial sanctions and measures, ("The Official Gazette of the Republic of Serbia" 55/2014).
16 Ordinance on the Execution of Community service, ("The Official Gazette of the Republic of Serbia", 20/2008, 24/2014).

Current trend in Serbian criminal procedure system - obviously concerns the leading role of public prosecution services in out-of-court settlements.

The Serbian Criminal Procedure Code, which came into force in 2011 but has been applied in the courts of all jurisdictions since October 2013 sets forth 3 stages of the criminal process:

1. Pre-trial Proceedings (Pre-investigation, Investigation and Indictment)
2. Main Hearing within First Instance Proceedings (Preparatory Hearing, Main Hearing, Pronouncing and Proclamation of the Judgment)
3. Legal Remedies Proceedings

The pre-investigation stage begins with filing a criminal complaint and it is supervised by the Public Prosecution.

The Criminal Procedure Code mandates that prosecutors assume responsibility for leading criminal investigations. Their involvement in the earliest stages of decision making, especially involving decisions around questions regarding detention, has the potential to ensure that only the strongest cases proceed to investigation, and, most importantly, the more thoughtful use of detention, which could lessen overcrowding in facilities, and more efficiently streamline criminal matters through the continuum of the

Process.

The public prosecutors decide on individual cases. However, by applying new powers, such as transaction fines, public prosecutors to a large degree create and implement criminal policies as regards the general approaches adopted towards certain types of crimes.

A second trend in Serbian criminal procedure is the emergence of sentence bargaining elements. And a third common trend in the new criminal procedure in Serbia is visible with simplified procedures - penal orders - which consist of an administrative type of arrangement with a focus on petty crimes and mass crimes. Here, too, the public prosecutor has a significant position as it is the public prosecutors' office which initiates such proceedings, although, formally, it is the judge who is responsible for issuing the penal order.

Deferring Criminal Prosecution is applied only in the pre-trial process in the pre-investigation phase. The prosecutor has considerable discretion over crimes with penalties of under five years, and may defer prosecution upon a defendant's agreement to rectify whatever harm he caused and satisfy other conditions of a law-abiding life that the prosecutor may propose (CPC art. 283 par. 1 and 2).

With simplified proceedings, the case in most instances is settled out of court as a trial is not requested and - according to empirical evidence - penal orders are rarely refused by defendants. As penal orders are restricted to non-custodial sanctions, simplified procedures may be considered to include some sort of implicit understanding that in exchange for accepting such economic processing a sentencing discount is granted.

Out-of-court settlements, be it through unconditional and conditional dismissals by the public prosecutor, or through court-based bargaining and settlement procedures cutting off a full trial are first of all aimed at petty offences and moderately serious crime. It is evident that at least as regards mass and petty offences the bulk of cases will actually have properties such as clear and simple factual circumstances which do not call for a full trial.

At pre-trial stage it is also possible for the court to utilize measures other than detention to secure the presence of the defendant and to ensure the unobstructed conduct of criminal proceedings (CPC art. 188).To better ensure compliance with prohibition of leaving a dwelling (house arrest), the court may also decide to order the wearing of a location tracking

devices, or reporting to the police (see CPC art. 190 regarding house arrest), or seizure of a driver's license or travel documents (see CPC art. 199 regarding the prohibition of leaving a temporary residence).

In fact, Article 189 of the CPC indicates that the court should not impose harsher measures than are necessary to accomplish the same purpose. However, there remain many open questions as regards a most important issue: the sentencing discount and the size of discounts that can be offered in exchange for consenting to out-of-court proceedings.

Statutory guidelines most often either reduce possible penalties to non-custodial penalties (as is the case in penal order procedures as well as in conditional dismissals) or cut down the range of penalties by one third or two thirds (an option which is quite often used in statutory guidelines on mitigation in sentencing).[17] Control of discretion and proper responses to the risk of abuse are linked to the victims' position in the procedure on the one hand, and to the question of transparency of out-of-court settlements on the other hand. In particular, the victims' position is of paramount importance, not only for the purpose of control, but also for pursuing victim policies independent of whether the case is settled out-of-court or within the framework of trial procedures.

NON-CUSTODIAL OPTIONS AT TRIAL AND SENTENCING STAGE

Community service received considerable attention in the 1980s in most European countries[18]. What makes community service so attractive to be incorporated into systems of criminal sanctions is (comparable to day fines) the easy transformation into time spent in serving punishment, and with that, the easy comparability with imprisonment. Insofar, community service is built easily into sentencing schemes which take time which has to be served as a starting point.

Article 52 of the Criminal Code of the Republic of Serbia prescribes that community service may be imposed on the offenders who have committed criminal offences for which imprisonment up to three years or a fine are prescribed. It defines community service as any kind of socially acceptable and useful work that does not offend human dignity and that is not performed with the intention to obtain material (financial) benefits.

When deciding whether to impose this punishment, the court is obliged to take into account the purpose of punishment, i.e. general and special prevention (see CC art.42), the type of committed criminal offence, the personality of the offender and his readiness to perform community service. It is important to mention that community service cannot be imposed on the offender without his consent. If the offender fails to fulfill all the obligations imposed within the punishment of community service, the court is entitled to replace this punishment with imprisonment (CC art.42.par.5.)

Efforts are being made to identify large-scale community work projects to increase the numbers of offenders engaged in work that benefits organizations and communities. The aim here is to increase the opportunities for skills acquisition to ensure that offenders can enhance their employment prospects and that offenders with special needs can be accommodated where possible.

17 Morgenstern, C., "Pre-trial/remand detention in Europe: facts and figures and the need for common minimum standards", *Academy of European Law*, 9, 527-542, 2009, p.534.
18 Downes, D., Hansen, K., "Welfare and punishment in comparative perspective", in: S. Armstrong, L. McAra (Eds.), *Perspectives on Punishment: the Contours of Control*, Oxford University Press, 133-154, 2006, p.145.

As a 'true' alternative to imprisonment, there is substantial evidence internationally that community service has worked well. In relation to the nature of community work, research shows that offenders whose experiences have been rewarding are less frequently reconvicted.[19] The limits to community service are found in international conventions and national constitutions on forced labour outside the prison context.[20] Here the consent of the offender is seen as a way of avoiding the infringement of prohibition of forced labour.

When defining the punishment of imprisonment in article 45, Criminal Code of the Republic of Serbia mentions that this punishment may also be executed in the premises where the offender lives provided that it does not last for more than one year and that his personality, previous life, behavior after the commission of criminal offence, degree of guilt and other relevant circumstances suggest that the purpose of punishment can be accomplished in that way. This modality of execution of prison sentence cannot be applied on the offender who committed criminal offence against marriage and family if the offender and the victim live in the same household.

Also there is great scope for mediation, reconciliation and reparation to play an important part in the implementation of alternative sanctions in Serbia (CC art. 58 par. 3 which provides exemption from penalty and art. 59 which provides for settlement of the offender and victim). The Serbian Criminal Code provides two forms of suspended sentence (without and with protective supervision).

The purpose of a suspended sentence and judicial admonition is not to impose a sentence for lesser criminal offences to the offender who is guilty when it may be expected that an admonition with the threat of punishment (suspended sentence) or a caution alone (judicial admonition) will have sufficient effect on the offender to deter him from further commission of criminal offences (CC art.64).

The court determines the type and the measure of punishment on the offender, but at the same time, declares that the punishment will not be executed if the offender does not commit a new criminal offence within the so called "check term", which cannot be shorter than one year or exceed a five years' period.

Conditional sentence with protective supervision represents a specific, optional modality of the enforcement of ordinary conditional sentence, which is applied if the court estimates that such surveillance is useful or necessary and includes various measures of assistance, guidance, surveillance and protection. The duration of measures of protective supervision is determined within the check-period defined in the conditional sentence and these measures are revoked together with the revocation of conditional sentence.

NON-CUSTODIAL OPTIONS AT POST-SENTENCING STAGE

Normative framework that regulates the alternative sanctions the Republic of Serbia after the sentencing stage during the execution of a sentence of imprisonment comprises the provisions of several legal and sublegal acts. The most important are Criminal Code and Law on the Execution of Criminal Sanctions. There are two cases in which the sentenced person may be released from prison although the punishment has not yet been fully served. The first situation refers to the application of conditional release, which is regulated by the Criminal

19 Aebi, M.F., Delgrande, N., SPACE II – Council of Europe Annual Penal Statistics: Persons Serving Non-Custodial Sanctions And Measures in 2012, Survey 2012, Strasbourg: Council of Europe, 2014.
20 See for example the International Covenant on Civil and Political Rights 1966, Art. 8.

Code and the second to the institution of early release from prison, which is regulated by the Law on the Execution of Criminal Sanctions.

Early release from prison may be granted as a special award for proper behavior and results accomplished during the application of treatment programs. [21] The decision on early release is made by the Director of the Administration for the Enforcement of Criminal Sanctions upon the suggestion of the Prison Manager. A prisoner can be released from prison if there are no more than six months left for his punishment to be completely served and provided that he has served at least nine tenths of the punishment. The Prison Manager is allowed to propose early release to the Director and his proposal has to be based upon the opinions given by the expert team of prison staff members (LECS article 184).

On the other hand, the decision on conditional release is made by the court. Conditional release can be implemented if the prisoner has served two thirds of punishment provided that his behavior has improved during the enforcement of punishment to the extent that makes it reasonable to expected that he will conduct properly after the release and that he will not re-offend, particularly in the period before the punishment is served. Other circumstances suggesting that the purpose of punishment has been accomplished are also taken into consideration. The prisoner who has attempted or managed to escape from prison cannot be granted conditional release. When deciding upon conditional release, the court takes into account the following circumstances: behavior of the prisoner during the enforcement of prison sentence, fulfillment of his working obligations depending on his capability as well as other circumstances showing that the purpose of punishment has been achieved. In the decision on conditional release, the court may order the offender to fulfill some other obligations, such as those referring to conditional sentence with intense supervision. If the court does not revoke conditional release, it will be considered that the offender has served his punishment in total (CC art.46).

The court may revoke conditional release if the conditionally released prisoner commits one or more criminal offences for which punishment of more than six months is imposed. The court may also revoke conditional release if the conditionally released person commits one or more criminal offences for which a less severe punishment is imposed or fails to fulfill some of the imposed obligations. When deciding on the revocation of conditional release, the court takes into consideration the similarity between the committed criminal offences, motivation for re/offending and other circumstances suggesting that revocation is acceptable and reasonable (CC art.47).

Conditional release may be imposed at post-sentencing stage. In other words, the conditional release is available for use after the sentencing stage during the execution of a sentence of imprisonment.

Conditional release is of crucial importance if the social rehabilitation of ex-prisoners is to be achieved. [22] A lot of attention has been paid by the Council of Europe to this alternative measure since 1970, when it was the object of Resolution (70) 1 on the practical organisation of measures for the supervision and after-care of conditionally sentenced or conditionally released offenders". The Recommendation – Rec. (2003) 22 on Conditional Release (parole) provides the following definition: "…conditional release means the early release of sentenced prisoners under individualised post-release conditions. Conditional release is a community measure..."

21 Zeleskov Doric J., Batricevic, A., Kuzmanovic M., *Probation in Europe Serbia*, CEP, Confederation of European Probation, 2014, p.25.

22 Morgenstern, C., Larrauri, E., "European Norms. Policy and Practice", in F. McNeill, K. Beyens (Eds.), *Offender Supervision in Europe*, New York: Palgrave Macmillan, 125-154, 2013, p 132.

Both early release from prison and conditional release come with conditions and orders attached which seek to tailor the sentence to the specific needs and risks displayed by the offender. In addition, the measures contribute to the reintegration of the offender and they facilitate the process of preparation for release.[23]

With the Law on the Enforcement of Non-Institutional Sanctions and Measures coming into effect in Serbia, it has been envisaged that the fulfillment of obligations that can be imposed through release on parole (release on parole with protective supervision) be overseen by the Commissioner Service of the Penal Sanctions Enforcement Directorate (PSED).

IMPLEMENTATION OF COMMUNITY MEASURES AND SANCTIONS IN SERBIA

Legal provisions pertinent to the issues of implementation each of the alternative sanctions in the Republic of Serbia are contained in the several laws.

These are:

1. Law on the Execution of Criminal Sanctions (LECS),
2. Law on the Execution of non-custodial sanctions and measures,
3. Ordinance on the Execution of Community service.

These laws and regulations were adopted in 2014 and they are focused on key issues surrounding the implementation and application of alternative sanctions.

The Law on the Execution of Criminal Sanctions contains general provisions on enforcement of the alternative sanctions and measures provided by the Criminal Code and the Criminal Procedure Code.

Also the Law on the Execution of Criminal Sanctions contains the legal provisions about the competence of the judge for enforcement (LECS articles 33 to 42), then regulates the execution of imprisonment, reception and classification of the convict, position, rights and obligations of the convict, the process of providing assistance and accepting of convicts after they are released from prison, jurisdiction and procedure for execution of security measures, et cetera.

The Law on the Execution of non-custodial sanctions and measures and Ordinance on the Execution of Community service are focused on the legal framework, the organization of a commissioner service responsible for alternative sanctions and probation, including staff recruitment and training and strategic planning. Generally recognized important elements of the mission of a commissioner service include: public protection, reducing re-offending, risk assessment, effective execution of penalties and alternative (community-based) sanctions, assistance to offenders aiming at reintegration and rehabilitation.

The Law on the Execution of non-custodial sanctions and measures provides for the tasks of the Commissioner's Service. Generally speaking, based on the current legal situation, the Commissioner's Service will have the task to monitor the implementation of the penalties of community service, suspended sentence with protective supervision, conditional release, home detention, deferring criminal prosecution, the prohibition of leaving a dwelling - house arrest, advising and providing support and assistance to a person after the execution of the prison sentence to avoid re-commission of criminal offenses.

23 Kuhn, A., Tournier P. Walmsley R., *Report on prison overcrowding and prison population inflation, Strasbourg*: Council of Europe, 2000, p.33.

The Commissioner's Service could have a wide range of other additional tasks and responsibilities. Some examples are:

- providing information to judicial authorities in order to assist them in sentencing and other decisions (including risk assessment of re-offending)
- developing, implementing and monitoring community sanctions and measures
- providing practical and social help, care and aftercare to the offender during his contact with the criminal law system
- implementing interventions that aim to prevent recidivism (incl. individual or group training programmes ultimately aiming at changing criminal behaviour)
- support for (ex-)detainees and assist them during preparations for release
- control and supervision of conditions applied to offenders.

It might be assumed that the reduction of crime and recidivism and thus increasing safety in society is one of the main goals for the Commissioner Service.

THE RIGHTS AND NEEDS OF VICTIMS

In Europe, victim-offender mediation programmes first appeared at the beginning of 1980s.[24] While in the 1960s and 1970s goals pursued by way of settlement out-of-court procedures certainly were focused on reducing stigma and relapse in crime, the last decade has seen the dominance of cost arguments and the economic rationale. But the last two decades have seen the victims of crime become again a central figure in the criminal process.[25]

In 1985, the Council of Europe published a recommendation concerning the position of the victim in the framework of criminal law and procedure (Rec (85)11). Although this recommendation does not entail guidelines concerning the role of the victim when it comes to community sanctions and measures, it provides some general guidelines concerning the approach towards victims by the police, during prosecution, when questioned by the court, and so on.

By this time increasing awareness on the rights and needs of victims, both on national and international levels, had already shaped public policy markedly.

This trend is clearly perceptible in the relevant recommendations of the Council of Europe, the introduction of state compensation schemes[26] and the promotion of victim support schemes.[27]

Relevant to the applicability of community sanctions is the right for victims to receive information on the prisoner's release at pre- and post-trial level. The development of victim-offender mediation programmes, and other schemes that were inspired by indigenous and informal justice practices, in due course stimulated a vast body of literature on what has come to be termed as 'restorative justice'. Given the contentious nature of the philosophy behind this concept[28], this study does not seek here to discuss different constructions of the notion of restorative justice. Suffice to say that the term "restorative justice" does not indicate

24 Marshall, T.F., *Restorative Justice. An Overview*, London, Home Office, 1999, p.21.
25 Sherman, L. W., Strang, H., *Restorative Justice: The Evidence,* London: The Smith Institute, 2007, p.30.
26 *Compensation for Victims of Crime*, Council of Europe/European Committee on Crime Problems, Strasbourg, 1978. Greer, D., *Compensating Crime Victims: a European Survey*, Max- Planck-Institut für ausländisches und internationales Strafrecht, Freiburg, 1996.
27 Albrecht, H-J., "Criminal Prosecutions: Developments, Trends and Open Questions in the Federal Republic of Germany", *European Journal of Crime, Criminal Law and Criminal Justice*, vol. 8, no 3, 245–256, 2000, p. 237.
28 Levrant, S., Cullen, F. T., Fulton, B. and Wozniak, J., F., "Reconsidering Restorative Justice: The Corruption of Benevolence Revisited?" *Crime and Delinquency*, vol.45, 3–27, 1999, p.12.

a "unitary" concept[29] but rather a "shorthand convenient term"[30] that describes a variety of divergent practices in which victim orientation is noticeable.

The challenge of the basic philosophy of restorative justice is suggested to be in its conception of crime, as crime is not seen as a mere violation of law or the interests of the state, but as a violation of human relations. Accordingly, the innovative pledge of restorative justice is explained with the 'restoration' of 'harm' that is caused by the crime through a process whereby the offender is held accountable for her/his crime and the victim is given a voice to participate in decisions that affect them.

Such a process involving both the offender and victim, it is believed, provides a more satisfactory experience to the individual victims on the one hand, and offers greater reintegration possibilities to offenders on the other hand.[31] Research concerning the application of victim-offender mediation and other restorative justice practices (such as family-group conferencing) shows that this type of alternative approach is very suitable when handling more serious crimes. In more serious crimes, victims often have a greater need for an explanation from the offender or for communicating with, and expressing their feelings to the offender. Also, the effect of the use of restorative justice practices on re-offending is larger for more serious crimes than it is for less serious crimes.

Other than in the Specialized Department and the War Crimes Department of the Higher Court in Belgrade, Serbia's criminal justice system lacks any formal victim services or coordination units.[32] There are no specific constitutional or legislative mandates requiring notification or consultation with a victim, especially regarding detention decisions.

Criminal proceedings in Serbia are initiated on the basis of a motion to indict by the Public Prosecutor. When the Public Prosecutor finds that that there are no grounds for instituting criminal proceedings, the injured party may file an objection with the superior Public Prosecutor (CPC arts 50, 51). If the prosecutor withdraws charges after the confirmation of the indictment, the injured party may pursue prosecution (CPC art. 52).

The CPC mandates that the Public Prosecutor dismiss a criminal complaint where the act reported does not constitute a criminal offence or a criminal offence prosecutable ex officio, where the statutory limit for prosecution has lapsed, or the offence is encompassed in an amnesty or pardon or where there are other circumstances that exclude proceedings, or, lastly, where there is no reasonable suspicion that the suspect committed a criminal offence. If a complaint is dismissed, the Prosecutor shall notify the injured party of the reasons for dismissal (see also CPC art. 52).

Except in the special offices for organized and war crimes, there are no victim services within the Public Prosecution, nor is there any such formal unit within the courts.

However restorative justice is an important philosophical source of creating new forms of alternative sanctions and measures. Also considering the savings on cost and administrative efficiencies that this perspective inherently brings about, restorative justice as a new panacea seems to reshape existing methods and induce new forms of non-custodial sanctions and measures.

29 Shapland, J., "Restorative Justice and Criminal Justice: Just Responses to Crime", in von Hirsch, A., Roberts, and J., V., Bottoms, A., Roach, K. and Schiff, M. (eds.) *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms*? Hart Publishing, Oxford, 195–218, 2003, p.197.

30 Dignan, J. with Lowey, K., "Restorative Justice Options for Northern Ireland: A Comparative Review", *Criminal Justice Review Commission/Northern Ireland Office*, Belfast, 2000, p. 30.

31 Elonheimo H., "Restorative Justice Theory and the Finnish Mediation Practices", a Paper Presented at the Third Annual Conference of the European Society of Criminology, Helsinki, 27-30 August 2003, (on-line), accessed 2 February 2016, available at http://restorativejustice.org/10fulltext/elonheimo.pdf.

32 *Detention Procedure Assessment for Serbia, Pre-Disposition Stages,* American Bar Association's Rule of Law Initiative, 2013, on-line, accessed 2 February 2016, available at http://www.americanbar.org/content/dam/aba/directories/roli/serbia/serbia_detention_procedure_assessment_tool_05_2013.authcheckdam.pdf , p.21.

SPECIAL GROUPS

It is also important to consider adequately the type of offender for whom different kinds of alternative sanctions will be appropriate, how they will be assessed, by what means and by whom and how effectiveness will be assessed. This is consistent with R (2000) 22, para. 19, which recommends that, "Criteria of effectiveness should be laid down so as to make it possible to assess from various perspectives the costs and benefits associated with the programmes and interventions…"

The majority of prisoners in Serbia are adult men that have been convicted of crime. However, other categories of prisoner also make up a significant proportion of the prison population. Detainees who are members of vulnerable populations, including (but not limited to) foreign citizens, persons with physical or mental disability or illness, women, and sexual minorities, have the right to be treated non-discriminatorily and to benefit from special measures that may be necessary for their protection.[33] Persons seeking refugee status or asylum shall not be penalized solely for entering a country illegally, and may be only detained when necessary to establish identity, verify claims, or protect national security, and subject to judicial and administrative review.

Foreign national prisoners often face various extra challenges which other prisoners do not. This situation is particularly acute for foreign national prisoners who are not normally resident in the state in which they are imprisoned. If a prisoner's first language differs from that of the state in which they are imprisoned, their communication with a lawyer and understanding of their legal situation may be impaired. The United Nations Standard Minimum Rules for the Treatment of Prisoners state that the different categories of prisoners shall be kept in separate institutions or parts of institutions taking account of their sex, age, criminal record, the legal reason for their detention and the necessities of their treatment.[34]

In their *Handbook of Basic Principles and Promising Practices on Alternatives to Imprisonment*, the UNODC mentions children, offenders who are addicted to drugs, mentally-ill offenders, women, and foreign national prisoners. The report states that, while these people may be in prison as a result of formal proceedings, "where this is not the case, their imprisonment poses grave human rights concerns". Whatever their legal status, prisons are particularly poorly placed to provide the care these prisoners need.[35]

The Serbian legal system focuses on the urgent need to develop alternatives to imprisonment for these special categories of prisoners. Serbia's Constitution protects minorities, guaranteeing special protection in their exercise of full equality and identity (CONST. art. 14). The Constitution also provides for equal opportunities for men and women, (CONST. art 15), and states that foreign nationals shall enjoy all rights guaranteed by the Constitution and under Serbian law, except those only afforded to Serbian citizens (CONST. art. 17).

The Law on the Execution of Criminal Sanctions provides that a prisoner shall not be discriminated against on the basis of race, color, sex, language, religion, political or other con-

33 Green, D., *When Children Kill Children: Penal Populism and Political Culture,* Oxford: Oxford University Press, 2012, p.14

34 *Standard Minimum Rules for the Treatment of Prisoners*, Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977, accessed 6. February 2016, available at https://www.unodc.org/pdf/criminal_justice/UN_Standard_Minimum_Rules_for_the_Treatment_of_Prison

35 *Handbook of basic principles and promising practices on Alternatives to Imprisonment*, United Nations Office on Drugs and Crime (UNODC), Vienna, New York, 2007, (on-line) accessed 1 February 2016, available at https://www.unodc.org/pdf/criminal_justice/Handbook_of_Basic_Principles_and_Promising_Practices_on_Alternatives_to_Imprisonment.pdf, p.57.

victions, ethnic or social origin, financial status, education, or social or other personal status (LECS art.7.). Additionally, a prisoner with special needs is entitled to accommodation in line with the type and degree of his needs (LECS art.77.par.3).

Lastly, the Criminal Code provides criminal penalties for anyone who instigates or exacerbates national, racial or religious hatred or intolerance among peoples and ethnic communities living in Serbia (criminal offense of Violation of the Right to Expression of National or Ethnic Affiliation, (CC art.130).

Since women detainees comprise a sizably smaller percentage of the total population of detainees, segregation of women being held at the pre-trial stage is more challenging, and they are often housed with the already convicted women, with the same level of security and without regard to severity of crime. The only institution for women in Serbia is located in Pozarevac, where all women are confined in closed cells. Its population is comprised of mostly women who have been convicted. Article 117 of the Law on the Execution of Criminal Sanctions provides that female prisoners with children under two years old may keep a child until the end of the sentence, but no longer than until the child reaches the age of two years.

In a 2012 report, the Belgrade Center for Human Rights noted that persons with disabilities were particularly vulnerable in police detention, further stating that the inadequacy of detention facilities and prisons create an increased likelihood that these individuals' rights will be violated while they are in detention.

CONCLUSION

Summarizing the previous discussion, it could be said that the contemporary status of alternative sanctions is characterized by their intense implementation, primarily through international documents and then through the national legislation, in order to provide conditions for the implementation with the restriction that the "criminal policy" is limited by the principles of the law state, by the trend of the criminal justice constraint and by human rights standards. According to this, there is a tendency, in the legislative environment, in the activities of the international organizations and in the national legislations, towards a wider implementation of the mentioned sanctions in practice, which contributes to a better connection between theories and practices of domestic and international criminal law.

The issue on implementation of alternative measures in the domestic jurisprudence is a "living" area and develops towards harmonization of international standards on human rights, constitutional principles and applicable legal provisions.

The examination of non-custodial sentences is also indicative of the fact that the exchange and dissemination of ideas have had a profound impact upon law-making.

Criminal justice actors are attempting to consider and use alternatives to detention more frequently, which could result in a more measured use of limited resources, and a more prompt and fair administration of criminal justice, without jeopardizing security to the community.

Also, the use of community sanctions and measures, instead of imprisonment, can address the problem of overcrowding in prisons. It can also improve the prospects of offenders′ social reintegration by not insolating them from the community, thereby enabling them to continue working and living with their families, while paying back for the offense committed in ways other than deprivation of liberty. When accompanied by adequate support and, where appropriate, treatment for offenders, non-custodial sanctions and measures can assist offenders to lead positive lives without having to relapse back into criminal behavior patterns.

REFERENCES

1. Aebi, M.F., Delgrande, N., SPACE II – Council of Europe Annual Penal Statistics: Persons Serving Non-Custodial Sanctions And Measures in 2012, Survey 2012, Strasbourg: Council of Europe, 2014.
2. Albrecht, H-J., "Criminal Prosecutions: Developments, Trends and Open Questions in the Federal Republic of Germany", *European Journal of Crime, Criminal Law and Criminal Justice*, vol. 8, no 3, 245–256, 2000.
3. *Custodial and non custodial measures. Alternatives to Incarceration. Criminal Justice Assessment Toolkit*, United Nations Office on Drugs and Crime (UNODC), Vienna, New York, 2006.
4. Greer, D., Compensating Crime Victims: a European Survey, Max- Planck-Institut für ausländisches und internationales Strafrecht, Freiburg, 1996.
5. Detention Procedure Assessment for Serbia, Pre-Disposition Stages*, American Bar Association's Rule of Law Initiative*, 2013. on-line, accessed 2 February 2016, available at http://www.americanbar.org/content/dam/aba/directories/roli/serbia/serbia_detention_procedure_assessment_tool_05_2013.authcheckdam.pdf
6. Dignan, J., Lowey, K., "Restorative Justice Options for Northern Ireland: A Comparative Review", *Criminal Justice Review Commission/Northern Ireland Office*, Belfast, 2000.
7. Elonheimo H., "Restorative Justice Theory and the Finnish Mediation Practices", a Paper Presented at the Third Annual Conference of the European Society of Criminology, Helsinki, 27-30 August 2003, on-line, accessed 2 February 2016, available at http://restorativejustice.org/10fulltext/elonheimo.pdf
8. Downes, D., Hansen, K., "Welfare and punishment in comparative perspective", in: S. Armstrong, L. McAra (Eds.), *Perspectives on Punishment: the Contours of Control*, Oxford University Press, 133-154, 2006.
9. Franklin, T.W., Franklin, C.A., Pratt, T.C., "Examining the empirical relationship between prison crowding and inmate misconduct: A meta-analysis of conflicting research results", *Journal of Criminal Justice*, 34, 401-412, 2006.
10. Green, D., *When Children Kill Children: Penal Populism and Political Culture,* Oxford: Oxford University Press, 2012.
11. Gaes, G.G., *The Effects of Overcrowding in Prison*, Chicago: The University of Chicago, 1985.
12. *Handbook of basic principles and promising practices on Alternatives to Imprisonment*, United Nations Office on Drugs and Crime (UNODC), Vienna, New York, 2007.
13. Heiskanen, M., Aebi, Marcelo F., Van der Brugge Willem, Jehle, J-M., *Recording Community Sanctions and Measures and Assessing Attrition, A Methodological Study on Comparative Data in Europe*, European Institute for Crime Prevention and Control, affiliated with the United Nations (HEUNI), Publication Series No. 77, Helsinki, Finland, 2014.
14. *Investigating Alternatives to Imprisonment. Within Council of Europe Member States*, The Quaker Council for European Affairs (QCEA), 2010.
15. Junger - Tas, J, "Alternative sanctions: myth and reality", *European Journal on Criminal Policy and Research*, vol.2, 44-66, 1994.
16. Kuhn, A., Tournier P. Walmsley R., *Report on prison overcrowding and prison population inflation, Strasbourg*: Council of Europe, 2000.
17. Lappi-seppälä, T., "Explaining national differences in the use of imprisonment", in S. Snacken, E. Dumortier, (Eds.), *Resisting punitiveness in Europe? Welfare, human rights and democracy*, Oxon: Routledge, 35-72, 2012.

18. Levrant, S., Cullen, F. T., Fulton, B. and Wozniak, J., F., "Reconsidering Restorative Justice: The Corruption of Benevolence Revisited?", *Crime and Delinquency*, vol.45, 3–27, 1999.

19. Marshall, T.F., *Restorative Justice. An Overview*, London, Home Office, 1999.

20. Morgenstern, C., "Pre-trial/remand detention in Europe: facts and figures and the need for common minimum standards", *Academy of European Law*, 9, 527-542, 2009.

21. Morgenstern, C., Larrauri, E., "European Norms, Policy and Practice", in F. McNeill, K. Beyens (Eds.), *Offender Supervision in Europe*, 125-154, New York: Palgrave Macmillan, 2013.

22. Peers v. Greece, Application no. 28524/95, 19 April 2001.

23. Pitts, J.M.A, Griffin, O.H.G., Johnson, W.W., "Contemporary prison overcrowding: short-term fixes to a perpetual problem", *Contemporary Justice Review: Issues in Criminal, Social, and Restorative Justice*, 17, 124-139, 2014.

24. Shapland, J., "Restorative Justice and Criminal Justice: Just Responses to Crime", in von Hirsch, A., Roberts, and J., V., Bottoms, A., Roach, K. and Schiff, M. (eds.) *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms*? Hart Publishing, Oxford, 195–218, 2003.

25. Sherman, L. W., Strang, H., *Restorative Justice: The Evidence,* London: The Smith Institute, 2007.

26. Snacken, S., McNeill, F., "Chapter 2: Scientific Recommendations", in D. Flore, S. Bosly, A. Honhon, J. Maggio (Eds.), *Probation Measures and Alternative Sanctions in the European Union,*561-571, Cambridge: Intersentia, 2012.

27. Standard Minimum Rules for the Treatment of Prisoners, Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977, accessed 6. February 2016, available at https://www.unodc.org/pdf/criminal_justice/UN_Standard_Minimum_Rules_for_the_Treatment_of_Prison

28. Van Kalmthout, A., "Community sanctions and measures in Europe: A promising challenge or a disappointing utopia?" pp. 121-133, in *Council of Europe, Crime and criminal justice in Europe*, Strasbourg Cedex: Council of Europe Publishing, 2000.

29. White paper on prison overcrowding, Council for Penological Co–operation (PC-CP), Document prepared by the Directorate General Human Rights and Rule of Law, Strasbourg, 24 September 2015.

30. Zeleskov Doric J., Batricevic, A., Kuzmanovic M., *Probation in Europe – Serbia*, CEP, Confederation of European Probation, 2014.

UDC: 340.134:343.431(497.5)
340.134:343.431(497.11)

COMPARATIVE LEGISLATIVE ANALYSIS OF CRIMINAL LEGISLATION OF THE REPUBLIC OF CROATIA AND THE REPUBLIC OF SERBIA IN TERMS OF HUMAN TRAFFICKING AS THE MOST BRUTAL VIOLATION OF FUNDAMENTAL HUMAN RIGHTS[1]

Vanda Božić, PhD[2]
University of Zagreb, Faculty of Law

Summary: Author analyzes criminal legislation of the Republic of Croatia and the Republic of Serbia in terms of human trafficking as the most brutal violation of fundamental human rights and as one of the leading forms of organized crime at the present time. She indicates legal solutions in the two aforementioned countries, their similarities and differences. The paper examines the situation in relation to the criminal offenses of trafficking in persons in the Republic of Croatia and the Republic of Serbia along with a review and analysis of final case law in relation to the types of exploitation and sentence. Accordingly, the author suggests measures that must be carried out with the aim of combating this form of organized crime and provides suggestions for possible changes.

Keywords: Human trafficking, types of exploitation, Croatia, Serbia

INTRODUCTION

At the global level *trafficking in human beings* is one of the most brutal violations of fundamental human rights on one hand, and it is one of the most profitable criminal activities on the other. It is not limited to just one country, it is spread to the countries of origin, countries of transit and countries of destination, therefore, this criminal activity involves several phases: the phase of recruiting victims in the countries of origin, their transport through the transit countries to the destination country and, in the end, various forms of exploitation of victims in the country of destination. The ways of recruiting and exploiting victims, especially with the development of new technologies, are themselves becoming increasingly perfidious and brutal, which only leads to serious consequences. The exact number of victims is impossible to determine, we can only surmise what is actually the dark figure as identified victims are just a drop in the ocean. Women, men and children are abused and exploited by being traded in various ways, which violates their fundamental human rights and is therefore a reason why in national legislations this crime is among crimes against humanity and human dignity protected by international law. Mutual co-operation of countries in combating human trafficking is crucial, from prevention itself through the identification and protection of victims to the

1 This research has been fully supported by the Croatian Science Foundation, under the project number 1949. "Multidisciplinary Research Cluster on Crime in Transition - Trafficking in Human Beings, Corruption and Economic Crime."
2 E-mail: vanda.bozic@pravo.hr.

prosecution and punishment of perpetrators of this terrible crime. This paper will analyze the criminal legislation of two neighboring countries, Croatia and Serbia, with regard to human trafficking, to point out their legal solutions, similarities and differences and will try to give suggestions for possible improvements of positive regulations. Criminal offenses of trafficking in human beings in the Republic of Croatia and the Republic of Serbia were investigated and analyzed in relation to charged and convicted persons and sentences imposed, and victims and types of exploitations were identified. The conclusion states the situation in the Republic of Croatia and the Republic of Serbia in relation to the offense of trafficking in persons and, therefore, points to the necessary changes that will surely contribute to the successful suppression of human trafficking.

TRAFFICKING IN HUMAN BEINGS ACCORDING TO BINDING INTERNATIONAL LEGAL DOCUMENTS

The most important international document which stipulates the obligation to criminalize trafficking in persons in the national legislation of EU member states, both the existing ones and those that want to be admitted to its membership, is the United Nations Convention Against Transnational Organized Crime with its Protocols[3], the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children[4] and the Protocol Against the Smuggling of Migrants by Land, Sea and Air[5], supplementing the Convention. According to the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, *trafficking in persons shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.*[6]

The Republic of Croatia signed this internationally important document among the first signatory states, during the international conference in Palermo on December 12, 2000, ratified it on January 24, 2003,[7] and on September 29, 2003 the Convention entered into force.[8] The Republic of Serbia also signed the United Nations Convention Against Transnational Organized Crime on December 12, 2000[9], declared the Law on Ratification of the United

3 United Nations Convention against Transnational Organized Crime, United Nations, Treaty Series, vol. 2225, p. 209.

4 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, United Nations, Treaty Series, vol. 2237, p. 319; Doc. A/55/383.

5 Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, United Nations, Treaty Series, vol. 2241, p. 507; Doc. A/55/383

6 Art. 3.a. *Ibid.*

7 The Ministry of Foreign and European Affairs, organized crime, available at: http://www.mvep.hr/hr/vanjska-politika/multilateralni-odnosi0/mir-i-sigurnost/transnacionalne-prijetnje/organizirani-kriminal/, (31/01/2016)

8 Law on Ratification of United Nations Convention against Transnational Organized Crime, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, Act, OG, IA No 14/2002, 13/2003, 11/2004, United Nations Convention against Transnational Organized Crime, United Nations, Treaty Series, vol. 2225, p. 209.

9 Among the first countries that have signed the Convention, in addition to Republic of Croatia and

Nations Convention Against Transnational Organized Crime and the Additional Protocols on June 6, 2001[10], which entered into force on June 30, 2001.[11]

In addition to the United Nations Convention Against Transnational Organized Crime and its Protocols, internationally important documents[12] stipulating the ban on trafficking in human beings include the Council of Europe Convention on Action against Trafficking in Human Beings[13], Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victim,[14] and the Brussels Declaration on preventing and combating trafficking in human beings.[15]

Other relevant international documents on the Prohibition of Trafficking in Persons and the Slavery Convention 1926,[16] Forced Labour Convention of 1930,[17] Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others1949,[18] Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery 1956,[19] Convention on the Elimination of forced Labour of 1957,[20] International Covenant on Civil and Political Rights1966,[21] Convention on the Elimination of All Forms of Discrimination against Women 1979,[22] Convention on the Rights of the

Serbia, were: Albania, Argentina, Austria, Azerbaijan, Belgium, Bolivia, Bosnia and Herzegovina, Brazil, Colombia, Cyprus, Denmark, Finland, France, Germany, Italy, Russian Federation, Sweden, The former Yugoslav Republic of Macedonia, Uganda and Togo.

10 Declared is the Law on Ratification of United Nations Convention against Transnational Organized Crime and additional protocols, available at: http://www.tuzilastvorz.org.rs/html_trz/PROPISI/konvencija_un_protiv_org_krim_lat.pdf,31/01/2016

11Law on Ratification of United Nations Convention against Transnational Organized Crime, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, Act, OG SFRJ, IA No 6/2001

12 See more about this in: Božić, V: Trafficking in human organs as a form of organized crime, PhD Dissertation, University of Zagreb, Faculty of Law, 2012, p. 70.-87.

13 Council of Europe Convention on Action against Trafficking in Human Beings https://www.coe.int/t/dghl/monitoring/trafficking/Docs/Convntn/CETS197_en.asp, (31/01/2016) Law on Ratification of the Council of Europe Convention on Action against Trafficking in Persons, OG RH, IA no. 07/07 Law on Ratification of the Council of Europe Convention on Action against Trafficking in Persons,OG RS, IA no 19/2009

14 Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA,http://eur-lex.europa.eu/legal-content/HR/TXT/?uri=CELEX:32011L0036, (31/01/2016)

15 Brussels Declaration on preventing and combating trafficking in human beings http://www.belgium.iom.int/STOPConference/Conference%20Papers/brudeclaration.pdf, (31/01/2016)

16 Slavery Convention signed at Geneva on 25 September 1926, http://www.ohchr.org/EN/ProfessionalInterest/Pages/SlaveryConvention.aspx, (31/01/2016)

17 ILO Forced Labour Convention, 1930 (No. 29), http://www.ilo.org/wcmsp5/groups/public/@asia/@ro-bangkok/documents/genericdocument/wcms_346435.pdf, (31/01/2016)

18 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, Approved by General Assembly resolution 317 (IV) of 2 December 1949 http://www.ohchr.org/EN/ProfessionalInterest/Pages/TrafficInPersons.aspx, (31/01/2016)

19 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Adopted by a Conference of Plenipotentiaries convened by Economic and Social Council resolution 608(XXI) of 30 April 1956, http://www.ohchr.org/EN/ProfessionalInterest/Pages/SupplementaryConventionAbolitionOfSlavery.aspx, (31/01/2016)

20 C105 - Abolition of Forced Labour Convention, 1957 (No. 105), http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C105, (31/01/2016)

21 International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx, (31/01/2016)

22 Convention on the Elimination of All Forms of Discrimination against Women, Adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979, http://www.ohchr.org/Documents/ProfessionalInterest/cedaw.pdf, (31/01/2016)

Child1989,[23] Worst Forms of Child Labour Convention 1999,[24] Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict in 2000,[25] the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography in 2000.[26]

TRAFFICKING IN HUMAN BEINGS IN CRIMINAL LEGISLATION OF REPUBLIC OF CROATIA

Trafficking in human beings was criminalized by Art. 106 of the Criminal Code of Croatia[27]. The criminal offense consists of three constituent elements:[28] *activities*,[29] *means* [30] and *purpose*.[31]

The prison sentence **from one to ten years** shall be imposed on anyone *who by force or threat, deception, fraud, kidnapping, abuse of power or difficult position or relationship of dependence, by giving or receiving financial compensation or benefits to achieve the consent of a person having control over another person, or who otherwise recruits, transports, transfers, harbors or receives a person or exchanges or transfers control of the person to take advantage of its work through forced labor or servitude, establishing slavery or similar status, or to its exploitation for prostitution or other forms of sexual exploitation, including pornography, or for unlawful or forced marriage, or for taking parts of its body, or for its use in armed conflicts or the purpose of committing unlawful acts*[32] and the one who recruits, transports, transfers, harbors or receives a child or exchanges or transfers control of the child for taking parts of its body.[33] The same penalty shall be imposed on those who use the services of victims through forms of exploitation, knowing that the person is a victim of human trafficking.[34] There does not necessarily have to be any abuse for the offense of trafficking to be committed. It is sufficient

23 Convention on the Rights of the Child, Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx, (31/01/2016)

24 C182 - Worst Forms of Child Labour Convention, 1999, (No. 182), http://www.victorproject.eu/media/uploads_file/2014/05/05/p18n5qjk611p9fi8rs121vq31d0625.pdf, (31/01/2016)

25 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, Adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000, http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPACCRC.aspx, (31/01/2016)

26 Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, Adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000, http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPSCCRC.aspx, (31/01/2016)

27 Criminal code of Republic of Croatia, Official Gazette no.125/11, 144/12, 56/15, 61/15, *See also* Turković K., Novoselec P., Derenčinović D., i dr.: Komentar Kaznenog zakona, Zagreb, Narodne novine, 2013.g.

28 See more about this in: Božić, V: Human smuggling and trafficking in Croatian criminal legislation and jurisprudence, Collected Papers of the Law Faculty of the University of Rijeka, (1991) v.36, 2015, no 2, p.845-874.,

29 The recruitment, transportation, transfer, harboring or receipt of persons

30 Threat, use of force or other forms of coercion, abduction, fraud, abuse of power or of a position of vulnerability or giving or receiving of payments or benefits to achieve the consent of a person having control over another person

31 For the purpose of exploitation; See more about this in: Derenčinović, D.: Not for sale - on the rights of victims of trafficking after the European Court of Human Rights ruling in the case Rantsev against Cyprus and Russia, Almanacof Academy of Legal Sciences of Croatia No.1/2010

32 Art.106 Par.1 CC RC

33 Art.106 Par.2 *Ibid.*

34 Art.106 Par.4 *Ibid.*

that the perpetrator performs one of the activities (*purchases, transfers, transports, transfers, encourages or mediates in the purchase*) by any of the described means (*force, threat, fraud, kidnapping*). If there is abuse, it will only be an aggravating circumstance, which the court must take into account in sentencing.

If the victim agrees to exploitation, this has no impact on the existence of the crime of trafficking in human beings.[35] The victim of human trafficking is not criminally responsible and cannot be punished.[36]

The aggravated form of the offense is punishable by imprisonment of three to fifteen years. This will be the case if the offense is committed against a child or the offense is committed by an official in the course of practice or is committed against a larger number of persons or the life of one or more persons was knowingly endangered.[37]

Imprisonment of up to three years shall be inflicted upon those who allow the commission of the *crime of trafficking in human beings*, **maintain, suspend, conceal, damage or destroy a passport or identity document of another person,**[38] and the punishment shall also apply to those who try to commit the offense.[39]

TRAFFICKING IN HUMAN BEINGS IN CRIMINAL LEGISLATION OF REPUBLIC OF SERBIA

Serbian Constitution explicitly prohibits that anyone can be bound in slavery or servitude and prohibits any form of trafficking in human beings and forced labor, which includes sexual or economic exploitation of persons in a disadvantaged position.[40] The criminal offense of trafficking in human is stipulated under Art. 388 of the Criminal Code of Serbia.[41]

Imprisonment of three to twelve years shall be imposed on anyone who by force or threat, deception or maintaining deception, abuse of authority, trust, dependency relationship, difficult circumstances of another, by retaining identity papers or by giving or receiving money or other benefit, recruits, transports, transfers, sells, buys, mediates in sale, hides or holds another person for the purpose of labor exploitation, forced labor, commission of offenses, prostitution or other forms of sexual exploitation, begging, pornography, establishing slavery or similar relations, removal of organs or body parts or service in armed conflicts,[42] and if the crime is committed against a minor a penalty of at least five years is prescribed[43] and in this case the perpetrator will be punished even if no force, threat or any other abovementioned way of execution was used.[44]

The aggravated form of the offense is punishable by imprisonment of five to fifteen

35 Art.106 Par 7 CC RC
36 The same is stated by the Council of Europe Convention on Action against Trafficking in Human Beings, art.26. *Each Party shall, in accordance with the basic principles of its legal system, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so.*
37 Art.106 Par.3 CC RC
38 Art.106 Par.5 *Ibid.*
39 Art.106 Par.6 *Ibid.*
40 Art. 26. Prohibition of slavery, servitude and forced labor, Official Gazette of RS, No 98/2006 http://www.ustavni.sud.rs/page/view/139-100028/ustav-republike-srbije, (31/01/2016)
41 Criminal code of the Republic of Serbia, Official Gazette of RS, No 85/05, 88/05, 107/05, 72/09, 111/09, 121/12, 104/13, 108/14, *See also*: Stojanović, Z: Komentar Krivičnog zakonika, Beograd, 2012
42 Art.388/1 Ibid. http://paragraf.rs/propisi/krivicni_zakonik.html, (31/01/2016)
43 Art.388 Par.3 *Ibid.*
44 Art.388 Par.2 *Ibid.*

years, which will be the case if the offense resulted in grievous bodily injury,[45] **or imprisonment of at least ten years**[46] if there was a death of one or more persons. Aggravated form is prescribed if the offense is committed by a group, in which case a prison sentence of at least five years is prescribed[47], or by an organized criminal group, with a penalty of at least ten years.[48]

Prison sentence of six months to five years shall be imposed on a perpetrator who knows or should have known that the person is a victim of trafficking, has abused its position or enabled another person to abuse its position for exploitation,[49] if the person is a minor it will be punishable by imprisonment of one to eight years.[50] Consent to being exploited does not affect the existence of the crime.[51]

SIMILARITIES AND DIFFERENCES IN LEGAL SOLUTIONS AND PROPOSALS DE LEGE FERENDA

It is evident from Table No.1 that for the basic form of the offense the CC of Republic of Serbia prescribes a higher penalty, 3-12 years, both for the lower minimum and the upper maximum then the CC of Republic of Croatia, 1-10 years.

If the offense is committed against a child, the CC of Republic of Croatia prescribes a higher sentence, 3-15 years, while the CC of Republic of Serbia prescribes a sentence of a minimum of five years, however, with a higher lower limit of the possible penalty. Similarly, if the offense is committed against a minor, a greater range of penalties is given by the CC of Republic of Croatia, from 1-10 years, while the CC of Republic of Serbia stipulates a minimum of 5 years in prison.

If trafficking is committed by a criminal association or an organized criminal group, the CC of Republic of Croatia prescribes a maximum sentence is 5-20 years in prison, while the CC of Republic of Serbia prescribes a minimum sentence of 10 years in prison.

The perpetrator who uses the services of a victim, for whom he knows to be a victim of human trafficking or enables this for somebody else, under the CC of Republic of Serbia will be punished by imprisonment of 6 months to 5 years, while the CC of Republic of Croatia prescribes a prison sentence of 1-10 years. The legislative body of Republic of Serbia should consider increasing penalties since this is a commission of an offense despite the knowledge that it involves a victim of human trafficking.

The CC of Republic of Croatia contains the criminal charges relating to an official, as the perpetrator, as an aggravated form, *delictum proprium*, which provides for a sentence of 3-15 years in prison, but the CC of Republic of Serbia does not contain this even though it existed in the previous CC of Republic of Serbia.[52] It would be desirable to return the aforementioned incrimination to the CC RS because it was perpetrated by a person who has a special role.

45 Art.388 Par.4 *Ibid.*
46 Art.388 Par.6 *Ibid.*
47 Art.388 Par.5 *Ibid.*
48 Art.388 Par.7 *Ibid.*
49 Art.388 Par.8 *Ibid.*
50 Art.388 Par.9 *Ibid.*
51 Art.388 Par.10 *Ibid.*
52 Art.111.b.2.CC RS, Official Gazette of RS, No 26/77, 28/77, 43/77,20/79, 24/84, 39/86, 51/87, 6/89, 42/89 i 21/90, 16/90, 26/91, 197/87, 75/91,58/91, 9/92, 49/92, 51/92, 23/93, 67/93, 47/94, 17/95, 44/98, 10/02, 11/02, 80/02,39/03, 67/03 http://www.serbialaw.eu/sr/pocetna-strana/krivicno-pravo/krivicni-zakon-republike-srbije/#krivicni-zakon-republike-srbije, (31/01/2016)

The CC RS stipulates the aggravated form of the offense if the injury occurred as a form of serious bodily injury or death, while the CC RC states the endangering of one or more of lives without any such consequences as the aggravated form. The solution of the CC RC could be adopted by the CC RS considering that it is a serious crime and the mere endangering of someone's life should already be an aggravating circumstance.

Retaining, removing, concealing, damaging or destroying of travel documents or identity documents of another person[53] is criminalized by the CC RC in accordance with the recommendations of the Council of Europe Convention on Action against Trafficking in Human Beings for the reason that the perpetrator of human trafficking may not be the perpetrator of such criminal activities. However, Croatia has not criminalized *forging* of travel or personal documents nor the *obtaining and making* of the same, for the purpose of committing the crime of human trafficking, such as the Convention states, therefore, it is proposed that this be rectified in the near future and entered into the CC RC. Under the current CC of Republic of Croatia, if travel documents are counterfeited for the purpose of committing the crime of trafficking in human beings, there will be a merger of the crime of trafficking in persons and the criminal offense of forging a document. The CC RS does not contain the aforementioned provision, but has provided for the retention of identity documents as one of the means by which one can commit an offense, however, insufficiently, for retention is only one form of manipulation of personal documents, and this incrimination should be brought in line with international documents.

The consent of the victim to exploitation is irrelevant both for the CC RC and CC RS, but it also does not explicitly include a provision on non-punishment and non-prosecution of victims of trafficking in human beings, which should be necessary to consider and prescribe.

Table No.1 *Prescribed punishment for the offense of trafficking in human beings according to CC RC and CC RS*

PENALTIES FOR CRIME OF TRAFFICKING IN HUMAN BEINGS		
	Art.106 Criminal Code RC	**Art.388 Criminal Code RS**
Basic form	1-10 years	3-12 years
If the offense is committed against a child[54]	3-15 years	Minimum 5 years
If the offense is committed against a minor[55]	1-10 years	Minimum 5 years
If there s serious bodily injury	3-15 years	5-15 years
If there s serious bodily injury of a minor	3-15 years	Minimum 5 years
If death of one or more persons occurred	3-15 years	Minimum 10 years
If the offense is committed by a group	-	Minimum 5 years

53 In accordance with Art.20 of the Council of Europe Convention on Action against Trafficking in Human Beings https://www.coe.int/t/dghl/monitoring/trafficking/Docs/Convntn/CETS197_en.asp, (31/01/2016)

54 A child is a person under the age of eighteen years, Art.87 Par.7 CC RC, the same according to Art.112 Par.8 CC RS.

55 According to Art.112/9 CC RS, a minor is a person between fourteen and eighteen years of age, while 112/10 CC RS says that a minor is a person under eighteen years of age.

If the offense is committed by an organized criminal group[56] criminal organization[57]	According to Art. 329 of CC, whoever as a part of a criminal association commits or incites others to commit a criminal offense shall be punished with **3-15 years of imprisonment** for an offense for which the prescribed upper limit of penalty is 10 or 12 years, and with **5-20 years of imprisonment** and for an offense for which the prescribed upper limit of penalty is 15 years	Minimum 10 years
If one uses the services of a victim, for whom one knows is a victim of THB, or allows it	1-10 years	6 months – 5 years
If one uses the services of a minor, for whom one knows is a victim of THB, or allows it	1-10 years	1-8 years
If the offense was committed by an official in the performance of his duties	3-15 years	-
If the life of one or more persons was endangered knowingly	3-15 years	-
If the offense is committed against a larger number of people	3-15 years	-
If in order to allow the offense, one maintains, takes away, conceals, damages or destroys a travel or identity document of another person	Up to 3 years	-
Punishment for an attempt to retain, confiscate, hide, damage or destroy a travel or identity document of another person	YES	-
Punishment for attempt	According to Article 34 of CC an attempt will be punished if the criminal offense is punishable by imprisonment of five years or more	According to Article 30 of CC an attempt will be punished for the criminal offense for which the law provides punishment of imprisonment of five years or more
Consent of a victim to exploitation	Irrelevant	Irrelevant

RESEARCH AND ANALYSIS OF COMMITTED CRIMES OF TRAFFICKING IN HUMAN BEINGS AND VICTIMS IDENTIFIED

A) IN THE REPUBLIC OF CROATIA

Croatia is increasingly becoming a country of origin and country of destination and transit for trafficking in human beings. As seen in the Table no. 2, in 2014 there were a total of 17 persons charged and four convicted, 3 men and 1 woman, for the criminal offense of THB. The highest imposed unconditional sentence was prison sentence of 5-10 years, and the lowest sentence of 6-12 months.

56 According to Art.112/Par. 35 CC RS, organized criminal group is a group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more criminal offenses for which a punishment of imprisonment of four years or more is prescribed, in order to acquire direct or indirect financial or other benefits.

57 Criminal Association, according to Art.328/4CC RC, is made of at least three people who have joined together with the common purpose of committing one or more criminal offenses for which a prison sentence of three years or more is prescribed, and it does not include the association of persons accidentally for directly committing one offense.

Table No. 2. *Persons charged and convicted for the crime of trafficking in human beings in 2014*[58]

ADULT PERSONS CHARGED AND CONVICTED FOR CRIMINAL OFFENCE OF TRAFFICKING IN HUMAN BEINGS IN CROATIA IN 2014	
CHARGED	
TOTAL	17
WOMEN	3
INDICTMENTS ISSUED	14
CONVICTED	
TOTAL	4
WOMEN	1
TOTAL PRISON SENTENCE	4
PRISON 10-15 YEARS	-
PRISON 5-10 YEARS	1
PRISON 3-5 YEARS	-
PRISON 2-3 YEARS probation	1
PRISON 1-2 YEARS probation	1
PRISON 6-12 MONTHS	1

In the period 2009-2013 a total of 41 charges were submitted for the offense of trafficking in human beings and 11 convictions were issued, as shown in Table No. 3. The situation with regard to charges and convictions with respect to a particular year is quite similar, the highest being 12 charges in 2013, and most convictions - 4 in 2009.

Table No. 3. *Adult persons charged and convicted for criminal offense of trafficking in human beings in 2009-2013*[59]

CHARGES AND CONVICTIONS FOR TRAFFICKING IN HUMAN BEINGS IN CROATIA FROM 2009-2013		
YEAR	CHARGED	CONVICTED
2009	7	4
2010	8	3
2011	8	1
2012	6	2
2013	12	1
TOTAL	41	11

During 2014, there were 37 identified victims of human trafficking, 29 women and 8 men in the Republic of Croatia. According to the type of exploitation, 6 people were exploited for work, 31 people sexually, and 3 persons were exploited at the stage of transit.

58 Central Bureau of Statistics, adult offenders, application, prosecution and conviction in 2014 http://www.dzs.hr/Hrv_Eng/publication/2015/SI-1551.pdf, (31/01/2016)
59 According to Central Bureau of Statistics, http://www.dzs.hr/ , (31/01/2016)

Table No.4. *Identified victims of trafficking in human beings by sex and age in 2014*[60]

* 3 victims were exploited for both work and sexual purposes

TYPE OF EXPLOITATION 2014	W	M	Total	< 18 years	>18 years
Sexual	27	4	31		
Work	3	4	7		
Transit	2	1	3		
Total	29	8	37/41*	22	15

Thirty-seven (37) identified victims is so far the largest number of victims identified in one year. During the last ten years in Croatia a total of 122 victims of trafficking were identified as can be seen in Table No. 5.

Table No. 5. *Identified victims of trafficking from the 2005 to 2014*[61]

IDENTIFIED VICTIMS OF TRAFFICKING IN CROATIA FROM 2005-2014										
2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	**TOTAL**
6	13	15	7	8	7	14	11	4	37	**122**

The new report by the Group of Experts GRETA on action against trafficking in human beings for 2015 states that further steps are necessary to identify child victims of trafficking and victims of trafficking for the purpose of labor exploitation and also that the authorities should make efforts to further raise public awareness on THB.[62]

B) IN THE REPUBLIC OF SERBIA

Serbia is a source, transit point, and destination for men, women and children vulnerable to trafficking for sexual exploitation and forced labor, domestic work and forced marriage. Women in Serbia are exposed to sexual exploitation by Serbian criminal groups in Russia, Italy, Germany and Switzerland, men are exploited for work in Russia, Azerbaijan, Slovenia and the United Arab Emirates, and the children, especially the Roma, are submitted to sexual exploitation, forced labor, begging or doing criminal offenses.[63] Serbia has an increased number of identified victims of THB, especially the victims of forced labor. Apart from victims from the RS, there have been records on victims from Montenegro, Bosnia and Herzegovina, Bulgaria, Romania and Moldavia. The failure of the state is reflected in not providing sufficient protection which was necessary for victims during criminal proceedings because they were thus subjected to intimidation and secondary traumatization. A smaller number of traffickers were convicted, and sentences were relatively small.

60 Source: Ministry of the Interior of Republic of Croatia, Statistics for 2014, available at: https://vlada.gov.hr/UserDocsImages/Sjednice/2015/238%20sjednica%20Vlade/238%20-%2014.pdf, (05/02/2016)
61 According to the Ministry of Interior of Republic of Croatia, http://www.mup.hr/31.aspx, (05/02/2016)
62 GRETA, Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Croatia, Adopted on 20 November 2015, Published on 4 February 2016, http://www.coe.int/t/dghl/monitoring/trafficking/Docs/Reports/2nd_eval_round/GRETA_2015_33_FGR_HRV_en.pdf, (07/02/2016)
63 Report on human trafficking in Serbia in 2015, available at: http://serbian.serbia.usembassy.gov/izvestaji/izvestaj-o-trgovini-ljudima-2015-godina.html, Trafficking in human beings Report, the Office for monitoring and combating trafficking, http://www.state.gov/ g/tip/rls/tiprpt/2006/65989.htm (07/02/2016)

According to data by the Statistical Office of RS for 2014, as is apparent from Table No. 6, 17 adults were convicted for trafficking, of which the maximum penalty was imprisonment of 10-15 years, and the lowest sentence of 1-2 years.

Table No. 6. *Persons registered and convicted for the crime of trafficking in human beings in 2014*[64]

ADULT PERSONS CHARGED AND CONVICTED FOR CRIMINAL OFFENCE OF TRAFFICKING IN HUMAN BEINGS IN SERBIA IN 2014	
CHARGED	
TOTAL	21
WOMEN	2
INDICTMENTS ISSUED	17
CONVICTED	
TOTAL	17
WOMEN	2
TOTAL PRISON SENTENCE	16
PRISON 10-15 YEARS	3
PRISON 5-10 YEARS	5
PRISON 3-5 YEARS	3
PRISON 2-3 YEARS	4
PRISON 1-2 YEARS	1

In the period 2009-2013 a total of 254 people were charged and 115 people were convicted for trafficking in persons. Most were reported in 2010 (71), and most convicted in 2012 (34) as shown in Table No.7.

Table No. 7. *Persons charged and convicted for the crime of trafficking in human beings from 2009-2013*[65]

CHARGES AND CONVICTIONS FOR TRAFFICKING IN HUMAN BEINGS IN SERBIA FROM 2009-2013		
YEAR	CHARGED	CONVICTED
2009	50	20
2010	71	20
2011	53	14
2012	55	34
2013	25	27
TOTAL	254	115

In 2014, there were 125 identified victims of trafficking, of which 24 women (19.20%) and 101 men (80.80%). Men were exclusively exploited for work, 78.40%, and women were mostly sexually exploited, 12%. The data is visible in table No.8.

64 Republic Institute for Statistics: Adult offenders in the RS 2014, http://webrzs.stat.gov.rs/WebSite/Public/PageView.aspx?pKey=146, (07/02/2016)
65 *Ibid.*

Table No.8 *Identified victims of trafficking in human beings by sex and age in 2014*[66]

TYPE OF EXPLOITATION 2014	W	M	TOTAL	Minors	Adults
Sexual	15	-	15	7	8
Other type of exploitation	1	-	1	1	-
Work	-	98	98	-	98
Forced marriage	4	-	4	4	-
Forced begging	2	1	3	3	-
Illegal adoption	2	-	2	2	-
Coercion to commit criminal offenses	-	2	2	2	-
Total	24	101	125	19	106

Compared to 2014, in 2015, significantly fewer victims of human trafficking were identified, only 40, which is shown in Table No.9. The reason for the increase of identified victims in 2014 was the expansion of labor exploitation of men. In 2015, most types of exploitations were sexual exploitation of women 52.50% and forced begging 25.00%.

Table No.9. *Identified victims of trafficking in human beings by sex and age in 2015*[67]

TYPE OF EXPLOITATION 2015	W	M	Total	Minors	Adults
Sexual	21	-	21	8	13
Misuse for pornography	-	1	1	1	-
Work	2	1	3	2	1
Forced marriage	2	-	2	1	1
Forced begging	6	4	10	10	-
Illegal adoption	-	1	1	1	-
Coercion to commit criminal offenses	1	1	2	1	1
Total	32	8	40	24	16

There was a much greater number of identified victims of human trafficking in the Republic of Serbia in a period of ten years (2005-2014), as seen in Table No. 10, which amounted to 773 victims (not including data for 2015) compared to the number of identified victims in Croatia, as shown in Table No.4., which was 122 victims.

Table No. 10. *Identified victims of trafficking from the 2005 to 2015*[68]

IDENTIFIED VICTIMS OF TRAFFICKING IN SERBIA FROM 2005-2014											
2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	TOTAL
26	56	96	55	107	61	76	79	92	125	40	813

66 Center for protection of victims of trafficking, statistics for 2014, available at: http://www.centarzztlj.rs/index.php/statistika, (07/02/2016)
67 Center for protection of victims of trafficking, statistics for 2015, available at: http://www.centarzztlj.rs/index.php/statistika, (07/02/2016)
68 The Ministry of Interior of Serbia, Statistical data, available at: http://www.mup.gov.rs/cms_lat/sadrzaj.nsf/trgovina-ljudima.h, (07/02/2016)

CONCLUSION

In general, it can be concluded that the legal solutions in the national criminal legislations of the Republic of Croatia and the Republic of Serbia are in accordance with international legal documents on prescribing the prosecution and punishment of trafficking in human beings.

As for the charged and convicted persons for criminal offense of THB, the analysis shows that in Croatia there were fewer charges (17) and convictions (4) in 2014 than in Serbia, where there were 21 charges and 17 convictions. However, there is much more difference if we look at the five year period (2009-2013). In Croatia there were a total of 41 charges and 11 convictions, while in Serbia there were 254 charges and 115 convictions. If we look at the number of identified victims of THB, in the period 2005-2014, the Republic of Serbia leads with 773 victims, compared to Croatia where 122 victims were identified. Both in the Republic of Croatia and the Republic of Serbia the most common exploitation is for work and sexual exploitation of the victims of THB, with the Republic of Serbia still having a significant number exploited for forced begging.

Strengthening of international cooperation, especially between neighboring countries, is a necessary prerequisite to combat trafficking in persons, and identifying perpetrators and victims. More and more victims can be found among migrants, asylum seekers and unaccompanied persons, which demands necessary regular training of police, border police, judges, prosecutors, child-care facilities and other persons who come into contact with victims of trafficking. Due to the frequency of new forms and modes of recruitment of victims, but also of exploitation, it is necessary to conduct campaigns to raise public awareness about all forms of THB, especially for labor and sexual exploitation and trafficking of children. It is necessary to warn people who are going out of their countries to work because we should not forget that traffickers are increasingly using existing victims to force them to find new victims.

Crucial for the protection of victims, both in the CC RC and the CC RS, is to insert a provision of impunity of victims for acts committed as a direct result of having been trafficked. Also, with the objective of maximum protection of victims and to avoid exposure to re-traumatization, victims should be ensured full protection when testifying in court.

There is a need for prescribing confiscation of movable and immovable property which is used for the commission of THB, such as transport means, facilities where the victims are located, as a separate provision of the criminal offense of THB.

The CC RS should also recognize unauthorized or forced marriage as a form of exploitation under the criminal offense of THB.

Various forms of exploitation of people violate their fundamental human rights, freedom and dignity, contrary to the rules of international law; therefore, a Law on Combating Trafficking in Persons is worth considering.

De lege ferenda it is necessary, both in the CC RC in CC RS, to prescribe an aggravated form of THB when crime is committed against a significantly weaker victim: pregnant women, people with disabilities, mentally and physically ill persons or mentally disabled persons.

Furthermore, trafficking in children should be provided as a separate criminal offense in all possible forms of abuse in accordance with the Convention on the Rights of the Child and Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.

Also, for the most common form of exploitation, sexual exploitation, there is a need to enter a provision into the legal text that would distinguish it from other similar offenses, particularly related to the intermediary in prostitution, in order to avoid possible wrong practice of the legal qualification of the crime.

Finally, the conclusion is that if all the measures proposed in the paper are adopted, a big step in the fight against human trafficking would certainly be made.

REFERENCES

1. Božić, V: Trafficking in human organs as a form of organized crime, PhD Dissertation, University of Zagreb, Faculty of Law, 2012
2. Božić, V: Human smuggling and trafficking in Croatian criminal legislation and jurisprudence, Collected Papers of the Law Faculty of the University of Rijeka, (1991) v.36, 2015, no 2, p.845-874.
3. Brussels Declaration on preventing and combating trafficking in human beings http://www.belgium.iom.int/STOPConference/Conference%20Papers/brudeclaration.pdf
4. Center for protection of victims of trafficking, statistics for 2014, available at: http://www.centarzztlj.rs/index.php/statistika
5. Center for protection of victims of trafficking, statistics for 2015, available at: http://www.centarzztlj.rs/index.php/statistika
6. Central Bureau of Statistics, adult offenders, application, prosecution and conviction in 2014 http://www.dzs.hr/Hrv_Eng/publication/2015/SI-1551.pdf
7. Central Bureau of Statistics, adult offenders, application, prosecution and conviction in 2013, http://www.dzs.hr/
8. Central Bureau of Statistics, adult offenders, application, prosecution and conviction in 2012, http://www.dzs.hr/
9. Central Bureau of Statistics, adult offenders, application, prosecution and conviction in 2011, http://www.dzs.hr/
10. Central Bureau of Statistics, adult offenders, application, prosecution and conviction in 2010, http://www.dzs.hr/
11. Central Bureau of Statistics, adult offenders, application, prosecution and conviction in 2009, http://www.dzs.hr/
12. C105 - Abolition of Forced Labour Convention, 1957 (No. 105), http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C105
13. C182 - Worst Forms of Child Labour Convention, 1999, (No. 182), http://www.victorproject.eu/media/uploads_file/2014/05/05/p18n5qjk611p9fi8rs121vq31d0625.pdf
14. Convention on the Elimination of All Forms of Discrimination against Women, Adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979,
15. http://www.ohchr.org/Documents/ProfessionalInterest/cedaw.pdf
16. Convention For The Suppression Of The Traffic In Persons Of The Exploitation Of The Prostitution Of Others, UN GA Resolution 317 (IV), 2 December 1949, http://www.ohchr.org/EN/ProfessionalInterest/Pages/TrafficInPersons.aspx
17. Convention on the Rights of the Child, Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx
18. Council of Europe Convention on Action against Trafficking in Human Beings https://www.coe.int/t/dghl/monitoring/trafficking/Docs/Convntn/CETS197_en.asp

19. Council Framework Decision of 19 July 2002 on combating trafficking in human beings, OJ L 203 of 01/8/2002, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV-%3Al33137
20. Criminal code of Republic of Croatia, Official Gazette no.125/11, 144/12, 56/15, 61/15
21. Criminal code of the Republic of Serbia, Official Gazette of RS, No 85/05, 88/05, 107/05, 72/09, 111/09, 121/12, 104/13 i 108/14, http://paragraf.rs/propisi/krivicni_zakonik.html
22. Criminal code of the Republic of Serbia, Official Gazette of RS No 26/77, 28/77, 43/77, 20/79, 24/84, 39/86, 51/87, 6/89, 42/89 i 21/90, 16/90, 26/91, 197/87, 75/91, 58/91, 9/92, 49/92, 51/92, 23/93, 67/93, 47/94, 17/95, 44/98, 10/2002, 11/02, 80/02, 39/03, 67/03, http://www.serbialaw.eu/sr/pocetna-strana/krivicno-pravo/krivicni-zakon-republike-srbije/#krivicni-zakon-republike-srbije
23. Derenčinović, D.: Not for sale - on the rights of victims of trafficking after the European Court of Human Rights ruling in the case Rantsev against Cyprus and Russia, Almanac of Academy of Legal Sciences of Croatia No.1/2010
24. Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA; http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:101:0001:0011:EN:PDF
25. GRETA, Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Croatia, Adopted on 20 November 2015, Published on 4 February 2016, http://www.coe.int/t/dghl/monitoring/trafficking/Docs/Reports/2nd_eval_round/GRETA_2015_33_FGR_HRV_en.pdf
26. ILO Forced Labour Convention, 1930 (No. 29), http://www.ilo.org/wcmsp5/groups/public/@asia/@ro-bangkok/documents/genericdocument/wcms_346435.pdf
27. International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx
28. Law on Ratification of United Nations Convention against Transnational Organized Crime, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, Act, OG, IA No 14/2002, 13/2003, 11/2004
29. Law on Ratification of United Nations Convention against Transnational Organized Crime and additional protocols, available at: http://www.tuzilastvorz.org.rs/html_trz/PROPISI/konvencija_un_protiv_org_krim_lat.pdf
30. Law on Ratification of the Council of Europe Convention on Action against Trafficking in Persons, OG RH, IA no. 07/07
31. Law on Ratification of the Council of Europe Convention on Action against Trafficking in Persons,OG RS, IA no 19/2009
32. Ministry of the Interior of Republic of Croatia, Statistics for 2014, available at: https://vlada.gov.hr/UserDocsImages/Sjednice/2015/238%20sjednica%20Vlade/238%20-%2014.pdf
33. Ministry of Interior of Republic of Croatia, http://www.mup.hr/31.aspx
34. Ministry of Interior of Serbia, Statistical data, available at: http://www.mup.gov.rs/cms_lat/sadrzaj.nsf/trgovina-ljudima.h

35. Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, Adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000, http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPACCRC.aspx
36. Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, Adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000, http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPSCCRC.aspx
37. Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the united nations convention against transnational organized crime, Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, New York, 15 November 2000, https://www.unodc.org/unodc/en/treaties/CTOC/countrylist-migrantsmugglingprotocol.html
38. http://www.ohchr.org/EN/ProfessionalInterest/Pages/ProtocolTraffickingInPersons.aspx
39. Report on human trafficking in Serbia in 2015, available at: http://serbian.serbia.usembassy.gov/izvestaji/izvestaj-o-trgovini-ljudima-2015-godina.html
40. Republic Institute for Statistics: Adult offenders in the RS 2014,
41. http://webrzs.stat.gov.rs/WebSite/Public/PageView.aspx?pKey=146
42. Slavery Convention signed at Geneva on 25 September 1926, http://www.ohchr.org/EN/ProfessionalInterest/Pages/SlaveryConvention.aspx
43. Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Adopted by a Conference of Plenipotentiaries convened by Economic and Social Council resolution 608(XXI) of 30 April 1956, http://www.ohchr.org/EN/ProfessionalInterest/Pages/SupplementaryConventionAbolitionOfSlavery.aspx
44. Trafficking in Persons Report 2015 Serbia, http://serbian.serbia.usembassy.gov/izvestaji/izvestaj-o-trgovini-ljudima-2015-godina.html
45. Trafficking in human beings Report, the Office for monitoring and combating trafficking, http://www.state.gov/ g/tip/rls/tiprpt/2006/65989.htm
46. Turković K., Novoselec P., Derenčinović D., i dr.: Komentar Kaznenog zakona, Zagreb, Narodne novine, 2013.
47. United Nations Convention against Transnational Organized Crime, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, NN, MU br. 14/2002, 13/2003, 11/2004, United Nations Convention against Transnational Organized Crime, United Nations, Treaty Series, vol. 2225, p. 209
48. Stojanović, Z: Komentar Krivičnog zakonika, Beograd, 2012

UDC: 343.85:343.37(497.5)
343.85:343.53(497.5)

STRENGTHENING OF THE INSTITUTIONAL FRAMEWORK FOR COMBATING ECONOMIC CRIME IN THE REPUBLIC OF CROATIA – ABOLITION AND ESTABLISHMENT OF SPECIALIZED BODIES/ SERVICES

Ante Orlović, PhD[1]

Ministry of the Interior of the Republic of Croatia,
Police Academy, Police College

Ivica Milković

Ministry of the Interior of the Republic of Croatia,
Police Department Osječko-baranjska

Ante Gudelj, MA

Ministry of the Interior of the Republic of Croatia,
Police Department Splitsko-dalmatinska

Abstract: Fight against economic crime as complex and pervasive social phenomenon implies the existence of appropriate institutions of the rule of law, as well as their proper functioning. These institutions, which are numerous and various, act individually or in interaction and in their totality represent a specific institutional framework or system. The institutional framework should be characterized by stability, but also by flexibility, i.e. it needs to correspond with the dynamics and content of socio-economic changes. Formal and content changes of the institutional framework are under jurisdiction of the political authorities, which implement their interventions in the institutional architecture by acts (Croatian Parliament) or by regulations (Government of the Republic of Croatia). In recent period in the Republic of Croatia, the following interventions can be mentioned as the most important interventions in the structure of the institutional framework for combating economic crime*: the abolition of the Financial Police (2012), the abolition of the State Inspectorate (2013), the establishment of the Police National Office for the Suppression of Corruption and Organized Crime (2008)* within the Ministry of the Interior and *the establishment of the Independent Sector for Tax Fraud Detection (2014)* within the Ministry of Finance. Indicated formal changes of the institutional framework structure with the aim of its strengthening are necessary and justified when they are based on the analysis and strategy, i.e. when they comply with the requirements of the external and internal environment in which institutions operate. Reasons for decision making on the abolition or establishment of the above-mentioned specialized bodies/services should be more clearly elaborated in the professional and general public. From the lack of transparency and argumentation, perception stems that political authorities generally choose imprecise or improvised (ad-hoc) solutions rather than systematic and analytical when it comes to decisions on the establishment or abolition of specialized institutions/ bodies/ services.

Key words: economic crime, institutional framework, specialized bodies/services, abolition and establishment

1 E-mail: aorlovic@fkz.hr.

INTRODUCTION

Economic crime is a special type of crime which occurs in the sphere of economy, from which its complexity and omnipresence are arisen. States tend to protect their national economies from all forms of illegal activities by which certain subjects achieve illegal material gain, i.e. inflict material damage to the state and other subjects. State's and community's opposition to the economic crime is generally complex and includes a number of different aspects, the most important among them being *legal, economic, ethical, political, social and institutional*. Their intensity can be different over times, but they always need to be interconnected and coordinated. *The institutional aspect* is probably the most explicit of all, it is essential and direct, and includes a variety of activities for prevention and repression of economic crime. In terms of terminology and content, *economic crime* is a synthesis of *economy* and *crime* as relevant social facts. Economic crime is a complex social phenomenon whose study must or should be *multidisciplinary (law, economics, sociology, criminology, crime science) and multidimensional (definition, etiology, phenomenology, consequences, prevention, repression, rehabilitation)*[2]. *Economic crime* in a narrow sense *(restrictively defined)* encompasses the totality of criminal offenses committed in the sphere of management, the executive and supervisory functions in economic subjects in the pursuit of economic activities and the exchange of goods in the market. In a broader sense *(extensively defined)* economic crime includes punishable acts (criminal offenses and misdemeanors) committed even in the non-economic (social) subjects if they are related to the property management (Orlović and Pajčić, 2007:697-698).

Economic and social activities are omnipresent, dynamic, and often even complex; their protection from crime requests the establishment of appropriate institutions, i.e. institutional framework or system. The architecture of the institutional framework should be characterized by stability, but also by dynamics and flexibility. Right balance between these characteristics is also important. In the Republic of Croatia the institutional framework for combating economic crime is made of many institutions, which can be classified into different categories, according to their character (preventive, repressive, special). Political authorities and other relevant structures often make decisions on their restructuring or reforming – by the establishment or abolition of specialized bodies/ services for combating economic crime, in order to strengthen institutions and institutional framework. In the recent period, there have been several significant interventions in the indicated terms with the prevailing impression, although there are differences from case to case, that they are based more on *intuition* and *reduced logic* and less on *strategy* and *system analytics*.

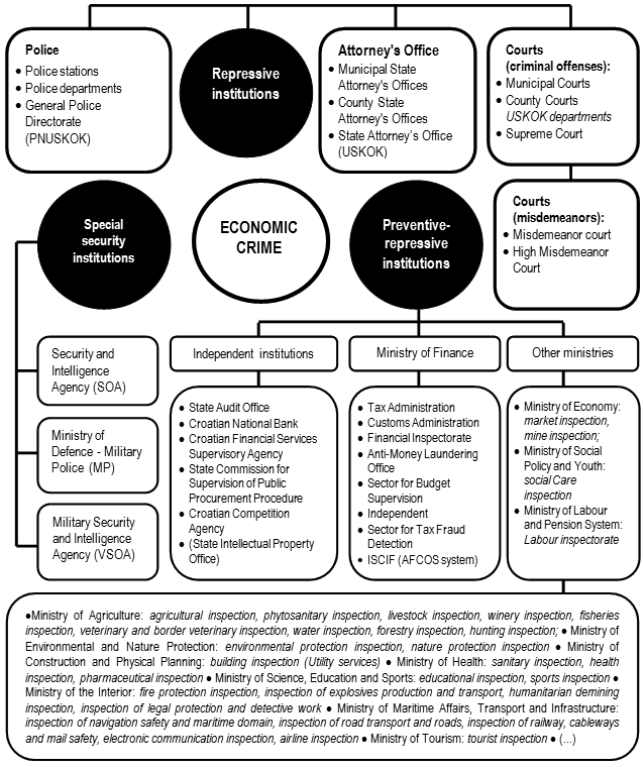
INSTITUTIONAL FRAMEWORK FOR COMBATING ECONOMIC CRIME IN THE REPUBLIC OF CROATIA

Institutions opposing economic crime are many and various. Their action and interrelation is more of a *co-existential (heterogeneous)* character and less of a *synergic (homogeneous)* character. Due to their current characteristics, it is more justified to call the totality of these institutions *a conglomerate of institutions* instead of *mechanism, organism or system of institutions*. *Conglomerate* of state institutions/ bodies/ services for prevention and suppression of economic crime in the Republic of Croatia is shown in Picture 1.[3] In principle, the main

2 See more in: Orlović, A. (2013) *Economic crime in the Republic of Croatia*, Redak-Split.

3 In depiction of the conglomerate of state bodies and institutions competent for economic crime (Picture 1.), all the ministries in the Government of the Republic of Croatia are not shown, as well as all inspections in those ministries which are shown – for example, within the Ministry of Economy, except for *market inspection* and *mine inspection*, there are also *electricity inspection, pressure equipment inspection* and *toxic chemicals management inspection* (see Act on the Inspections in the Economy). //

determinants of the institutional framework are its formal and content dimension. Formal dimension includes the number and organizational forms of institutions, while content dimension includes the competence and functioning of institutions. Indicated dimensions are not independent; they are mutually conditioned and connected.



Conglomerate of state institutions/ bodies/ services competent for prevention and suppression of economic crime in the Republic of Croatia[4]

STREGTHENING OF THE INSTITUTIONAL FRAMEWORK FOR COMBATING ECONOMIC CRIME

In accordance with the above-mentioned determinants of the institutional framework of the rule of law, its strengthening can be manifested in the formal and content sense. The content aspect is generally more relevant, it includes improvement of the platform and infrastructure of institutional action, in which one of the most important goals is that they function more as a system, and less as a *conglomerate*. The formal aspect is generally more explicit, it implies interventions in the organizational structure of the institutions or in their numbers to form immediate and visible effects - the abolition and/or the establishment of specialized bodies/services for combating economic crime.

Ministry of Finance – ISCIF = Independent Service for Combating Irregularities and Fraud

4 See more in Orlović, A., Milković, I., Gudelj, A. (2015)

THE ABOLITION OF THE SPECIALIZED BODIES/SERVICES

In recent period in the Republic of Croatia, the following interventions can be mentioned as the most important "destructive" interventions in the architecture of the institutional framework for combating economic crime*: the abolition of the Financial Police (2012) and the abolition of the State Inspectorate (2013).*

Financial Police in the Republic of Croatia was established in 1992 pursuant to the Financial Police Act (OG 89/92) as a state authority within the Ministry of Finance. Financial police ceased to operate in 2001 with the adoption, i.e. entry into force of the Act on Cessation of the Financial Police Act (OG 67/01). Financial police in the Republic of Croatia was re-established in 2004 pursuant to the Financial Police Act (OG 177/04) which states (Article 1) that its main task is financial supervision in order to strengthen financial discipline of budget payers, combating the informal economy and prevention of evasion payment of budget commitments in order to achieve budget revenues.[5] In the Proposal of the Financial Police Act created by the Government of the Republic of Croatia (November 2004) and addressed to the Croatian Parliament[6] - to justify the establishment of the Financial Police, the following things are mentioned: *After abolition of the Financial Police in 2001, Tax Administration and Customs Administration took control over supervision of budget revenues collection. The basic tasks of these administrative organizations are to determine tax and customs obligations, payment and control of the legality of the tax laws. Financial police as a smaller and operational body, whose only task is supervision, would ensure effective systems of monitoring and payment of budget revenues. Sturdy supervision system is a way to financial discipline and insurance of stability of the tax system. A particularly important task of the Financial Police is to combat the underground economy, so-called grey economy and to prevent tax evasion.*

Financial police again ceased to operate in 2012 by passing the Act on Cessation of the Financial Police Act (OG 25/12). In the Proposal of the Act on Cessation of Financial Police Act created by the Government of the Republic of Croatia (January 2012) and addressed to the Croatian Parliament[7] - to justify the abolition of the Financial Police, the following things are mentioned: *After monitoring the application of the legislation and the effectiveness of the work of inspection services in the Ministry of Finance (Tax administration, Financial Police, Financial Inspectorate, Customs administration) overlaps in the responsibilities of inspection services were identified, as well as additional burden on tax payers which are the result of non-compliance of supervision, considering that some services work independently with the same or similar powers. Based on the established facts and in accordance with the objectives of the Government of the Republic of Croatia of the need for rationalization of work in the bodies of state administration, and the recommendations of international organizations on the elimination of overlapping responsibilities between the Financial Police and other supervisory authorities, an extensive modification of the entire organization of the Financial Police is in progress, and in this regard the abolition of the Financial police is proposed.*

In relation to the above mentioned (inconsistent) facts and the chronology of events it is necessary to highlight three fundamental aspects of the context: a) *the political context* - the

5 Article 5, Paragraph 2 of the Act states that the Financial Police particularly supervises: 1. production and trade of petroleum products, tobacco products, beer, alcohol, coffee and non-alcoholic drinks in order to determine the regularity of calculation and timeliness of payment of special tax; 2. fulfillment of obligations of calculation and payment of contributions for compulsory insurance; 3. fulfillment of obligations towards the budget assumed by a concession agreement or lease agreement.

6 Croatian Parliament/ Information and documentation service, research and network information (19 January 2016) https://infodok.sabor.hr/Reports/KarticaAktaFrm.aspx?zak_id=3684

7 Croatian Parliament/ Information and documentation service, research and network information (19 January 2016) https://infodok.sabor.hr/Reports/KarticaAktaFrm.aspx?zak_id=23650

establishment of the Financial Police in both occasions happened during the reign of one political option (*right*), and its abolition on both occasions was conducted during the reign of other political option (*left*); b*) the temporal context* - promptness of decision making on the abolition/ establishment of the Financial Police (immediately after the takeover); c) *the essential context* – explanations of the decisions on the establishment/ abolition of the Financial Police are insufficiently reasoned and informative (especially in case of abolition).

State Inspectorate in the Republic of Croatia was established in 1997 pursuant to the Act on Amendments and the Act on the Structure and Scope of Ministries and State Administration Organizations (OG 131/97). On the date of the entry into force of this Act (Article 15) the State Inspectorate shall be established and it shall take over *market inspection, electricity inspection, mine inspection and pressure equipment inspection* from the Ministry of Economy; *livestock inspection, winery inspection, fisheries inspection, forestry and hunting inspection* from the Ministry of Agriculture and Forestry; *labour inspection and occupational safety inspection* from Ministry of Labour and Social Affairs and *tourist and catering inspections* from the Ministry of Tourism. Thus, inspections that were functioning in the framework of a number of ministries were excluded from the composition of these ministries and involved in the State Inspectorate as a separate body or inspection conglomerate. In 1999, State Inspectorate Act (OG 76/99) was passed, regulating the inspection activities, organization and working methods of the State Inspectorate. In 2008, new State Inspectorate Act (OG 116/08) was passed, which states (Article 2) that *the State Inspectorate shall provide inspection services relating to the supervision of activities and the application of regulations in the areas of: trade and services, labour and occupational safety, electricity supply, mining, pressure equipment, calculation, collection and payment of the sojourn tax, catering and tourism.* In the above-mentioned Act, in accordance with the indicated areas of action, different types of inspectors/ inspections operating within the State Inspectorate are categorized (Article 13-25): *economic inspection, labour inspection, electricity inspection, mine inspection, pressure equipment inspection*.

State Inspectorate was abolished or ceased to exist (01 January 2014) with the adoption or the entry into force of the Act on Amendments to the Act on the Structure and Scope of Ministries and Other Central Government Bodies (Article 10). *The activities of the State Inspectorate, within the framework defined by this Act, shall be taken over by Ministry of Finance, Ministry of Economy, Ministry of Labour and Pension System, Ministry of Agriculture and Ministry of Tourism* (Article 11). Thus, inspections that were already functioning within the State Inspectorate did not stop with the work, but were transferred in the systems of competent ministries.[8] In the Proposal of an Act on Amendments to the Act on the Structure and Scope of Ministries and Other Central Government Bodies (November 2013)[9] - to justify the abolition of the State Inspectorate, the following is mentioned: *In order to carry out inspection tasks, the Republic of Croatia has established more than 40 inspections, most of whom are operating within those central government bodies that are responsible for that administrative area, while the State Inspectorate established 6 inspections (labour inspection, occupational safety inspection, economic inspection, pressure equipment inspection, mine inspection and electricity inspection), which perform inspection activities in the administrative areas of competence of other central government bodies. In this way, with two different models of inspecting activities, a non-unified system is established and the central government bodies, performing affairs within their jurisdiction, are placed in an unequal position. Since implementation of inspection control is basic instrument of correct application of the law and also provides a direct monitoring of the situation in each administrative area, it is essential to unite inspection activities and other affairs of state administration in the same administrative area in the same government body.*

8 For example, see – Labour Inspectorate Act, Act on Inspections in the Economy, Tourist Inspection Act
9 Croatian Parliament/ Information and documentation service, research and network (21 January 2016)https://infodok.sabor.hr/Reports/KarticaAktaFrm.aspx?zak_id=25528

Explanation of the respective political decision should contain formal, principled and abstract arguments, but also essential, exact and concrete ones. The arguments which are not explicated in this explanation are, e.g.: what are the key advantages and disadvantages of two specified models of inspecting activities; why one of these models is better than the other; what are projections of the effectiveness of the new models and their comparison with the existing model; what are reflections of the change in the organizational model of inspection services on the overall system of monitoring the legality of conducting economic and social activities (interactions with other institutions).

THE ESTABLISHMENT OF THE SPECIALIZED BODIES/SERVICES

In recent period in the Republic of Croatia, the following interventions can be mentioned as the most important "constructive" interventions in the architecture of the institutional framework for combating economic crime: *the establishment of the Police National Office for the Suppression of Corruption and Organized Crime (2008) within the Ministry of the Interior and the establishment of the Independent Sector for Tax Fraud Detection (2014) within the Ministry of Finance.*

Police National Office for the Suppression of Corruption and Organized Crime (PNUSKOK) is one of three specialized bodies within the repressive institutions that make "the USKOK vertical" (the other two bodies are public prosecution USKOK and the so-called "USKOK courts"). The main features of "USKOK vertical" in organizational and procedural terms are *specialization, interaction and "integration"*.

Police National Office for the Suppression of Corruption and Organized Crime monitors and studies certain forms of corruption and organized crime, their trends and their manner of execution and directly implements complex criminal investigations of corruption and organized crime at the national level. The criteria which determine jurisdiction of PNUSKOK are *criminal investigations*: which are carried out on the territory of two or more police departments, which need international police cooperation and are carried out in the area of several countries, which are focused on prominent holders of the most serious crimes and which are related to the most complex forms of criminal offenses in the domain of complex and organized crime.[10] Structure of PNUSKOK includes headquarters (*strategic wing*) and regional centers (*operative wing*). Headquarters comprises of six specialized departments: *Organized Crime Department, Drugs Department, Department of Economic Crimes and Corruption, Criminal Analysis Department, Criminal Intelligence Department, Department for Special Criminal Investigations.* Regional centers-services for the suppression of corruption and organized crime are located in Zagreb, Split, Rijeka and Osijek.

Police National Office for the Suppression of Corruption and Organized Crime (PNUSKOK) was established within the Ministry of the Interior of the Republic of Croatia (2008) as a separate organizational unit within the Criminal Police Directorate. This happened during the reorganization of the indicated Directorate; the aim of which was to effectively oppose existing and new forms of crime by adopting the standards of the European Union.[11] The reorganization was based on the following key assumptions: *the introduction of the concept of Intelligence-Led Policing (ILP) (criminal-intelligence model), a division of crime and police conduct at levels (local, regional, national), redefining the goals of criminal investi-*

10 Regulation on the Internal Organization of the Ministry of the Interior (Article 33) (OG 70/12)
11 Reorganization was carried out as a part of the program MATRA/ Flex in cooperation with police experts from the Netherlands. Reorganization project was carried out in the period from 2005 to 2009.

gations (orientation, repression, prevention, specialization, education). In accordance with the specified parameters, PNUSKOK was established as national police body competent for the most complex forms of corruption, economic and organized crime. The basic principles of the Office's work are *flexibility and elasticity*, and they result from the same characteristics of complex forms of corruption, economic and criminal offenses from the field of organized crime. The establishment of PNUSKOK can be considered as fully justified "intervention" in the institutional framework of the Ministry of the Interior, particularly in the context of the fact that this police body is primarily established with the mission to be the counterpart to public prosecution USKOK, from which arises their close, permanent and intense cooperation.

Independent Sector for Tax Fraud Detection is an organizational unit within the Ministry of Finance established as a central national unit for the collection, control, analytical processing and data exchange. This sector was founded in 2014 – by the Regulation on Amendments to the Regulation on Internal Organization of the Ministry of Finance (OG 134/14). Within the Independent Sector for Tax Fraud Detection several services have been established: *Service for detection of organized tax fraud* (risk taxpayers, large tax evasion, international frauds in the field of VAT); *Service for the assessment of assets of natural persons and tax debtors* (illegally acquired property of significant value, assets "hidden" from the measures of enforcement or collection of tax debt); *Service for cooperation with law enforcement authorities* (State Attorney's Office, USKOK, MI - detection of criminal offenses related to economic crime, tax evasion and other public contributions).

In accordance with the problem it is necessary to highlight the fact of the previous existence of organizational units of the Ministry of Finance, which are competent for actions related to the almost identical issues - tax frauds. Supervision Sector operates as a part of the Tax administration - Central office, and within Supervision Sector the following services have been established:[12] *Service for supervision of value added tax and fight against fraud with the VAT, Service for supervision of profit tax, Service for supervision of income tax and contributions, Service for tax crimes detection.* Except in terms of content, there are certain ambiguities in terms of organization. The Central office of Tax administration and the Independent Sector for Tax Freud Detection operate within the Ministry of Finance on the same (highest, national) level and in fact the first body does not operate as a part of a second body - even though it is very akin and "subordinated" to it.

Seen from a separate perspective, the establishment and jurisdiction of the Independent Sector for Tax Fraud Detection could be justified, but seen from the context of already existing organizational structure and competence of organizational units within the Ministry of Finance - the situation becomes debatable. It has already been indicated that the Independent Sector was established based on amendments to the Regulation on the Internal Organization of the Ministry of Finance (November 2014) – but there are no any explanations of the reasons behind the adoption of this act, i.e. the fundamental reason for the establishment of this specialized body.[13]

CONCLUSION

Fight against economic crime as complex and pervasive social phenomenon implies the existence of appropriate institutions of the rule of law, as well as their proper functioning. These institutions, which are numerous and various, act individually or in interaction and

12 Regulation on the Internal Organization of the Ministry of Finance - editorial revised text (Article 32) - Website of the Tax Administration http://www.poreznauprava.hr/hr_propisi/_layouts/in2.vuk.sp.propisi.intranet/propisi.aspx#id=pro1275 (26 January 2016)

13 Government of the Republic of Croatia – Session no.192 held on November 13, 2014 (Agenda - Item 13) https://vlada.gov.hr/sjednice/192-sjednica-vlade-republike-hrvatske/15172 (27 January 2016)

in their totality represent a specific institutional framework or system. In principle, the main determinants of the institutional framework are its formal and content dimension. Formal dimension includes the number and organizational forms of institutions, while content dimension includes the competence and functioning of institutions. Indicated dimensions are not independent; they are mutually conditioned and connected. In accordance with the above-mentioned, strengthening of the institutions, i.e. institutional framework of the rule of law can be manifested in the formal and content sense. The content aspect is generally more relevant, it includes improvement of the platform and infrastructure of institutional action, in which one of the most important goals is that they function more as a system, and less as a *conglomerate*. The formal aspect is generally more explicit, it implies interventions in the organizational structure of the institutions or in their numbers to form immediate and visible effects - the abolition and/or the establishment of specialized bodies/services for combating economic crime. Indicated formal changes of the organizational structure of the institutions with the aim of their strengthening are necessary and justified when they are based on the analysis and strategy, i.e. when they comply with the requirements of the external and internal environment in which institutions operate. Reasons for decision making on the abolition or establishment of the above-mentioned specialized bodies/services should be more clearly elaborated in the professional and general public. From the lack of transparency and argumentation, perception stems that political authorities generally choose imprecise or improvised (ad-hoc) solutions rather than systematic and analytical when it comes to decisions on the establishment or abolition of specialized institutions. In accordance with the above-mentioned, there are no significant differences between the institutional solutions which are implemented on the basis of the *acts* (adopted by the Croatian Parliament) and *regulations* (adopted by the Government of the Republic of Croatia). Insufficient degree of transparency and argumentation of the publicly available documents is present in both cases. The acts generally establish/ abolish the institutions and regulations establish/ abolish specialized organizational units within the institutions. The proposals for the adoption (the amendments) of specific acts or regulations on changes (strengthening) of the institutional framework - as a rule contain certain "minimalist" reasoning (arguments) which are mainly technical in nature and are not sufficiently informative. In the background of outlined proposals there are likely some "studies" of a smaller or larger scale (depending from case to case), which for various reasons are not made public. However, even with these assumptions it could be said that the management of the institutional framework for combating economic crime is not sufficiently based on the required standards and algorithms of strategic planning and management *(evaluation of the situation - SWOT analysis - vision - mission - objectives - strategy - plans - implementation – evaluation of results - consequences)*. Deeper, more systematic and more extensive researches of the issues are necessary; they would give results that would be more relevant and useful - for both the theory and practice.

REFERENCES

1. Orlović, A. (2013) *Economic crime in the Republic of Croatia*, Redak-Split.
2. Orlović, A., Milković, I., Gudelj, A. (2015) *National System for Prevention and Repression of Economic Crime in the Republic of Croatia – a Conglomerate of Government Bodies and Institutions*, 8. Međunarodni naučni skup "Dani bezbjednosti" – Zbornik radova, str. 451-464, Nezavisni univerzitet, Fakultet za bezbjednost i zaštitu Banja Luka.
3. Orlović, A., Pajčić, M. (2007) *Police Investigations of Criminal Offenses of Economic Crime,* review, Hrvatski ljetopis za kazneno pravo i praksu, Vol. 14 – No 2/2007, p. 695-738, Hrvatsko udruženje za kaznene znanosti i praksu, Zagreb.

4. Proposal of Financial Police Act (November 2004)
5. Proposal of an Act on Amendments to the Act on the Structure and Scope of Ministries and Other Central Government Bodies (November 2013)
6. Proposal of an Act on Cessation of the Financial Police Act (January 2012)
7. Regulation on the internal organization of the Ministry of Finance (OG 32/12, 67/12, 124/12, 78/13, 102/13, 24/14, 134/14, 154/14)
8. Regulation on the internal organization of the Ministry of the Interior (OG 17/11 and 70/12)
9. State Inspectorate Act (OG 76/99 and 116/08)
10. Act on the Inspections in the Economy (OG 14/14)
11. Labour Inspectorate Act (OG 19/14)
12. Act on Amendments to the Act on the Structure and Scope of Ministries and State Administration Organizations (OG 131/97)
13. Act on Amendments to the Act on the Structure and Scope of Ministries and Other Central Government Bodies (OG 148/13)
14. Tourist Inspection Act (OG 19/14)
15. Financial Police Act (OG 89/92 and 177/04)
16. Act on Cessation of the Financial Police Act (OG 67/01 and 25/12)
17. www.vlada.gov.hr
18. www.sabor.hr
19. www.porezna-uprava.hr

UDC: 343.811
343.28/.29

PRISON OVERCROWDING – MITIGATING THE CONSEQUENCES

Zdravko Grujić, MA[1]
University of Priština, Kosovska Mitrovica, Faculty of Law
Ivan Milić, MA
University of Novi Sad, Faculty of Law

Abstract: Prison overcrowding is the characteristic of the most prison systems worldwide, including Serbia's penitentiaries. This phenomenon is not the product of contemporary criminal justice systems, it has tradition of almost two centuries, practically since the founding of the modern prisons. Prison overcrowding is a consequence of the long term and continuous growth in the number of prisoners, the role of imprisonment as main criminal sanction as well as the lack of prisons' capacity. It presents the specific crisis of prison systems and imprisonment, but also indicates the ineffectiveness of criminal justice systems and modern criminal law in general. In this paper authors are presenting the data on prison overcrowding at the global level, especially data relating to this phenomenon in the Serbian penitentiary system, discussing the factors and causes contributing to prison overcrowding and searching for the solutions to mitigate the consequences of this „chronic" problem relating to our national penitentiary system.

Key words: prison overcrowding, imprisonment, penitentiary system, prison population.

INTRODUCTION

Prison overcrowding is a serious problem in a large number of modern criminal justice systems, but also one of the primary indicators of prison crisis and crisis of the imprisonment as a penalty. This phenomenon seems to occur simultaneously with the emergence of the first modern prison facilities in the nineteenth century, when the imprisonment takes over the function of the dominant criminal sanction,[2] or, as Albrecht points out, it came as the result of a slow, steady and long term increase in the number of prisoners, developing in to a culture of "chronic overcrowding", where increases in prison entries as well as increases in sentence length have been specified as major contributors to the inflation of prison population and overcrowding.[3]

Overcrowding of penitentiary systems can be defined as a situation in prisons were there are more prisoners than the accommodation capacities allow.[4] Prison population consists not

1 zdravko.grujic@pr.ac.rs
2 In this context, Foucault points out that the „reforming" prisons is almost as old as imprisonment, it seems like a part of its program. Fuko, M., „*Nadzirati i kažnjavati – nastanak zatvora*" Novi Sad, 1997, p. 226.
3 Albrecht, H. J., Prison Overcrowding – Finding Effective Solutions, Strategies and Best Practices Against Overcrowding in Correctional Facilities, *Strategies and Best Practices against Overcrowding in Correctional Facilities Report of the Workshop*, Twelfth United Nations Congress on Crime Prevention and Criminal Justice, Tokyo, Japan, 2011, pp. 66, 83.
4 "Overcrowding means simply that the number of prisoners exceeds the official prison capacity." Tapio Lappi-Seppala, Causes of Prison Overcrowding, *Strategies and Best Practices against Overcrowding in*

only of offenders convicted to imprisonment, but also of pre-trial detainees, persons convicted for misdemeanors, persons sentenced to other criminal sanctions which include deprivation of liberty and offenders sentenced to a fine or other penalty which was substituted by imprisonment.[5] Defining and determining the capacity of penitentiary systems presents a problem that requires special attention in this work.

The primary, and basically logical, premise is that the increase number of inmates is caused by the general increase in crime rates, that is, increased crime rates cause prison overcrowding. Nevertheless, Albrecht points out, a consensus seems to exist that changes in crime rates do not contribute significantly to prison growth and overcrowding.[6] Moreover, there are different tendencies. In some jurisdictions the crime rate decreases but the prison population increases, in others both variables are stagnating, in third, the crime rates increase but the prison rate decreases.[7]

If the crime rate is not a key factor leading to prison overcrowding, the question is which factors are contributing to the emergence of this phenomenon. Regarding the penitentiary system of the Republic of Serbia, in this paper we consider basic criminal policy of the legislator, punitive policy of the courts (as represented by the structure of the imposed criminal sanctions), overuse of the pre-trial detention, early release practices, capacity and infrastructure of prison facilities and insufficient implementation of alternative criminal sanctions and measures, as basic factors that cause overcrowding, but at the same time, they represent the determinants for mitigating the consequences of prison overcrowding.

Prior to that, it is important to present prison overcrowding data and rate of prison population in a global perspective.

SHORT REVIEW ON PRISON POPULATION AND PRISON OVERCROWDING IN GLOBAL PERSPECTIVE

According to the International Centre for Prison Studies, prison population in 2013 consisted of over ten million people, while almost half of the country (or territory) had a rate of over

Correctional Facilities Report of the Workshop, Twelfth United Nations Congress on Crime Prevention and Criminal Justice, Tokyo, Japan, 2011, p. 51; European Committee for the Prevention of Torture and Inhuman and Degrading Treatment of Punishment–CPT in the General Report from 1991, in par. 46. point, inter alias, that „overcrowding is an issue of direct relevance to the CPT's mandate. All the services and activities within a prison will be adversely affected if it is required to cater for more prisoners than it was designed to accommodate". 2nd General Report on the CPT's activities covering the period 1 January to 31 December 1991, http://www.cpt.coe.int/en/annual/rep-02.htm, (27.01.2016).

5 See: Ilić, A., Prenaseljenost zatvora – fenomenološki i etiološki aspekti, *Crimen*, no. 2, 2011, p. 246.

6 „However, the assumption that the crime rates are not correlated with prison growth (and overcrowding associated with that) deserves greater scrutiny. Most of the studies assuming a non-correlation stem from North America where in fact in the face of decreasing crime rates, overcrowding problems in some jurisdictions have worsened. While this assumption may hold true for changes in crime rates in general, increases in (sensitive) crime categories which attract prison sentences, in particular long prison sentences, during the last decades have been identified as drivers of overcrowding in prisons as has the reliance on criminal law for example in the field of public order policies." Hans-Jorg Albrecht, Prison Overcrowding – Finding Effective Solutions, Strategies and Best Practices Against Overcrowding in Correctional Facilities, *op. cit.,* p. 82.

7 Lappi-Seppala comparing reported crime (excluding traffic) and number of prisoners in several countries, in the period from 1985 to 2005, and points „In Finland, total reported crime went up when prison trends were declining. In England and Wales both crime trends and prison rates were going up (but not simultaneously). In US, crime rates remained first stable and then declined, as the prison figures were rising. The Canadian crime trend looks much like one from US, but the imprisonment curve is totally different (not rising!!!)." Lappi-Seppala,T., Causes of Prison Overcrowding, *Op. cit.*, p. 51.

150 prisoners per 100,000 citizens. An analysis of comparative data from the same source show that the average rate of prison population in the last fifteen years has grown from 136 to 144.[8]

The data refer to the 222 independent countries and dependent territories. The highest prison population rate in the world had United States (716) (760 in 2008), Saint Kitts and Nevis (714), Seychelles (709), U.S. Virgin Island (539), Barbados (521), Cuba (510), Rwanda (492), Anguilla – U.K. (487), Belize (476), Russia (475) etc. Prison population rates vary considerably between different regions of the world, and between different parts of the same continent. For example, in Africa the median rate for western African countries is 46, whereas for southern African countries it is 205; median rate in Western European countries is 98, in South America 202, Caribbean countries 376.[9]

However, prison population rate data are only one indicator of prison overcrowding; the other is the capacity of prison institutions. Prison overcrowding can be rated (calculated) as the ratio between the total number of prisoners and the capacity of the prison system. Occupancy rate (overcrowding occupancy) is expressed with numerical value of 100. If the relation between the prison population and the capacity of prison institutions is higher than these values, prison overcrowding is recorded.

This raises the question of the minimum space in prisons for each prisoner, that is, determining the capacity of every prison system. There is a lack of an international consented set of criteria which could be used because the international documents concerning rights of the prisoners leave to the national legislation to establish minimum standards regarding the prisoners' accommodation. International documents stipulate only that each prisoner should have all sleeping accommodation which shall respect human dignity and, as far as possible, privacy, and meet the requirements of health and hygiene etc.[10] In regard to this, the (non) existence of national standards relating to the minimum accommodation space for each prisoner, or disparity of criteria, brings us to the fact that prison overcrowding can only be studied if we observe each individual criminal justice and prison system in the world.

However, noticing the practice in the Member States of the Council of Europe and the practice of the European Court of Human rights, regarding the violation of Article 3 of the European Convention on Human, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment – CPT, in late 2015, has adopted a document relating to minimum standards of accommodation of prisoners. The CPT recommends that the minimum standard amounts to six square meters of living space for a single-occupancy cell and sanitary facility, or a minimum of four square meters of living space per prisoner in a multi-occupancy cell and a fully-partitioned sanitary facility.[11]

International Centre for Prison Studies data, involving 204 countries (or territories), show that prison overcrowding exists in 116 prison systems (57% of countries or territories). Maximum occupancy rate was recorded at Comoro Islands (388), Benin (363), El Salvador (325),

8 Walmsley, R., *World Prison Population List,* tenth edition, London, 2013, p. 1, http://www.apcca.org/uploads/10th_Editi on_2013.pdf (15.12.2015).
9 Ibidem.
10 Standard Minimal Rules for Treatment of Prisoners (Adopted by the First United Nations Congress on the Prevention on Crime and Treatment of Offenders, held in Geneva in 1955, and approved by the Economic and Social Council by its Resolutions 663C of 31 July 1957 and 2076 (LXII) of 13 May 1977), r. 9 to 19; Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules (Adopted by the Committee of Ministers on 11 January 2006 at the 952nd meeting of the Ministers' Deputies), r. 18.1 to 18.10.
11 Also, at least 2m between the walls of the cell and 2,5m between the floor and the ceiling of a cell. See: European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment–CPT, Living *Space per prisoner in prison establishments: CTP Standards*, CTP/Inf(2015)44, Strasbourg, 2015, http://www.cpt.coe.int/en/working-documents/cpt-inf-2015-44-eng.pdf (16.01.2016).

the Philippines (316), Uganda (273), Guatemala (270), Bolivia (269) and Sudan (255).

In South America prison overcrowding exists in 92% of the states (12 of 13), with the exception of Suriname. In Africa in 82% of the countries (38 of 46), while in Asia in 61% of the countries (16 of 26). Half of the Caribbean has a problem of overcrowding (11 out of 22 countries), and 87% countries of Central America, all except Belize. In North America, the US has the availability index 102.7%, while in Canada occupancy is at the level of 96.4%.

According to the same source, prison overcrowding on the Old Continent is characteristic in almost 30% of the countries (or territory) 17 out of the 57 prison systems.[12] Maximum occupancy rate was registered in Cyprus (137), Hungary (134), Albania (125), Belgium (122) and Ukraine (120), while the lowest in Monaco (26) and San Marino (15).[13]

However, the statistics of the Council of Europe for 2013 show that the problem of prison overcrowding is more serious compared to the data of the International Centre for Prison Studies. The data on the prison population published in the Council of Europe Annual Penal Statistics, SPACE I,[14] suggest that prison overcrowding exists in 21 out of the 47 member states, which makes about 44% of the countries. Median occupancy rate is 95.5. In 10 countries occupancy rate does not exceed a value greater than 110. The main indicators for 2014 and 2015 (status on 1 January) show that the occupancy rate is the highest in Italy (143, 1), Hungary (141.8), Cyprus (131.9), Greece (128.4) and Albania (120.2).[15]

The Council of Europe data regarding Republic of Serbia, from 2013, indicate that our country is in the group of those in which occupancy rate does not exceed 110, it was 109. The prison population consisted of a number of 10,031 prisoners, and the capacity of the system was 9,200. However, only a year earlier, according to the same source, the highest occupancy rate among the member states of the Council of Europe was recorded in the Republic of Serbia - 159.3.[16] Featured capacity was 6,950 available beds, and the prison population consisted of 11,070 prisoners. Did we apply the most successful model for solving the problem of prison overcrowding or was it just a different data on capacities of prisons? The answer is in the data presented on the available accommodation capacity.

PRISON OVERCROWDING IN REPUBLIC OF SERBIA

Prison overcrowding is the characteristics of our prison system. But, rating the occupancy overcrowding, however, is not an easy task. This requires explanation. In the earlier part, we noticed that in order to rate the occupancy overcrowding we need the data about prison population in total and capacity of the prison system. In the Republic of Serbia, the official data regarding prison population is presented in the reports of Ministry of Justice, Administration for Enforcement of the Penal Sanctions (Penal Administration).[17] But, on the other hand,

12 „The phenomenon of prison overcrowding continues to blight penitentiary systems across Europe and seriously undermines attempts to improve conditions of detention." 11th General Report on the CPT's activities covering the period 1 January to 31 December 2000, par. 28, http://www.cpt.coe.int/en/annual/rep-11.htm, (27.01.2016).

13 http://www.prisonstudies.org/world-prison-brief, (15.12. 2015).

14 Aebi, M. F., Delgrande, N., Council of Europe Annual Penal Statistic – SPACE I, Prison Population, Survey, Strasbourg, 2014, p. 61.

15 Council of Europe Annual Penal Statistic, Prison Stock on Jan 1st 2014 & 2015, http://wp.unil.ch/space/space-i/prison-stock-2014-2015/, (15.12.2015).

16 Aebi, M. F., Delgrande N., Council of Europe Annual Penal Statistic – SPACE I, Survey 2012, Strasbourg, 2014, p. 39.

17 See: 4. Annual Reports on Prison Administration Work 2013, 2012, 2011, 2010, 2009, 2007. Ministry of Justice of the Republic of Serbia, Belgrade, 2014, 2013, 2012, 2011, 2010, 2008. http://www.uiks.mpravde.gov.rs/cr/articles/izvestaji-i-statistika/ (15.01.2015).

there is no official accurate data on the accommodation capacity in prisons. The official documents present only numbers of "estimated" or "maximum estimated" capacity of a prison system.

In the last few years, the official documents have shown the data of approximately 9,000 beds in prisons,[18] while in the literature the number is estimated to about 6,000,[19] taking into account the prescribed minimum amount of space (in cells) of four square meters and eight cubic meters of space per prisoner.[20] The 2007 Annual Report of the Prison Administration states that „the capacity of prisons is estimated to 6,000 beds, but if it had been determined on the basis of the recommendations set up in the European prison rules, it would have been no more than 4,500.[21] CPT in par. 34 of the Report to the Government of Serbia on the visit from 1 to 11 February 2011, published in 2012, stated that „maximum capacity of 6,500 calculated applying the standard of 4 m² of living space per prisoner".[22]

Since then, in addition to adaptation and renovation of certain prison facilities, prison system has had only two new prisons projected to accommodate 450, that is, 200 prisoners. It is also important to notice that out of the 35 prison institutions, only 29 of them are under the jurisdiction of the Penal Administration. The remaining number is located in the territory of Kosovo and Metohija and as of 1999 are no longer a part of the prison system. This fact is reflected in the total capacity of our prison system and influences the rate of prison overcrowding.

If we accept the official data on "estimated" prison capacity of 9,000 prisoners, the occupancy rate of prison overcrowding was 120 in year 2009, 125 in 2010, 123 in 2011, 114 in 2012 and 111 in 2013. However, if we accept the assessment of the CPT of 6,500 prisoners, the occupancy rate was 166 in 2009, 172 in 2010, 170 in 2011, 157 in 2012 and 154 in 2013 (!). That means that the official data show, in the five consecutive years, the occupancy rate of a 25% above the capacity decreased to 11%, which can be characterized as "acceptable", while unofficial data indicate that the prison overcrowding rate is far above the European states with highest rates. In any case, systematic measures are necessary in reducing prison overcrowding and to preserve the functioning of prison system on the basis that will allow the protection of the fundamental rights of persons deprived of their liberty.

Prison overcrowding is, of course, determined by the increase rate of the prison population. In the Republic of Serbia, starting from the 1991, enormous growth have been registered in the rates of prison population. Thus, according to data from the Strategy of developing system of the execution of criminal sanction in the Republic of Serbia from 2013 to 2020, but also other State strategy's and reports of the Penal Administration, the number of prisoners from 3,600 at the beginning of the nineties, increased to 6,000 inmates in 2000, while four years later prison population consisted of 7,800 prisoners. In October 2012 statistics registered the highest number of prisoners - 11,300. [23]

18 See: Strategija za reformu sistema izvršenja zavodskih sankcija u Srbiji, Beograd, 2005, p. 5; Strategija razvoja sistema izvršenja krivičnih sankcija u Republici Srbiji, 2013. do 2020. godine, p. 7. http://www.srbija.gov.rs/vesti/dokumenti_ sekcija.php?id=45678, (15.12.2015).

19 See: Kostić M., Dimovski D., Penološki pristup velikom broju osuđenih lica u penitencijarnom sistemu Republike Srbije, *NBP – Journal of Criminalistic and Law*, no. 2, 2015, p. 168.

20 Article 79. Zakon o izvršenju krivičnih sankcija „*Službeni glasnik Republike Srbije*" no. 55/2014;

21 2007 Annual Report on Prison Administration Work, p. 9.

22 Report to the Government of Serbia on the visit to Serbia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 1 to 11 February 2011,CPT/Inf(2012)17, http://www.cpt.coe.int/documents/srb/2012-17-inf-srb.pdf, (16.01.2016).

23 See: Strategija razvoja sistema izvršenja krivičnih sankcija u Republici Srbiji od 2013. do 2020. godine, Beograd, 2013; Strategija za smanjenje preopterećenosti smeštajnih kapaciteta u zavodima za izvršenje krivičnih sankcija u Republici Srbiji u periodu od 2010. do 2015. godine, „*Službeni glasnik Republike Srbije*" no. 53/2010 i 65/2011.

In the period between 2004 to 2013, in the structure of imposed criminal sanctions, imprisonment consisted of average of 27.62%. The lowest percentage of 22.2% was recorded in 2007, while a maximum of 34.8% in 2013. The average number of imposed prison sentences was 9,564 per annum. It is interesting that the general crime rate (total number of reported crimes) in 2005 was about 8% higher than in 2013. It confirms that the general crime rate does not correlate with an increase in the prison population, thus not with the overcrowding of prison system either.

The share of short-term prison sentences (one year), in the structure of imprisonment, was between 62.6% in 2010 and 85.3% in 2005. The average participation was 74.73%.

In the structure of the prison population, between 2009 and 2013, the convicted offenders shared average 68%. By each year the convicted offenders make 69% of the prison population in 2009 (7,463), 64% in 2010 (7,167), 66% in 2011 (7,322), 68% in 2012 (6.952) and 73% in 2013 (7.330).

Detainees are almost a quarter of the prison population (25%). They constituted 24% of the prison population in 2009 (2,601), 30% in 2010 (3,332), 28% in 2011 (3,109), 25% in 2012 (2,532) and 19% in 2013 (1,894).

The offenders sentenced to imprisonment for misdemeanor make over 2.5% of the prison population, while the remaining percentage consists of persons sentenced to other criminal sanctions of the institutional character.

However, in order to understand the situation in the penitentiary system, bearing in mind the structure of the sentence to imprisonment, overuse of detention and imposed short-term prison sentences, we will point out the total number of the inmates who, in addition to the prison population, were admitted or released from prison institutions. In 2009, the prison population consisted of 10,795 prisoners, while during that year penitentiary institutions admitted a total of 25,320 and released 24,220 prisoners. The data for 2010 show that the prison population consisted of 11,211 prisoners, 23,972 admitted and 23,556 released. In 2011, the population consisted of 11,094 prisoners, 26,856 admitted and 26,973 released. In 2012, the population was 10,226, 27,355 were admitted while 28,165 prisoners were released. In 2013, the prison population consisted of 10,031 prisoners, 25,947 admitted and 26,277 released. The presented data on the total number of prisoners in the framework of prison system show, in addition to overcrowding, the problem of prison overloading, which directly affects the functionality and sustainability of the system.

FACTORS CONTRIBUTING TO MITIGATE THE CONSEQUENCES OF PRISON OVERCROWDING

Adopting the new sets of criminal codes and laws in 2005, and going into effect of the new Criminal Code[24] and the Law on Execution of Criminal Sanctions,[25] with their significant amendments from 2009 and 2011, the Law on Juvenile Offenders,[26] and the adoption of new laws in the execution in 2014, the Law on execution of criminal sanctions[27] and Law on execution of non-custodial sanctions and measures,[28] has led to the introduction of new alternative

24 Krivični zakonik „*Službeni glasnik Republike Srbije*“ no. 85/2005; 88/2005; 107/2005; 72/2009; 111/2009; 121/2012; 104/2013, and 108/2014.
25 Zakon o izvršenju krivičnih sankcija, „*Službeni glasnik Republike Srbije*“ no. 85/2005; 72/2009; and 31/2011.
26 Zakon o maloletnim učiniocima krivičnih dela i krivičnopravnoj zaštiti maloletnih lica, „*Službeni glasnik Republike Srbije*“ no. 85/2005.
27 Zakon o izvršenju krivičnih sankcija „*Službeni glasnik Republike Srbije*“ no. 55/2014.
28 Zakon o izvršenju vanzavodskih sakncija i mera, „*Službeni glasnik Republike Srbije*“ no. 55/2014.

criminal sanctions and measures and to building normative and organizational framework for their implementation. New alternative criminal sanctions, systematized as punishment, are community service (Article 52 CC) and temporary confiscation of driver's license (Article 53 CC), and, after changes to the Criminal Code in 2009, "house arrest" as a modality for the execution of imprisonment up to one year which is executed without leaving the house where the convicted resides (Article 45, paragraph 5 of the CC).

Alternative measures of procedural character have been anticipated since 2001,[29] and a new Code of Criminal Procedure expands the possibility for their application.[30] Primarily, the principle of opportunity of criminal prosecution (Article 283, 284 CCP), as well as other measures which substitute the use of detention (Article 197, 199, 202, 208 CCP), are the basis measures which can influence the prison overcrowding.

Bearing in mind the changes in the legislation, it was expected that the implementation of new alternative criminal sanctions and measures will mitigate the consequences of prison overcrowding in the Republic of Serbia.

However, although, formally, there was a change in the traditional character of our criminal legislation, it has not significantly reflected on the penal policy of the courts. Observing the structure of the imposed criminal sanctions during the period between 2004 and 2013, it could not be concluded that there was any significant change in the system of criminal sanctions. Frequent amendments to laws and tightening the penal policy indicate that the criminal political orientation of the legislator was still directed to the "punitive populism".[31] The practice of the courts should be implemented, but also it needs to be corrective, punitive policy through the legislature, with the imposition of short-term prison sentences, on the one hand, but also with imposition of a conditional sentence, as a basic criminal justice resource, on the other.

Penal policy of courts, in the observed ten-year period, has shown that the conditional sentence is still basic criminal sanction which was imposed in more than a half of sentenced crime,[32] while the use of imprisonment as second sanction, affects prison overcrowding on the whole. The application of new alternative criminal sanctions, community sentence, "house arrest" and temporary confiscation of driver's license share around 3-3.5% of imposed criminal sanctions. The community service shared about 1%, temporary suspension of driving license 0.0%,[33] while "house arrest" makes up about 2.5% of criminal sanctions imposed. Courts show tendency to increase participation of house arrest in the structure of imposed penalties.

We pointed out that detainees make about a quarter of the prison population, which shows that courts overuse detention, although, amended criminal-procedural legislation is enabling the implementation of other measures, among others, a ban on leaving the house.

Institute of conditional release, after the amendments to the Criminal Code from 2012, is obliged for most crimes (Article 46 of the Penal Code), and in contrast to the original legal solution when it was prescribed as optional. Practice shows a significant decline of approved conditional release (parole) for the period between 2009 and 2012, and an increase in 2013 that is still far below the level of the first year of observation. In 2009 the total of conditionally

29 Zakonik o krivičnom postupku "Službeni list SRJ", no. 70/2001; and 68/2002 and "*Službeni glasnik Republike Srbije*", no. 58/2004; 85/2005; 115/2005; 85/2005; 49/2007; 20/2009; 72/2009, and 76/2010.
30 Zakonik o krivičnom postupku "*Službeni glasnik Republike Srbije*" no. 72/2011; 101/2011; 121/2012; 32/2013; 45/2013; and 55/2014.
31 See: Ristivojević, B., „Punitivni" populizam srpskog zakonodavca – kritička analiza tzv. Marijinog zakona, *Nova rešenja u kaznenom zakonodavstvu Srbije i njihova praktična primena,* Beograd, 2013, p. 323.
32 In the period from 2004 to 2013 conditional sentence shares average of 54.32% of imposed sanctions. The lowest share of 45.8% was recorded in 2004, while a maximum of 59.2% in 2010.
33 Only 55 temporary confiscation of drivers' license were imposed from year 2007 to 2014. See: Republički zavod za statistiku, no. 603, *Punoletni učinioci krivičnih dela u Republici Srbiji 2014 – prijave, optuženja i osude,* Beograd, 2015.

released was 1735 people, in 2010, 1697, 990 in 2011, 600 in 2012, and in 2013, 1,099 prisoners. Mitigation requirements for approval and mandatory application of parole may, to some extent, relieve the prisons facilities and mitigate the consequences of prison overcrowding.

Principle of opportunity of criminal prosecution has been effective in practice by prosecutors' offices since 2002. Although the results of the initial application were modest,[34] in 2010 it was applied to more than 5,000 offenders, while in 2014, similarly as in 2013, to approximately 12,500 offenders.[35]

A few notes on the existing infrastructure of prison system in Serbia. The Prison Administration is responsible for the organization, implementation and monitoring of the execution of imprisonment and other criminal sanctions and measures. Despite the efforts in adaptation and reconstruction of some of the existing facilities, and the construction of two new prisons, it should be noted that most of the prison buildings were built in the ninetieth, or in the first half of the twentieth century. The age of the buildings and architectural deficiencies cause additional difficulties in organizing the execution sanctions and measures, in accordance with minimum standards and the rights of persons deprived of liberty.

In accordance with the foregoing, we can conclude that mitigating consequences of prison overcrowding in Serbia must be the result of a systematic approach which basically must include: altered criminal policy discourse of the legislator, abandoning the "penal populism" in relation to most offences and introduction of new alternative criminal sanctions based on positive experiences in the comparative law; change of the penal policy of the courts through a wider application of alternative criminal sanctions, primarily community service and house arrest, avoiding the imposition of short-term prison sentences in order to comply with the punitive concept of the legislator; reducing the overuse of the detention, application of other measures to ensure the presence of offender in the criminal proceedings; wider application of the principle of opportunity of criminal prosecution; change in the policy of granting a conditional release; and construction of new prisons and reconstruction of existing facilities in order to organize a functional system which protect the fundamental rights of persons deprived of liberty.

CONCLUSION

The problem of prison overcrowding appears in more than half prison systems in the world, including the institutional system of execution of criminal sanctions and measures in the Republic of Serbia. Comparative indicators of prison overcrowding are determined on the basis of the total number of prisoners and the capacity of each prison system. The lack of universal international norms which define minimal standards of accommodation in prisons, presents specific problem on researching prison overcrowding, and all the data should be used with particular attention.

Determining the prison overcrowding rate in the Serbia prison system represents a specific challenge. If we rely on official data, overcrowding occupancy is on average 118, in period between 2009 and 2013. If we consider „more realistic" data, than overcrowding rate, it is 163, in the same period.

34 In the period from 28 February 2002 to 1 May 2005 on the territory of the prosecutor's offices of the City of Belgrade, the application of Article 236 of the CCP defer prosecution in 574 cases. In the period from 2013 to 2007 the regional public prosecutor's office rejected the criminal charges by applying the principle of opportunity in 10-11% of cases, with the exception of 2007 when it was applied in 8.38% cases. Ilić, G., Kiurski, J., Oportunitet krivičnog gonjenja i dosadašnja iskustva u primeni, *Pojednostavljene forme postupanja u krivičnim stvarima – regionalna krivičnoprocesna zakonodavstva i iskustva u primeni*, Beograd, 2013, p. 236, 242.

35 See: Republičko javno tužilaštvo, *Rad javnih tužilaštava na suzbijanju kriminaliteta i zaštiti ustavnosti i zakonitosti u 2013. godini*, Beograd, 2014, p.66.

Finally, without definitively "establishing" the rates of overcrowding, we can conclude, on presented data, that overcrowding and overloading are the basic characteristics of contemporary Serbian prison system. We have pointed, and therefore we conclude, that the mitigation consequences of prison overcrowding must be part of a systematic concept which, among other things, involves changing the basic criminal policy discourse of legislator, changing the penal policy of the courts, the promotion of alternative punishing of offenders for minor offenses, wider applications of alternative criminal sanctions and measures, wider application of the principle of opportunity of criminal prosecution; changing policy of granting a conditional release (parole), and modernization of a prison system infrastructure.

REFERENCES

1. Aebi, M. F., Delgrande, N., Council of Europe Annual Penal Statistic – SPACE I, Prison Population, Survey, Strasbourg, 2014,
2. Aebi, M. F., Delgrande, N., Council of Europe Annual Penal Statistic – SPACE I, Survey 2012, Strasbourg, 2014,
3. Albrecht, H. J., Prison Overcrowding – Finding Effective Solutions, Strategies and Best Practices Against Overcrowding in Correctional Facilities, *Strategies and Best Practices against Overcrowding in Correctional Facilities Report of the Workshop, Twelfth United Nations Congress on Crime Prevention and Criminal Justice*, Tokyo, Japan, 2011,
4. Annual Reports on Prison Administration Work 2013, 2012, 2011, 2010, 2009, 2007. Ministry of Justice of the Republic of Serbia, Belgrade, 2014, 2013, 2012, 2011, 2010, 2008. http://www.uiks.mpravde.gov.rs/cr/ articles/izvestaji-i-statistika/ (15.01.2015),
5. Council of Europe Annual Penal Statistic, Prison Stock on Jan 1st 2014 & 2015, dostupan na: http://wp.unil.ch/space/space-i/prison-stock-2014-2015/ (15.12.2015),
6. European Committee for the Prevention of Torture and Inhuman and Degrading Treatment of Punishment–CPT, *Living Space per prisoner in prison establishments: CTP Standards*, CTP/Inf(2015)44, Strasbourg, 2015. http://www.cpt.coe.int/en/working-documents/cpt-inf-2015-44-eng.pdf (16.01.2016),
7. Fuko, M., *Nadzirati i kažnjavati – nastanak zatvora*, Novi Sad, 1997,
8. Ilić, A., Prenaseljenost zatvora – fenomenološki i etiološki aspekti, *Crimen*, no. 2, 2011,
9. Ilić, G., Kiurski, J., Oportunitet krivičnog gonjenja i dosadašnja iskustva u primeni, *Pojednostavljene forme postupanja u krivičnim stvarima – regionalna krivičnoprocesna zakonodavstva i iskustva u primeni,* Beograd, 2013,
10. Kostić, M., Dimovski, D., Penološki pristup velikom broju osuđenih lica u penitencijarnom sistemu Republike Srbije, *NBP – Journal of Criminalistic and Law*, no. 2, Belgrade, 2015,
11. Krivični zakonik „*Službeni glasnik Republike Srbije*" no. 85/2005; 88/2005; 107/2005; 72/2009; 111/2009; 121/2012; 104/2013, and 108/2014,
12. Lappi-Seppala, T., Causes of Prison Overcrowding, *Strategies and Best Practices against Overcrowding in Correctional Facilities Report of the Workshop,* Twelfth United Nations Congress on Crime Prevention and Criminal Justice, Tokyo, Japan, 2011,
13. Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules (Adopted by the Committee of Ministers on 11 January 2006 at the 952nd meeting of the Ministers' Deputies),
14. Republički zavod za statistiku, no. 603, Punoletni učinioci krivičnih dela u Republici Srbiji 2014 – prijave, optuženja i osude, Beograd, 2015,

15. Republičko javno tužilaštvo, *Rad javnih tužilaštava na suzbijanju kriminaliteta i zaštiti ustavnosti i zakonitosti u 2013. godini*, Beograd, 2014,
16. Report to the Government of Serbia on the visit to Serbia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 1 to 11 February 2011,CPT/Inf(2012)17,http://www.cpt.coe.int/documents/srb/2012-17-inf-srb.pdf, (16.01.2016),
17. Ristivojević, B., „Punitivni" populizam srpskog zakonodavca – kritička analiza tzv. Marijinog zakona, *Nova rešenja u kaznenom zakonodavstvu Srbije i njihova praktična primena*, Beograd, 2013,
18. Standard Minimal Rules for Treatment of Prisoners (Adopted by the First United Nations Congress on the Prevention on Crime and Treatment of Offenders, held in Geneva in 1955, and approved by the Economic and Social Council by its Resolutions 663C of 31 July 1957 and 2076 (LXII) of 13 May 1977),
19. Strategija razvoja sistema izvršenja krivičnih sankcija u Republici Srbiji 2013. do 2020. godine, http://www.srbija.gov.rs/vesti/ dokumenti_ sekcija.php?id=45678, (15.12.2015).
20. Strategija za reformu sistema izvršenja zavodskih sankcija u Srbiji, Beograd, 2005,
21. Strategija za smanjenje preopterećenosti smeštajnih kapaciteta u zavodima za izvršenje krivičnih sankcija u Republici Srbiji u periodu od 2010. do 2015. godine, „*Službeni glasnik Republike Srbije*" no. 53/2010 and 65/2011.
22. Walmsley, R., *World Prison Population List*, 10th edition, London, 2013, http://www.apcca.org/ uploads/10th_Editi on_2013.pdf (15.12.2015).
23. World Prison Brief, http://www.prisonstudies.org/world-prison-brief, (15.12.2015).
24. Zakon o izvršenju krivičnih sankcija „*Službeni glasnik Republike Srbije*" no. 55/2014.
25. Zakon o izvršenju krivičnih sankcija, „*Službeni glasnik Republike Srbije*" no. 85/2005; 72/2009; and 31/2011.
26. Zakon o izvršenju vanzavodskih sakncija i mera, „*Službeni glasnik Republike Srbije*" no. 55/2014.
27. Zakon o maloletnim učiniocima krivičnih dela i krivičnopravnoj zaštiti maloletnih lica, „*Službeni glasnik Republike Srbije*" no. 85/2005.
28. Zakonik o krivičnom postupku "*Službeni list SRJ*", no. 70/2001; and 68/2002 and "*Službeni glasnik Republike Srbije*", no. 58/2004; 85/2005; 115/2005; 85/2005; 49/2007; 20/2009; 72/2009, and 76/2010.
29. Zakonik o krivičnom postupku "*Službeni glasnik Republike Srbije*" no. 72/2011; 101/2011; 121/2012; 32/2013; 45/2013; and 55/2014.
30. 2nd General Report on the CPT's activities covering the period 1 January to 31 December 1991, http://www.cpt.coe.int/en/annual/rep-02.htm, (27.01.2016)
31. 11th General Report on the CPT's activities covering the period 1 January to 31 December 2000, dostupno na: http://www.cpt.coe.int/en/annual/rep-11.htm, (27.01.2016).

UDC: 341.485-056.26/.29
341.231.14-056.26/.29

THE DISABLED AS A PROTECTED GROUP FOR THE PURPOSE OF GENOCIDE

Dragan Dakić[1]
University of Banja Luka

Abstract :The intent of this article is to explore whether the group of the disabled people could be considered as a protected group under the international instruments referring to the crime of genocide. To that end, it has been discussed whether the listed groups (national, ethnical, racial and religious) are the only groups that are protected against the "ultimate crime". The discussion refers to the theoretical understanding and judicial interpretations of the protected groups and their scope. Considering that the theory and case law provide grounds for both, exclusive and extensive, understanding of the protected groups and their scope, it has been addressed what are the common features of the groups that are indisputably protected. The findings that were reached through the discussion are that the group of the disabled has all the characteristics as the other protected groups, which qualifies them for the victim status. Bearing this in mind as well as the historical context of the concerning crime and its purpose, the teleological interpretation appears to be the most appropriate when defining which groups are protected for the purpose of genocide. Perhaps there is no possibility for the repetition of the Holocaust due to the present day historical circumstances, at least not in its latter scope. But, there is a latent tendency toward the creation of new threats against humanity arising out of new technologies. There lies the main value of this article. It contributes to the development of the ability to detect potential violations beyond those committed against the disabled people during the WWII.

Key words: disabled, genocide, protected groups.

INTRODUCTION

As it has been settled through the theory and case law, there must be three elements present to consider an act as constituting the crime of genocide. Those elements are: the identifiable act (*actus reus*), the victimized group and the intent (*mens rea*). This article refers to the second element, the victimized group, in order to explore whether the group of the disabled people could be considered as a protected group under the international instruments prohibiting the crime of genocide. The investigation begins with a general discussion about the possible ways to identify if some group could obtain the victim status. In this regard, the theory and case law of the relevant judicial bodies offer both exclusive and extensive approach to identifying protected groups.

Within the section which addresses the exclusive approach it has been referred to the *travaux préparatoires* of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), the case law of the tribunal for the Former Yugoslavia (ICTY), and scholarly arguments. Bearing in mind considerable support that the exclusive

1 E-mail: dragan.dakic@unibl.rs.

approach receives, it has been further discussed which is the scope of the protected groups and which are the operating criteria for defining the meaning of the enumerated categories. Unlike the firm exclusive approach to the issue of which groups are protected, a relaxed approach appears to dominate when defining the scope and meaning of the concepts of national, ethnical, racial and/or religious groups. In this light, the interpreting strategies applied by the international tribunals unequivocally opt for the extensive approach when defining the scope of the enumerated categories. However, in order to be identified as a victim of genocide, the targeted group needs to be exhaustive and exclusive; substantially valuable to mankind; and permanent to the degree that membership is, for the most part, involuntary. In this regard, the operation of the subjective and objective criteria for group identification have been presented which were applied in case law and argued in favor of a combined criterion, which is from its own part, inclusive in regard to the recognition of new victimized groups. This gave rise to the investigation of whether the group of the disabled could be subsumed under any of the protected groups.

The following subsection briefly addressed whether the disabled could be subsumed under the category of a national group, which has been rejected. It has been noted, however, that the disabled could be associated with the notion of a racial group since they could meet the requirements of the legal definition of that group. Considering the additional common features of the protected groups, that is, the recognition of the general group rights under the international human rights law, the following subsection addressed what reflections the group rights of the disabled could have to their recognition as a protected group. The group rights are the formal criterion, for the discussion in this subsection refers to the importance and operation of formal criteria in the relevant case law. Bearing in mind that other groups such as political or social also have recognized group rights under the human rights law but they are explicitly precluded from protection against genocide, it has been pointed to permanency as the distinctive trait between the group of the disabled and other comparable groups. The group permanency has been emphasized as a decisively significant property in the group identification by the International Criminal Tribunal for Rwanda (ICTR).

The latter section is concerned with the most appropriate interpretative approach to the group identification for the purpose of genocide keeping in mind the findings from the previous discussion that the disabled could obtain the victim status. In this section, the teleological interpretation of the Genocide Convention has been proposed. The teleological interpretation is vindicated by the historical context of the crime and its doctrinal background.

GROUP IDENTIFICATION EXCLUSIVE APPROACH

Following the wording of the cited instruments, it appears that only national, ethnical, racial or religious groups are protected against genocide while the members of any other group are precluded of collective protection. Although suchlike narrowness has been the subject of criticism,[2] it appears that the exclusive approach dominates. As to the *travaux préparatoires,* the social and economic groups for instance, were purposely excluded from the Genocide Convention,[3] which settles the limits to its interpretation[4] in regard to them. Also, the case

2 In this regard Schaack argues that the Genocide Convention merely sets a "basic minimum." See Beth Van Schaack, *The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot*, 106 YALE L.J. 2277 (1997).

3 See David Shea Bettwy, The Genocide Convention and Unprotected Groups: Is The Scope of Protection Expanding under Customary International Law, *Notre Dame Journal of International & Comparative Law* (2011) 167-196.

4 Vienna Convention on the Law of Treaties, art. 31(1), UN Doc. A/CONF.39/27 (1969)

law dominantly upheld the exclusive approach when considering protected groups.[5] In this regard, the prosecutor of the ICTY explained that a strict interpretation is needed to "justify the appellation of genocide as the 'ultimate crime.'"[6] There is also considerable academic support to such approach: Bettwy considers that the departure from the Convention's enumeration is in danger of disregarding the object and purpose of the Convention, and that the interest in maintaining the prestige of the crime of genocide is an ongoing force that limits the scope of the protected groups;[7] Schabas maintains that the Convention "does not even invite application to what might be called analogous groups."[8] A subsequent normative activity in this branch also follows a restrictive approach in the interpretation of the protected groups. The protection of social, political, and cultural groups has been considered by the drafters of the Rome Statute,[9] but the final version settled on the Convention's four-group enumeration.[10] In this regard, Plessis argues that "[i]n respect of the Rome Statute, the drafters have evinced a clear intention to limit the groups to the four identified by the Genocide Convention."[11] For, we can grant that it is crucial to determine whether the victimized group falls within the scope of one or more of the listed groups in the Article 2 of the Genocide Convention, i.e. to determine the scope of the protected groups.

THE MEANING OF ENUMERATED CATEGORIES AND OPERATING CRITERIA

As to the meaning of the categories enumerated in the Genocide Convention it should be emphasised that those are "social constructs, not scientific expressions."[12] According to the case law of the ICTR, "the concepts of national, ethnical, racial and religious groups have been researched extensively and that, at present, there are no generally and internationally accepted precise definitions thereof."[13] Similarly, ICTY considered that "to attempt to define a national, ethnical or racial group today using objective and scientifically irreproachable criteria would be a perilous exercise" and, accordingly, suggested that the targeted groups be categorized based on the specific context of each case.[14] After comprehensive analysis of the concerning case law of the ICTR and the ICTY, taking into consideration the criteria that were applied when determining the victim group, Young concludes that the Genocide Convention offers no decisive guidance as to how a victim group is to be defined.[15] Therefore, considering that

5 Except in Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, pars 511, 516.
6 *See* Prosecutor v. Karadžić and Mladić, Case No. IT-95-18-I, Transcript of Hearing, Opening Statement of Eric Ostberg, Prosecutor of the ICTY at 25 (Int'l Crim. Trib. for the Former Yugoslavia Jun. 27, 1996),
7 David Shea Bettwy, The Genocide Convention and Unprotected Groups: Is The Scope of Protection Expanding under Customary International Law *Notre Dame Journal of International & Comparative Law* (2011) 174.
8 William A. Schabas, *Genocide in International Law* (Cambridge University Press 2d ed. 2009) 117.
9 *See* United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court, Rome, It., *Text of the Draft Statute for the International Criminal Court*, 2 UN Doc. A/AC.249/1998/CRP.8 (Mar.–Apr. 1988).
10 *See* United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, It., June 15–17, 1998, *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, 13, n.2, U.N. Doc. A/CONF.183/2/Add.1 (Apr. 14, 1998).
11 Max du Plessis, *ICC Crimes*, *in* THE PROSECUTION OF INTERNATIONAL CRIMES 35, 36 (Ben Brandon & Max du Plessis eds., 2005) 11
12 William A. Schabas, *Genocide in International Law* (Cambridge University Press 2d ed. 2009) 129.
13 Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgment and Sentence, para 55 (Dec. 6, 1999),
14 Prosecutor v. Jelisić, Case No. IT-95-10-T, Judgment, para 70 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 14,1999), http://www.icty.org/x/cases/jelisic/tjug/en/jel-tj991214e.pdf.
15 Rebecca Young, How Do We Know Them When We See Them? The Subjective Evolution in the Identifi cation of Victim Groups for the Purpose of Genocide *International Criminal Law Review* 10 (2010) 21.

the introduced groups are unaccompanied by authoritative definitions, [16] there is room for examination if the disabled could be subsumed under the scope of the one or more listed groups. The starting point herein could be the determination of general features shared by the listed categories. When examining the Genocide Convention's *travaux préparatoires* and consideration of subsequent international practice Bettwy maintains that it demonstrates that the scope of protected groups is governed by three fundamental rules:[17]

1. the scope of protected groups must be exhaustive and exclusive so as to respect the prestige of the crime of genocide;

2. the groups included must be substantially valuable to mankind, so that their loss would be a great loss to the human race as a whole; [18] and

3. the groups included must be permanent and stable to the degree that membership is, for the most part, involuntary.

As to the first rule, it could be noted that membership in the group is involuntary and mostly grounded on objective traits. As to the remaining rules it should be stated that (the second rule) the inclusive concept embraces disability as a universal human variation rather than an aberration[19] and as such it is valuable to mankind; (the third rule) membership in this group is for the most part permanent and doesn't depend upon the will of its members. For, the group of the disabled meets the fundamental rules that determine the scope of the protected groups.

The case law even considers the subjective traits of the group as seen by the perpetrators leaving the determination of the group to their subjective approach.[20] The subjective determination of the protected groups was, in fact, the only applicable standard in the situation as it was in Darfur (victim and perpetrator often share a common language, religion and physical appearance). [21] The Darfur Report said that objective approaches have not been superseded, but that groups "are no longer identified only by their objective connotations but also on the basis of the subjective perceptions of the members of groups"[22] According to Verdirame, this is due to the fact that social constructs such as collective identities, and in particular ethnicity, "are not verifiable in the same manner as natural phenomena or physical facts."[23] This is line with the fact that Shaw considers that the "genocide is an attempt to destroy a group of people, regardless of how far the groups defined by perpetrators correspond to 'real' groups, inter subjectively recognized by their members or objectively identifiable by observers".[24] At the pin of the pro-subjective approach are Chalk and Jonassohn who suggested that the group

16 David Shea Bettwy, The Genocide Convention and Unprotected Groups: Is The Scope of Protection Expanding under Customary International Law, *Notre Dame Journal of International & Comparative Law* (2011) 167-196.

17 David Shea Bettwy, The Genocide Convention and Unprotected Groups: Is The Scope of Protection Expanding under Customary International Law *Notre Dame Journal of International & Comparative Law* (2011) 167-196.

18 According to the Lemkin central conception of genocide involves the loss of a unique group which impoverishes the human community. See David Luban, Calling Genocide by Its Rightful Name: Lemkin's Word, Darfur and the UN Report, (2006) 7 *Chicago Journal of International Law* 1, 16 (note added).

19 Michael Ashley Stein, Disability Human Rights, *California Law Review* (2007), 76.

20 *Prosecutor* v. *Jelisic*, Judgment, IT-95-10-T, 14 December 1999, para. 70.

21 See Yusuf Aksar, The "victimized group" concept in the Genocide Convention and the development of international humanitarian law through the practice of *ad hoc* tribunals, *Journal of Genocide Research* (2003), 5(2), June, 212.

22 Report of the International Commission of Inquiry on Darfur to the Secretary-General pursuant to Security Council resolution 1564 (2004) of 18 September 2004, 1 February 2005, UN Doc S/2005/60 para. 512.

23 Guglielmo Verdirame, Th e Genocide Definition in the Jurisprudence of the *Ad Hoc* Tribunals, *International and Comparative Law Quarterly* (2000):49, 578-598, at 588.

24 Martin Shaw, *What is Genocide?* (Polity Press, 2007), 102,3

for the purpose of genocide may even be imaginary.[25] Shaw invokes an essentially teleological objection to purely subjectively defined group as a victim of genocide because it loses sight of the crime's purpose of addressing the destruction of real collectivities as opposed to simply addressing indiscriminate terror.[26] In regard to the operation of the objective and subjective criteria for the determination of the protected group Schabas's suggestion appears to be the most acceptable. He considers that "the determination of the relevant protected group should be made on a case-by-case [basis], relying upon both objective and subjective criteria".[27] Evidently, the case law favors the combined approach to group identification.[28] As to the disabled, they are objectively determined group, but due to the widespread social model of disability, there is also room for subjective perception of the disability.

EXTENSIVE APPROACH

In any event, the scope of the listed categories cannot be interpreted narrowly. In this regard Amann suggests that the Genocide Convention definition should extend not only to the paradigm categories, but also to groups properly associated with one or more enumerated adjective.[29] If we examine whether the disabled could be subsumed under the national group we should recall that the genesis of the crime of genocide itself can be traced back to earlier international legal protection of the so-called national minorities.[30] Young offers the consideration that a national group also cannot be identified entirely subjectively or objectively.[31] An interesting parallel could be drawn from Quigley who argued that Khmers should be considered as a national group, and that the Khmer Rouge committed "auto-genocide" with intent to destroy, "in part," the Khmers as a national group in order to support his determination of the genocide in Cambodia.[32] But, considering that mass killing that occurred in Cambodia was not qualified as genocide, subsuming the disabled under the national group would require too extensive interpretation of the scope of that group. More likely, the disabled could be identified within the scope of the racial group. A racial group has been defined as "based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors."[33]

GROUP RIGHTS AND FORMAL CRITERION

Another feature common to the four protected groups is the possession of general group rights under the international human rights law. [34] The possession of the general group rights

25 Frank Chalk and Kurt Jonassohn, *Th e History and Sociology of Genocide: Analyses and Case Studies* (New Haven: Yale University Press, 1990), at 23, 25-26.
26 Martin Shaw, *What is Genocide?* (Polity Press, 2007), 102,3
27 W. A. Schabas, The Law and Genocide, in D. Bloxham and A. D. Moses (eds.). *The Oxford Handbook of Genocide Studies (2010),* 134.
28 *Prosecutor v Brdanin* , Case IT-99-36, Judgment of 1 September 2005 (Trial Chamber), para. 684.
29 Diane Marie Amann, Group Mentality, Expressivism, and Genocide, *International Criminal Law Review* 2:141.
30 Matthew Lippman, The Convention on the Prevention and Punishment of Genocide: Fifty Years Later, *Arizona Journal of International and Comparative Law* (1998):15, 415, 422;
31 Rebecca Young, How Do We Know Them When We See Them? The Subjective Evolution in the Identification of Victim Groups for the Purpose of Genocide *International Criminal Law Review* 10 (2010) 1–22, 9.
32 John Quigley, *Introduction* to Genocide in Cambodia 1, 2 (Howard J. De Nike et al. eds., 2000).
33 Trial Chamber, *Akayesu Judgement*, paras 6.3.1.304–305; Trial Chamber, *Kayishema and Ruzindana Case*, *Judgement*, para 98
34 David Shea Bettwy, The Genocide Convention and Unprotected Groups: Is The Scope of Protection Expanding under Customary International Law *Notre Dame Journal of International & Comparative Law* (2011) 191.

in international human rights law Bettwy finds as supportive to the addition of new groups to the enumeration.[35] Under this approach the group which has recognized collective rights has the victim standing for the purpose of genocide. The merit of this approach is explained by Bettwy who pointed to the example of the indigenous peoples.[36] Essentially this approach is also formalistic. The importance of the formal criterion in the identification of the protected group has been reaffirmed through relevant case law. Namely, the Tutsi were recognized as a stable and permanent protected group based on the existence of an official classification system in the legal system.[37] Also, in *Krstić,* the constitutional recognition of Bosnian Muslims as a nation has been used to identify them as a protected group.[38] The disabled meets the collective rights criterion as they are recognized at the national as well as at the international level[39] as a group which possesses group rights in the international human rights law. The protection against genocide could be considered as a status-differentiated right possessed by the disabled in the meaning of the term as defined by Baisley.[40]

If the disabled are to be classified as a social group it should be emphasized that they become identifiable members of the group even prior to birth, "in a continuous and often irremediable manner," in contrast to "the more "mobile" groups which one joins through individual voluntary commitment, such as political and economic groups."[41] For, the disabled should be clearly distinguished from other social groups for the purpose of genocide, and excluded from other social groups[42] that are non-stable and non-permanent Aksar, among others, firmly criticizes this.[43] He maintains that the political, economic and social groups have become more important than national, ethnic, racial or religious groups which is one of the reasons why non-prosecution and punishment of responsible persons involved in mass killings of human being should not be dependent on the deficiency of the definition of genocide in the Convention. [44] Aksar argues that the case law of "the ICTR proved that the protected groups are not limited to national, ethnic, racial or religious groups, and that any groups, as long as they are stable and permanent, can fall under the protection of the Genocide Convention."[45] When examining if the enumerated groups are limited or not, the ICTR considered that "the intention of the drafters of the Genocide Convention, which … was patently to ensure the protection of any stable and permanent group."[46]

HOW TO INTERPRET

At this point, it could be finally granted that the disabled could obtain the victim standing either through one of the enumerated groups or separately based on their group permanency. Also, this approach could be firmly supported through the teleological interpretation of the Genocide Convention. The teleological interpretation is one of the crucial when it comes to the implementation of the international treaties that "shall be interpreted in good faith in

35 *Ibid.*
36 *Ibid,* 167-196.
37 Judgment, *Akayesu* , (ICTR-96-4-T), Trial Chamber, 2 September 1998, §§ 170, 702.
38 Judgment, *Krstić* , (IT-98-33-T), Trial Chamber, 2 August 2001, § 559.
39 adopted UN General Assembly December 2006, GA Res A/RES/61/106, 24 January 2007,
40 Elizabeth Baisley Status-Differentiated Rights, *Journal of Human Rights*, (2012):11, 365–383.
41 Trial Chamber, *Akayesu Case*, *Judgement*, paras 6.3.1.296–297.
42 Political groups are not included in the list of protected groups; see U.N. GAOR, 3rd session, 6th Committee, p. 664.
43 Yusuf Aksar, The "victimized group" concept in the Genocide Convention and the development of international humanitarian law through the practice of *ad hoc* tribunals *Journal of Genocide Research* (2003), 5(2), June, 218.
44 *Ibid.*
45 *Ibid,* 217.
46 Trial Chamber, *Akayesu Case*, *Judgement*, paras 6.3.1.306–307.

accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".[47] For instance, theological interpretation has been applied by the Trial Chamber in *Kambanda* which found that the Genocide Convention is a milestone international effort to "liberate humanity" from this "unique" crime.[48] Perhaps the root of suchlike interpretation in this field extends to Nuremberg times, "[t]he destruction of the human group is the actual aim in view."[49] In this regard, the doctrinal background of this crime together with the purpose for its introduction should be considered. Raphael Lemkin who had proposed the term 'genocide' intended to cover by this crime the broad and systematic policy of destruction carried out by the Nazis against the Jews during the Second World War. Lemkin tried to explain the crime of killing the members of a group by the term 'genocide', which he combined from the Greek word *genos* (community, people, race) and the word *cide* (killing). Lemkin thought that the crime of genocide involves a wide range of actions, including not only deprivation of life, but also the prevention of life (abortions, sterilisations), etc.[50] In the Resolution 96(1) of 11 December 1946 of the General Assembly of the United Nations it has been stated that: [51]

Genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings; such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and to the spirit and aims of the United Nations.

Therefore, this crime occurs if the right to existence is denied to human group regardless of the basis on which a certain group was formed. For, 'the crime of genocide exists to protect certain groups from extermination or attempted extermination'.[52] The domestic codes of Romania and France firmly stand in harmony with suchlike position. Romanian code refers to "community" as to the protected groups.[53] Under the French law the genocide can be perpetrated against "[a] particular group, apart from other arbitrary criteria."[54] It offers room for the tragedies of tomorrow.[55] Amann considers that the proscription against genocide should remain open to application in novel contexts.[56]

47 Vienna Convention on the Law of Treaties, art. 31(1), UN Doc. A/CONF.39/27 (1969), quoted in Jelišić Appeal Judgement, supra note 61, para. 35 (describing principle as part of "settled jurisprudence of the Tribunal").
48 Prosecutor v. Kambanda, Case No. ICTR 97-23-S, Trial Chamber, Judgement and Sentence, para. 16 (September 4, 1998), available at http://www.ictr.org/
49 U.N. Econ. & Soc. Council, Ad Hoc Comm'n on Genocide, Relations Between the Convention on Genocide on the One Hand and the Formulation of the Nuremberg Principles and the Preparation of a Draft Code of Offences Against Peace and Security on the Other, 6, by the Secretariat, U.N. Doc. E/AC.25/3/Rev.1 (Apr. 12, 1948).
50 See Aydin Devrim, The Interpretation of Genocidal Intent under the Genocide Convention and the Jurisprudence of International Courts *The Journal of Criminal Law* (2014) 78 JCL 424
51 UN Doc A/BUR.50.
52 *Prosecutor* v. *Akayesu*, ICTR-96.4.T, Judgment, 2 September 1998, para. 469.
53 *See Romanian Criminal Code*, art. 172 (Rom.), LEGISLATIONONLINE.ORG, http://legislationline.org/download/action/download/id/1695/file/c1cc95d23be999896581124f9 dd8.htm/preview (last visited Nov. 12, 2015).
54 *See* CODE PÉNAL [C. PÉN.] art. 211-1 (Fr.) *available at* http://195.83.177.9/pdf/code_33.pdf (last visited Nov. 5, 2011).
55 Diane Marie Amann, Group Mentality, Expressivism, and Genocide, *International Criminal Law Review* 2:141.
56 *Ibid.*

CONCLUSION

Through the discussion of whether the group of the disabled could be recognized as victims of genocide we saw that the theory and case law of the relevant judicial bodies offer both, exclusive and extensive approach to the issue. As to the exclusive approach, it refers to the claim that only groups (national, ethnical, racial and religious) that were enumerated in the Genocide Convention, the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia Since 1991 and the Rome Statute, are protected against collective extermination through genocide. The exclusive approach is supported by the *travaux préparatoires* of the Genocide Convention, drafting history of the Rome Statute, the case law of the ICTY, and a significant proportion of academics. Regardless of numerous objections that could be put forward to the exclusive approach, it provides the legal certainty and the exact criteria for the identification of victimized groups.

As to the extensive approach it mostly rests on relaxed judicial interpretation of the scope of protected groups and the meaning of the enumerated categories within the international instruments. Namely, case law recognized different criteria to define the notions of national, ethnical, racial and/or religious group(s). In this regard, the international tribunals argued that there are no generally and internationally accepted precise definitions of the enumerated categories and that the objective and scientifically irreproachable criteria would be a perilous exercise if used to define the scope of the protected groups. International tribunals even recognized that a subjective perception of the perpetrators in regard to the group membership of their victims suffices to constitute the crime of genocide. The formal criterion for the group identification has been also sufficient for the crime of genocide to occur. Under the latter criterion, the victimized group shared all features with perpetrators; the only difference was a formal declaration of group membership which was certificated with identification card.

All of this brought me to the following conclusions: the group of the disabled has all the general features of a protected group that are required under the exclusive approach; if necessary, the group of the disabled could be subsumed under one of the listed groups, most likely under the racial group following objective criteria; considering the international human rights law recognition of their group rights and group permanency, the group of the disabled is distinguished from other comparable groups whose victim status has been explicitly denied; considering the historical context of the crime, its doctrinal background and the consequent interpretative strategy, the group of the disabled could obtain victim standing for the purpose of genocide.

The conclusion that the disabled could obtain victim standing either through one of the enumerated groups or separately based on their group permanency, could significantly affect other branches of law such as those that regulate abortion or prenatal diagnostic at the national level. In this regard, the operation of the malformation as a ground for abortion is highly questionable. This specially refers to *actus reus* "imposing measures intended to prevent births within the group" introduced under the article 2 of the Genocide Convention, Article 4 of the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia Since 1991 and Article 6 of the Rome Statute.

REFERENCES

1. Aydin Devrim, The Interpretation of Genocidal Intent under the Genocide Convention and the Jurisprudence of International Courts, *The Journal of Criminal Law* (2014) 78 JCL 424
2. Beth Van Schaack, The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot, *YALE L.J.* 2277 (1997).
3. Claus KREß, The Crime of Genocide under International Law, *International Criminal Law Review* 6: 461–502, 2006.
4. CODE PÉNAL [C. PÉN.] art. 211-1 (Fr.) *available at* http://195.83.177.9/pdf/code_33.pdf (last visited 15 Dec., 2015).
5. David Luban, 'Calling Genocide by Its Rightful Name: Lemkin's Word, Darfur and the UN Report' (2006) 7 *Chicago Journal of International Law* 1.
6. David Shea Bettwy, The Genocide Convention and Unprotected Groups: Is The Scope of Protection Expanding under Customary International Law, *Notre Dame Journal of International & Comparative Law* (2011).
7. Diane Marie Amann, Group Mentality, Expressivism, and Genocide, *International Criminal Law Review* 2:141.
8. Elizabeth Baisley Status-Differentiated Rights *Journal of Human Rights*, (2012):11.
9. Emily Jackson, Abortion, Autonomy and Prenatal Diagnosis, *Soc Legal Stud* (2000):9.
10. Frank Chalk and Kurt Jonassohn, The History of Sociology of Genocide: Analyses and Case Studies (Yale University Press 1990).
11. Guglielmo Verdirame, The Genocide Definition in the Jurisprudence of the *Ad Hoc* Tribunals, *International and Comparative Law Quarterly,* (2000):49.
12. Jens David Ohlin 'Attempt to Commit Genocide', in Paola Gaeta (ed.), *The UN Genocide Convention: A Commentary* (Oxford University Press, 2009).
13. John Quigley, *Introduction* to GENOCIDE IN CAMBODIA 1, 2 (Howard J. De Nike et al. eds., 2000).
14. Judgment, *Krstić* , (IT-98-33-T), Trial Chamber, 2 August 2001.
15. Martin Shaw, *What is Genocide?* (Polity Press, 2007).
16. Matthew Lippman, The Convention on the Prevention and Punishment of Genocide: Fifty Years Later, *Arizona Journal of International and Comparative Law* (1998):15.
17. Max du Plessis, *ICC Crimes*, *in* THE PROSECUTION OF INTERNATIONAL CRIMES., 36 (Ben Brandon & Max du Plessis eds., 2005).
18. Michael Ashley Stein, Disability Human Rights, *California Law Review* (2007).
19. Prosecutor v. Radislav Krstić, Case No. IT-98-33-A, Judgement, (Int'l Crim. Trib. for the Former Yugoslavia April 19, 2004).
20. *Prosecutor v Brdanin* , Case IT-99-36, Judgment of 1 September 2005 (Trial Chamber).
21. *Prosecutor* v. *Akayesu*, ICTR-96.4.T, Judgment 2 September 1998.
22. *Prosecutor v. Jelišić*, Case No. IT-95-10-T, Judgment 14 December 1999.
23. *Prosecutor v. Kambanda*, Case No. ICTR 97-23-S, Trial Chamber, Judgement and Sentence,
24. *Prosecutor v. Karadžić and Mladić*, Case No. IT-95-18-I, Transcript of Hearing, Opening Statement of Eric Ostberg, Prosecutor of the ICTY at 25 (Int'l Crim. Trib. for the Former Yugoslavia Jun. 27, 1996),

25. Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgment and Sentence, (Dec. 6, 1999).

26. Rebecca Young, How Do We Know Them When We See Them? The Subjective Evolution in the Identifi cation of Victim Groups for the Purpose of Genocide *International Criminal Law Review* 10 (2010).

27. Recommendation 874 (1979) on a European Charter on the Rights of the Child.

28. Report of the International Commission of Inquiry on Darfur to the Secretary-General pursuant to Security Council resolution 1564 (2004) of 18 September 2004, 1 February 2005, UN Doc S/2005/60.

29. Rita Joseph, *Human Rights and the Unborn Child* (Koninklijke Brill, 2009).

30. Romanian Criminal Code, LEGISLATIONONLINE.ORG,

31. The Convention on the Rights of Persons with Disabilities Adopted UN General Assembly December 2006, GA Res A/RES/61/106, 24 January 2007,

32. The Convention on the Prevention and Punishment of the Crime of Genocide Adopted by the UN General Assembly on 9 December 1948, entered into force on 12 January 1951.

33. Trial Chamber, *Kayishema and Ruzindana Case*, *Judgement*.

34. U.N. Econ. & Soc. Council, Ad Hoc Comm'n on Genocide, Relations Between the Convention on Genocide on the One Hand and the Formulation of the Nuremberg Principles and the Preparation of a Draft Code of Offences Against Peace and Security on the Other, 6, by the Secretariat, U.N. Doc. E/AC.25/3/Rev.1 (Apr. 12, 1948).

35. United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court, Rome, It., *Text of the Draft Statute for the International Criminal Court*, 2 UN Doc. A/AC.249/1998/CRP.8 (Mar.–Apr. 1988)

36. Vienna Convention on the Law of Treaties, UN Doc. A/CONF.39/27 (1969)

37. William A. Schabas, 'Darfur and the "Odious Scourge": The Commission of Inquiry's Findings on Genocide', *LJIL*, (2005) 18.

38. William A. Schabas, 'The Law and Genocide', in D. Bloxham and A. D. Moses (eds.). *The Oxford Handbook of Genocide Studies* (2010).

39. William A. Schabas, Genocide in International Law (Cambridge University Press 2d ed. 2009).

40. Yusuf Aksar, The "victimized group" concept in the Genocide Convention and the development of international humanitarian law through the practice of *ad hoc* tribunals *Journal of Genocide Research* (2003), 5(2).

UDC: 343.272(498)
343.85:343.9.02(498)

EXTENDED CONFISCATION IN ROMANIAN CRIMINAL LAW

Darian Rakitovan[1]

Abstract: The purpose of the existence of a criminal organization is not political, national, religious or any other ideological action. The main reason for organized crime, one of the most complex forms of modern criminality, is financial gain. The main motto of functioning of criminal organizations is – maximizing profit, with the lowest risk and the lowest investments, while a major part of the power of organized crime is based on illegal money.

The efficiency of a penal policy able to counter-fight this type of crime lies on controlling these means acquired from activities of a criminal nature. For this purpose, legislators are permanently searching for new, more effective means and mechanisms to fight organized crime, even if some of them are not a part of the traditional, general principles of criminal law.

The present study approaches precisely such relatively new institution in criminal matters, namely the extended confiscation, and its regulation in Romanian legislation.

Keywords: extended confiscation, the Criminal Code of Romania, the Criminal Procedure Code of Romania, organized crime.

INTRODUCTION

It is without a doubt that in modern life, and especially in the "world of crime" there are numerous possibilities presented daily to acquire illegal assets. This is especially noticeable in the sphere of organized crime, one of the most complex and the most dangerous kinds of modern crime, whose basic motive of existence is exactly to acquire (illegal) property gain.

As such, organized criminal groups persevere precisely due to the financial power that they have, and not due to the individuals that they consist of, as the members of these groups are, as a rule, "easily replaceable". Therefore, the reactions of the traditional systems of criminal justice that, before all, serve to deliver prison sentences for the perpetrators of criminal acts, cannot give the desired results. Besides, conditioned by such a legal reaction, the benefits of criminal acts most often remain at the disposal to their perpetrators after serving their prison sentences, which is *a priori* a sufficient motivation for them to risk their freedom and commit certain "profitable" criminal acts.

For these reasons, modern countries were forced to focus their legislative activity in the direction of finding and applying new legal instruments and mechanisms that would influence more efficiently the removal of the very motive to engage in organized crime. In other words, in today's condition of the state, the legislative bodies competent for the suppression of crime are more focused on the issue of property gain acquired through criminal acts, which has proven to be a much more efficient manner of combating organized crime and other forms of high financial crime.

1 E-mail: drakitovan@yahoo.com.

The consequence of this is that today, most European legislatures, adopted "new 'rules of the game' that are significantly different in comparison to those known before. This includes the changes in the evidentiary rules, with less leisure given to the suspected person, and the introduction of specialized investigation subjects and authorizations, as well as the application of the legal institution only in a limited sphere of criminal acts."[2]

In this sense, starting from the end of the previous and the beginning of this century, in most European countries there is a noticeable trend to simplify the mechanisms of freezing and confiscating assets. The simplification is mostly related to the process of providing proof, by renouncing the principle of definite proof in favour of the presupposition principle. At the same time, the burden of proof is often reversed in this matter, by transferring such burden to the person against whom proceedings are conducted. Therefore, "in combating organized crime classical methods of assets forfeiture have been abandoned in favour of more sophisticated instruments, such as extended confiscation, confiscation directly from third persons or civil confiscation."[3]

Naturally, Romania is no exception in this matter.

EXTENDED CONFISCATION IN THE CRIMINAL CODE

Following fierce political and public discussions,[4] in 2012, by adopting the Law No. 63/2012 on the changes and amendments to the Criminal Code and the Law No. 268/2009 on the Criminal Code[5], the changes made to the "old" Criminal Code of Romania of 1969 with the Article 118[2], stipulated a new legal institution in Romanian criminal law – *extended confiscation*. In fact, this is an adaptation of Article 3 of the Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Assets into Romanian legislature.

With certain alterations, this institution was retained in the New Criminal Code[6] (hereinafter abbreviated as the NCC) that is applicable starting with February 1st, 2014.

The extended confiscation is now regulated by the Article 112[1] of the NCC.

According to Article 108 of the NCC, extended confiscation is a *security measure*, along with: a) the obligation to undergo medical treatment; b) admission into a medical facility; c) prohibition to hold a certain office or to exercise a certain profession; and d) special confiscation.

As it can be noticed, the Criminal Code presupposes two forms of assets confiscation: *special confiscation* and *extended confiscation*.

In order to explain the institute of extended confiscation in more detail, a short overview of the security measure of special confiscation will be presented. This measure is regulated by provisions of Article 112 of the NCC:

(1) The following shall be subject to special confiscation:

a) assets produced by perpetrating any offense stipulated by criminal law;

b) assets that were used in any way, or intended to be used to commit an offense set forth by criminal law, if they belong to the offender or to another person who knew the purpose of their use;

2 Oliver Lajić, "Uporedni pregled sistema za istraživanje i oduzimanje imovine stečene kriminalom", in *Zbornik radova Pravnog fakulteta*, Vol. 46, No. 2, Novi Sad, 2012, p. 221.

3 Ioana-Celina Paşca, *Criminalitatea organizată în perspectiva legislațiilor europene*, Universul Juridic, București, 2015, p. 158.

4 See: Adrian Neacşu, *Confiscarea extinsa a averilor ilicite. De ce abia acum?*, available at: http://www.juridice.ro/155598/ confiscarea-extinsa-a-averilor-ilicite-de-ce-abia-acum.html.

5 Published in the Official Gazette of Romania, No. 258 of 19 April 2012.

6 Published in the Official Gazette of Romania, No. 510 of 24 July 2009.

c) assets used immediately after the commission of the offense to ensure the perpetrator's escape or the retention of use or proceeds obtained, if they belong to the offender or to another person who knew the purpose of their use;

d) assets given to bring about the commission of an offense set forth by criminal law or to reward the perpetrator;

e) assets acquired by perpetrating any offense stipulated by criminal law, unless returned to the victim and to the extent they are not used to indemnify the victim;

f) assets the possession of which is prohibited by criminal law.

(2) In the case referred to in par. (1) lett. b) and c), if the value of assets subject to confiscation is manifestly disproportionate to the nature and severity of the offense, confiscation will be ordered only in part, by monetary equivalent, by taking into account the result produced or that could have been produced and asset's contribution to it. If the assets were produced, modified or adapted in order to commit the offense set forth by criminal law, they shall be entirely confiscated.

(3) In cases referred to in par. (1) lett. b) and c), if the assets cannot be subject to confiscation, as they do not belong to the offender, and the person owning them was not aware of the purpose of their use, the cash equivalent thereof will be confiscated in compliance with the stipulations of par. (2).

(4) The stipulations of par. (1) lett. b) do not apply to offenses committed by using the press.

(5) If the assets subject to confiscation pursuant to par. (1) lett. b) – e) are not to be found, money and other assets shall be confiscated instead, up to the value thereof.

(6) The assets and money obtained from exploiting the assets subject to confiscation as well as the assets produced by such, except for the assets provided for in par. (1) lett. b) and c), shall be also confiscated.

Therefore, special or "classical" confiscation includes only the assets directly connected to a criminal offense stipulated by law, meaning those assets that were manufactured, used, given or acquired by perpetrating a criminal act stipulated by criminal law. In this manner, there needs to be a certain etiological link between the offense stipulated by criminal law and the asset that is the subject of confiscation.

Due to this fact, when it is not possible to prove that the assets are obtained by perpetrating any offense stipulated by criminal law, respectively that the assets were used in any way, or intended to be used to commit an offense set forth by criminal law; or used immediately after the commission of the offense to ensure the perpetrator's escape or the retention of use or proceeds obtained, if they belong to the offender or to another person who knew the purpose of their use; nor that the assets were given to bring about the commission of an offense set forth by criminal law or to reward the perpetrator; nor that there area assets the possession of which is prohibited by criminal law; or assets acquired by perpetrating any offense stipulated by criminal law, unless returned to the victim and to the extent they are not used to indemnify the victim, this measure of assets confiscation cannot be applied.

It is, therefore, not used to "confiscate or limit certain asset of the offender, but it is related to that, which does not belong to the offender in any case"[7], and for it to be applicable, the existence of a legal verdict is necessary that determines the execution of a certain offense stipulated by the Criminal Code, as well as the connection between this offense and the asset that is being confiscated.

"Considering that in certain conditions there is reasonable doubt, i.e. the doubt remains regarding whether a certain person acquired gain by conducting criminal offenses (which is especially characteristic for organized crime), which are not included in the specific legal

7 Zoran Stojanović, *Komentar Krivičnog zakonika*, Službeni glasnik, Beograd, 2006, p. 280.

conviction, because, for example, they could not be proven in their entirety, or the court remained in doubt and was guided by *in dubio pro reo* principle, legal mechanisms began to be introduced where a corresponding degree of doubt would be the condition required to conduct a special procedure."[8]

This is, of course, a measure that is the topic of this paper – *extended confiscation*.

Unlike safety measure of special confiscation that is related only to the assets that have been proven to originate from a specific criminal offence, meaning, that they are etiologically linked with this precise offence, by applying security measure of extended confiscation, assets that have not been proven to be acquired or that are not etiologically linked with that criminal offence, but only the illegality of their origin has been proven, can be confiscated from a legally convicted offender of a criminal act of a certain kind.

Therefore, the extended confiscation of "criminal", i.e. "unlawfully acquired" assets is called *extended*, as it does not relate only to the assets determined to originate from a specific criminal act by a legal verdict, but also those assets belonging to a convicted person for which there is a reasonable doubt of originating from other criminal acts in the person's "criminal career", i.e. the assets that the convicted was unable to prove to be obtained legally.

Thus, extended confiscation allows the confiscation of the assets whose legal origin cannot be proven, considering that this measure is based on the presumption of unlawful origin of such asset.

Provisions of Article 112[1], titled "Extended confiscation" of the current Romanian Criminal Code provide the following:

(1) Assets other than those referred to in Art. 112 are also subject to confiscation in case a person is convicted of any of the following offenses, if such offense is likely to procure a material benefit and the penalty provided by law is a term of imprisonment of 4 years or more:

a) drug and precursor trafficking;

b) trafficking in and exploitation of vulnerable people;

c) offenses on the state border of Romania;

d) money laundering offenses;

e) offenses related to the laws preventing and fighting pornography;

f) offenses related to the legislation to combat terrorism;

g) establishment of an organized crime group;

h) offenses against assets;

i) failure to observe the law on firearms, ammunition, nuclear materials and explosives;

j) counterfeiting of currency, stamps or other valuables;

k) disclosure of economic secrets, unfair competition, violation of the stipulations on import or export operations, embezzlement, violations of the laws on imports and exports, as well of the laws on importing and exporting waste and residues;

l) gambling offenses;

m) corruption offenses, offenses assimilated thereto, as well as offenses against the financial interests of the European Union;

n) tax evasion offenses;

a) offenses related to customs regulations;

p) fraud committed through computer systems and electronic payment means;

8 Đorđe Ignjatović, Milan Škulić, *Organizovani kriminalitet,* Pravni fakultet Univerziteta u Beogradu, Beograd, 2012, p. 383.

q) trafficking in human-origin organs, tissues or cells.

(2) Extended confiscation is ordered if the following conditions are cumulatively met:

a) the value of assets acquired by a convicted person within a time period of five years before and, if necessary, after the time of perpetrating the offense, until the issuance of the indictment, clearly exceeds the revenues obtained lawfully by the convict;

b) the court is convinced that the relevant assets originate from criminal activities such as those provided in par. (1).

(3) In enforcing the stipulations of par. (2), the value of the assets transferred by a convicted person or by one-third party to a family member or to a legal entity over which that convicted person has control shall also be considered.

(4) Sums of money may also constitute assets under this Article.

(5) In determining the difference between the legitimate income and the value of the assets acquired, the value of the assets upon their acquisition and the expenses incurred by the convicted person and their family members shall be considered.

(6) If the assets to be seized are not to be found, money and other assets shall be confiscated instead, up to the value thereof.

(7) The assets and money obtained from exploiting the assets subject to confiscation as well as the assets produced by such shall be also confiscated.

(8) Confiscation shall not exceed the value of assets acquired during the period referred to in par. (2) that are above a convicted person's lawfully obtained income.

It can be noticed that the provisions of Article 112[1] of the NCC, apart from the criteria of the extent of the punishment and the nature of a criminal act suitable to proceed with the confiscation of the material assets of the offender, presuppose the criteria of itemized listing of criminal acts for which measures of extended confiscation can be applied. Therefore, this is a combined system that deviates from the system recommended by the Council Framework Decision 2005/212/JHA and the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism[9] of 16 May 2005, also known as the Warsaw Convention or CETS 198. By combining these two systems (system of itemized listing and system of determining criminal acts according to certain criteria), a situation can occur that some of the criminal acts on the list do not meet the minimum requirements demanded by the other system, which actually leads to a kind of "neutralization"[10] of certain categories of criminal acts.

Apart from that, the provisions of the NCC related to the extended confiscation do not include all the criminal acts presupposed in the two mentioned international documents. Namely, the Code does not contain criminal acts of kidnapping and extortion (criminal acts that are frequently conducted by exponents of organized crime), unlawful deprivation of liberty and hostage taking, as well as other criminal acts often utilized by organized criminal groups whose aim is to intimidate and extort money[11], which acts are itemized in the Annex of the Warsaw Convention. We believe that the omission of these criminal acts is unjustified. On the other hand, the Code lists certain criminal acts that are not included in the Warsaw Convention, nor in the mentioned Framework Decision, such is the criminal act of disloyal competition, causing false bankruptcy, embezzlement or tax evasion. Taking this into consideration, we agree with the option that the "manner in which the Romanian legislator regulated the circumference of extended confiscation is not the most fortunate"[12].

9 Ratified by Law No. 420/2006, published in the Official Gazette of Romania, No. 968 of 4 December 2006.
10 Flaviu Ciopec, *Confiscarea extinsă: între de ce și cât de mult?*, Editura C. H. Beck, București, 2015, p. 121.
11 See: Viorel Pașca, *Curs de drept penal. Parte generală*, Ediția a II-a, Universul Juridic, București, 2012, p. 513.
12 Flaviu Ciopec, *op. cit.*, p. 121.

In accordance with Article 2 of the NCC, security measures can be ruled against persons who committed actions covered by criminal law. According to Article 107 of the NCC, security measures seek to eliminate any state of hazard and to prevent the commission of offenses provided by criminal law. These are taken against a person who committed an unjustified offense under criminal law, and may also be taken in case no penalty is applied to the offender.

However, in order for the security measure of extended confiscation to be applicable in specific cases, it is necessary that the action is a criminal offence (from those criminal offences itemized in the law) and that the person conducting the offence is convicted for that offence. Therefore, in the case of extended confiscation a "higher standard"[13] is demanded, considering that it is necessary for the act to be a criminal act and that it is convictable by law. The defendant can be a natural person of age, or a legal person. Considering that according to Article 114 of the NCC, juveniles can be issued exclusively to educational measure and not to the main penalties, the security measure of extended confiscation is not applicable to them.

Apart from the listed obligatory condition, in order for the aforementioned criminal actions to lead to extended confiscation, four other obligatory conditions must be cumulatively fulfilled, two of which are related to the nature and the gravity of the criminal offense: a) that the offense is likely to procure a material benefit; and b) that the penalty provided by law is a term of imprisonment of 4 years or more; and the remaining two which are related to the confiscated assets: a) that the value of assets acquired by a convicted person within a time period of five years before and, if necessary, after the time of perpetrating the offence, until the issuance of the indictment, clearly exceeds the revenues obtained lawfully by the convict; and b) that the court is convinced that the relevant assets originate from criminal activities such as those provided in par. (1).

It is our opinion that the fulfilment of these obligatory conditions expressly demanded by the NCC contains significant shortcomings.

As far as the first group of requirements related to the nature and the gravity of the act is concerned, we believe that it is justifiable to legally specify that this concerns only the criminal acts that potentially secure property gain, considering that "not all criminal offences have this potential despite the generic title of the chapter of the Criminal Code in which they are listed".[14] However, we believe that conditioning extended confiscation by a maximum sentence provided by law to be unjustified. This is foremost due to the fact that such legal formulation makes it impossible to apply this measure to certain criminal acts specific to organized crime groups, such as pressing into forced or compulsory labour (Article 212 of the NCC), exploitation of beggary (Article 214 par. (1) of the NCC), use of underage persons for mendicancy (Article 215 of the NCC), use of an exploited person's services (Article 216 of the NCC), misrepresentation (Article 244 par. (1) of the NCC), etc., for which the maximum sentence provided is less than 4 years of imprisonment. At the same time, Romanian legislature "determines the measure of special (extended, *a.n.*) confiscation according to the danger to society *in rem*, which is justified by the unlawful nature of assets acquisition, and not by the gravity of the criminal penalty itself. That, which is unlawfully acquired remains so, regardless whether the perpetrator of the act used to acquire such an asset is punished by sentencing."[15]

As far as the second group of the necessary requirements for the application of the extended confiscation is concerned, namely those related to the assets that can be confiscated, we believe that by determining a five-year period of audit of the origin of the assets prior to committing the criminal offence, this measure is given a too "rigid character"[16]. We are of opinion

13 *Ibidem*, p. 120.
14 Viorel Paşca, *op. cit.*, p. 513.
15 *Ibidem*.
16 *Ibidem*, p. 512.

that the formulation used in the Council Framework Decision 2005/212/JHA, according to which acquired gain is audited "during a period prior to conviction which is deemed reasonable by the court in the circumstances of the particular case"[17] ("and, if necessary, after the time of perpetrating the offense, until the issuance of the indictment"[18]), is much more adequate. "The measure of confiscating illegally acquired assets is not subjected to statute of limitation, so if the criminal activity lasted longer than five years it would not be an obstacle to confiscate the assets acquired in this period. On the other hand, if the criminal activity is conducted in a shorter period, for example, from two to three years, the imperative character of the provided five-year period would entail unnecessary income and assets checks of the perpetrator."[19]

The second imperative condition within this group is of subjective nature – the conviction of the court that the assets originate from criminal activity of the same type that was the reason to issue a verdict. Therefore, according to this legal solution, the conviction of the court that the acquired assets are of unlawful origin is not sufficient, but it must be determined that that assets originate from criminal activity of the same nature as the actions expressly provided in the law. However, this legal formulation cannot be considered suitable either. On the contrary, the alternative formulation given in Article 3 par. (2), lett. c) of the Council Framework Decision 2005/212/JHA according to which "where it is established that the value of the assets is disproportionate to the lawful income of the convicted person and a national court based on specific facts is fully convinced that the assets in question has been derived from the criminal activity of that convicted person" is considered suitable, as it does not demand that the criminal activities are of the same nature as those criminal activities that were the basis of the conviction. Only in this case, the fact that a certain person conducted criminal activities of certain gravity, in continuity during a certain period of time, and that at the same time did not have other legal income, could be sufficient evidence for the court to declare unlawful origin of acquired income during the period of criminal activity.

(3) In enforcing the stipulations of par. (2), the value of the assets transferred by a convicted person or by one-third party to a family member or to a legal entity over which that convicted person has control shall also be considered.[20]

We believe that, apart from the listed subjects, this should include the "subjects that the convicted person based relations similar to those between spouses or between parents and children, conditioned that they live in a common household." What remains unclear is why the legislator excluded such formulation that was inserted in Article 118 of the "old" Criminal Code by the Law No. 63/212 on the changes and additions of the Criminal Code and the Law No. 286/2009 from the text of the New Criminal Code.

(4) Sums of money may also constitute assets under this Article.[21]

Specifying thus is unnecessary, considering that in criminal law, the term *assets* includes both the immovable and mobile assets, and money is mobile assets.

(5) In determining the difference between the legitimate income and the value of the assets acquired, the value of the assets upon their acquisition and the expenses incurred by the convicted person and their family members shall be considered.[22]

(6) If the assets to be seized are not to be found, money and other assets shall be confiscated instead, up to the value thereof.[23]

17 Article 3 par. (2) lett. b) of the Council Framework Decision 2005/212/JHA.
18 Article 112[1] par. (2) lett. a) of the NCC.
19 Viorel Paşca, *op. cit.*, p. 514.
20 Article 112[1] par. (3) of the NCC.
21 Article 112[1] par. (4) of the NCC.
22 Article 112[1] par. (5) of the NCC.
23 Article 112[1] par. (6) of the NCC.

The value taken into consideration is the value that the asset had in the moment of acquisition, and not the value it had once it was discovered in the property of the accused. This legal solution is imposed considering that time that passed between these two moments can influence the value of assets.

While determining total assets, the assets that were the property of the accused in the observed time period, and that are no longer in their possession in the moment of the investigation must be taken into consideration, while assets produced or acquired through a criminal act that the subject is convicted of cannot be taken into consideration, as it is covered by the safety measure of special confiscation.

(7) The assets and money obtained from exploiting the assets subject to confiscation as well as the assets produced by such shall be also confiscated.[24]

(8) Confiscation shall not exceed the value of assets acquired during the period referred to in par. (2) that are above a convicted person's lawfully obtained income.[25]

Following the evaluation of the total assets, the value gained is compared with the legal earnings of the convicted from the observed time period. Extended confiscation can be applied only if the value of the total assets exceeds the subject's legally earned revenues. However, the confiscation cannot be the consequence of just any difference in the value, considering that the law demands that the difference leading to the utilization of this security measure to be *obvious*. Thus, the difference must be evaluated *in concreto* in each individual case, so this term enters "into the discretionary right of the criminal judge called upon deciding based on the circumstances of the case."[26]

It is necessary to mention that the rules governing the extended confiscation have been several times referred to the Constitutional Court of Romania.

"In the decisions delivered in this matter the Constitutional Court held that the norms of Criminal Code on extended confiscation are constitutional insofar they are not applied to acts committed and to assets acquired before the entry in force of Law No. 63/2012 amending and supplementing the Romanian Criminal Code and Law No. 286/2009 on the Criminal Code."[27]

Therefore, in accordance with the provisions of Article 15 of the Constitution of Romania[28] that prohibits retroactive application of criminal law, extended confiscation can be declared only for the criminal acts committed after passing of the Law No. 63/2012 that introduced this institution for the first time into Romanian criminal law. To be more precise, extended confiscation can be declared only for the criminal acts committed after 19 April 2012[29].

In the process of legal regulation of the measure of extended confiscation, there were heated debates concerning the need of the alteration of the Constitution, by erasing the second sentence in the text of Article 44, par. (4) that provides that: "The legality of acquirement shall be presumed." In that sense, declaring on the Draft of the Law on the Review of the Constitution, the Constitutional Court of Romania was of the position that the presupposition of the legality of the asset will not hinder the examination of the unlawful nature of asset acquisition, but that the burden of proof must be on the subject that questioned the legality of asset origin. The measure in which the interested party proves that certain assets, partially or in their

24 Article 112^1 par. (7) of the NCC.
25 Article 112^1 par. (8) of the NCC.
26 Flaviu Ciopec, *op. cit.*, p. 136.
27 Tudorel Toader, Marieta Safta, "The Constitutionality of Safeguards on Extended Confiscation", in *Journal of Eastern-European Criminal Law, No. 1/2015*, Universul Juridic, Timişoara-Pecs, 2015, p. 9.
28 Published in the Official Gazette of Romania, No. 767 of 31 October 2003.
29 Law No. 63/2012 was published in the Official Gazette of Romania, No. 258, on 19 April 2012, and in accordance with Article 78 of the Constitution, entered into force on the third day from the day of the publication.

entirety are acquired in an unlawful manner, such unlawfully acquired assets, i.e. illegally obtained goods can be confiscated in accordance with the law.[30] Therefore, considering that in Romanian criminal law it is the task of the accusing party to rebuke the presumption of a legal acquisition of assets, this presumption, although of constitutional rank, in terms of providing proof remains a relative presumption (*juris tantum*) and can always be rebuked.

EXTENDED CONFISCATION IN THE CRIMINAL PROCEDURE CODE

As far as the procedure to be followed in case of the application of security measure of extended confiscation is concerned, the following articles of the New Criminal Procedure Code of Romania[31] (hereinafter abbreviated as the NCPC) need to be particularly emphasized.

In accordance with provisions of Article 306, par. (7) of the NCPC, *the criminal investigation body is under an obligation to collect evidence needed to identify the assets and valuables subject to special and extended forfeiture, as under the Criminal Code.*

In accordance with Article 249, par. (1) of the NCPC *the prosecutor, during the criminal investigation, the Preliminary Chamber Judge or the Court, ex officio or upon request by the prosecutor, during preliminary chamber procedure or throughout the trial, may order asset freezing, by a prosecutorial order or, as the case may be, by a reasoned court resolution, in order to avoid concealment, destruction, disposal or dissipation of the assets that may be subject to special or extended confiscation or that may serve to secure the penalty by fine enforcement or to pay court fees or to compensate damages caused by the committed offense.*

Extended confiscation of assets can be ordered exclusively by the court in a suitable decision.

The procedure to conduct this measure (as well as the measure special confiscation) is provided in Article 574 of the NCCP:

A safety measure of special confiscation or extended confiscation, taken through a court decision, shall be enforced as follows:

a) seized assets shall be handed over to the authorized bodies, in order for them to take them over or sell them under the law;

b) if seized assets are in the custody of law enforcement bodies or of other institutions, the judge delegate in charge of enforcement shall send a copy of the court decision's enacting terms to the body with which these are kept. After receiving a copy of the court decision's enacting terms, seized assets shall be handed over to authorized bodies, in order for them to take them over or sell them under the law;

c) when a seizure concerns money amounts that were not deposited with banking units, the judge delegate in charge of enforcement shall send a copy of the enacting terms of the court decision to tax bodies, in order for them to enforce seizure as per the provisions referring to budgetary receivables;

d) when destruction of seized assets was ordered, these shall be destroyed in the presence of the judge delegate in charge of enforcement, and a report shall be prepared, which shall be submitted with the case file.

30 Constitutional Court, decision No. 799/2011, of 17 June 2011, published in the Official Gazette of Romania, No. 440 of 14 June 2011.
31 Published in the Official Gazette of Romania, No. 486 of 15 June 2010.

CONCLUSION

"Analysis of the criminological and criminalistics results in practice has shown that the traditional manners of combating crime are not efficient enough in repressing organized and/or other forms of high crime. Faced with an increase of organized crime, terrorism and corruption, as well as their consequences that were far graver than the consequences of "classical" crime, modern democratic countries were forced to pass new legal regulations in order to repress these extremely dangerous social phenomena."[32]

Today, organized crime is justifiably seen as "one of the factors of global insecurity" [33]. The economic power enables organized crime to infiltrate into the political environment using corruption, with the tendency to establish dominance over the economic sector and to violate the democratic system by monopolizing certain branches of authorities.

Therefore, in order to be effective, any attempt to prevent and combat such crime must focus on tracing, freezing, seizing and confiscating the proceeds from crime.

In other words – in order to combat organized crime as successfully as possible, it is necessary to directly attack the main motive of this social evil – *financial gain*.

For that purpose, "legal solutions were developed aimed at creating a suitable legal frame for depriving criminals of unlawfully acquired profit, while at the same time respecting the standards of human rights."[34]

One of the most efficient legal mechanisms in this direction is definitely *extended confiscation*.

The experiences in the application of this measure ensure that it "provides a valuable tool for law enforcement officials, as it helps strike at the economic foundations of criminal activity. It has been used successfully to target a variety of crime problems, ranging from illegal drug sales and street racing to nuisance properties and drunk driving."[35]

This measure, its role and ranges, must be well known to not only legislative, but also to police authorities that play a significant role in its application considering that the identification and locating of the assets cannot be achieved without "auditing in the field and recording by tax authorities in terms of the balance of the legal revenues of the accused and their family, their taxable assets, the time of their acquisition as well as other audits that the court cannot solemnly conduct. In the absence of such investigations, special (extended, *a.n.*) confiscation measure would only remain 'a dead letter'."[36]

However, even though extended confiscation is an extremely "desirable instrument that can be used to achieve (partial) restorative justice"[37], it must be ensured that this institution is not misused, as it could easily happen that "the desirable means to repress or control crime would bring forth a phenomenon that is in itself its aim and justification" [38].

Extended confiscation has also been recently included in Romanian criminal law.

---

32 Darian Rakitovan, "Specijalne nadzorne ili istražne metode u Novom Zakoniku o krivičnom postupku Rumunije", in *Prilagođavanje pravničke regulative aktuelnim trendovima u regionu, zbornik radova XII tradicionalnog naučnog skupa „Pravnički dani prof. dr Slavko Carić"*, Univerzitet Privredna akademija u Novom Sadu, Novi Sad, 2015, p. 728.
33 Viorel Paşca, *op. cit.*, p. 507.
34 Oliver Lajić, *op. cit.*, p. 208.
35 John L. Worrall, *Asset Forfeiture*, U.S. Department of Justice, Office of Community Oriented Policing Services, 2008, p. 33, available at: file:///D:/Downloads/nps60-072611-06%20(1).pdf.
36 Viorel Paşca, *op. cit.*, p. 517.
37 Oliver Lajić, "Ima li alternativu oduzimanje imovine stečene kriminalom koje se sprovodi u krivičnom postupku?" in *Zbornik radova Pravnog fakulteta*, Vol. 47, No. 2, Novi Sad, p. 345.
38 *Ibidem*, p. 346.

This measure was introduced not only for the national and the social interests of the country, but also to comply with the obligations of Romania as the signatory of numerous multilateral conventions of international and regionally-European character. The obligations in this section are even wider, considering that as of 1 January 2007, Romania has become a member of the European Union, and therefore apart from the obligations stemming from the international convention law, it has a duty to transfer and conduct *acquis communautaire*, i.e. legal instruments developed on the level of the EU into its own national legislation.

By analysing security measure of extended confiscation in Romanian criminal law, it is concluded that Romania, although later than the deadline indicated in the text of Article 6, par. (3) of the Council of the European Union Framework Decision 2005/212/JAI, has responded in principle positively to the requirements of harmonization of national legislation with EU legislation. However, we believe that this regulation on extended confiscation contains a certain number of shortcomings, which "has the effect of limiting the requirements of seizure of goods through crime, practically limiting the application of seizure in respect of goods originating from committing offenses."[39]

Taking the aforementioned into consideration, we believe that the legal regulation of the extended confiscation in the New Criminal Code of Romania should be revised, in terms of making corrections and removing the observed and other shortcomings, while keeping and possibly improving the existing good solutions.

REFERENCES

1. Boroi Alexandru, "Elements of Comparative Law on Extended Confiscation", in *The 9th edition of the International Conference "European Integration. Realities and Perspective"*, EIRP Proceedings, Danubius University, Galați, 2014, pp. 77–84.
2. Ciopec Flaviu, *Confiscarea extinsă: între de ce și cât de mult?*, Editura C. H. Beck, București, 2015.
3. Ignjatović Đorđe, Škulić Milan, *Organizovani kriminalitet,* Pravni fakultet Univerziteta u Beogradu, Beograd, 2012.
4. Lajić Oliver, "Ima li alternativu oduzimanje imovine stečene kriminalom koje se sprovodi u krivičnom postupku?" in *Zbornik radova Pravnog fakulteta*, Vol. 47, No. 2, Novi Sad, pp. 331–347.
5. Lajić Oliver, "Uporedni pregled sistema za istraživanje i oduzimanje imovine stečene kriminalom", in *Zbornik radova Pravnog fakulteta u Novom Sadu*, Vol. 46, No. 2, Novi Sad, 2012, pp. 207–222.
6. Neacșu Adrian, *Confiscarea extinsa a averilor ilicite. De ce abia acum?*, available at: http://www.juridice.ro/155598/ confiscarea-extinsa-a-averilor-ilicite-de-ce-abia-acum.html.
7. Pașca Ioana-Celina, *Criminalitatea organizată în perspectiva legislațiilor europene*, Universul Juridic, București, 2015.
8. Pașca Viorel, *Curs de drept penal. Parte generală*, Ediția a II-a, Universul Juridic, București, 2012.
9. Rakitovan Darian, "Specijalne nadzorne ili istražne metode u Novom Zakoniku o krivičnom postupku Rumunije", in *Prilagođavanje pravničke regulative aktuelnim trendovima u regionu, zbornik radova XII tradicionalnog naučnog skupa "Pravnički dani prof. dr Slavko Carić"*, Univerzitet Privredna akademija u Novom Sadu, Novi Sad, 2015, pp. 727–749.

39 Alexandru Boroi, "Elements of Comparative Law on Extended Confiscation", in *The 9th edition of the International Conference "European Integration. Realities and Perspective"*, EIRP Proceedings, Danubius University, Galați, 2014, p. 77.

10. Stojanović Zoran, *Komentar Krivičnog zakonika*, Službeni glasnik, Beograd, 2006.
11. Toader Tudorel, Safta Marieta, "The Constitutionality of Safeguards on Extended Confiscation", in *Journal of Eastern-European Criminal Law, No. 1/2015*, Universul Juridic, Timişoara-Pecs, 2015, pp. 9–21.
12. Worrall John L., *Asset Forfeiture*, U.S. Department of Justice, Office of Community Oriented Policing Services, 2008, available at: file:///D:/Downloads/nps60-072611-06%20(1).pdf.

Topic I

CRIMINALISTIC AND CRIMINAL JUSTICE ASPECTS OF CLARYFYING AND PROVING OF CRIMINAL OFFENCES

UDC: 343.8(4)"2014"
343.24/.297(4)"2005/2014"

INTERNATIONAL COMPARISONS OF PRISON STATISTICS: KEY FACTS AND FIGURES OF THE SPACE 2014 REPORT AND TRENDS FROM 2005 TO 2014

Marcelo F. Aebi, PhD[1]
Christine Burkhardt, MA
Julien Chopin, MA
Mélanie M. Tiago, MA
University of Lausanne, School of Criminal Sciences

Abstract: This paper provides an overview of the extent of imprisonment in Europe in 2014. It also studies its evolution from 2005 to 2014 as well as the possible causes of the trends observed. Data are taken from the *Council of Europe Annual Penal Statistics*. The results showed that the average European prison population rate increased from 2005 to 2011, and started decreasing after that. That decrease is partially explained by the downward trend showed by the average rate of entries into penal institutions after 2009 and the stabilization of the length of imprisonment after 2011. It is also related to a change in the composition of European prison populations. In particular, the percentage of prisoners sentenced for theft has decreased, while the percentages of prisoners sentenced for violent offences and for drug offences have increased. Furthermore, the decreases in the stock and the flow of entries of prisoners led to a decline of the average European prison density and, consequently, of overcrowding. The results are discussed in the light of recent research on the relationship between crime trends and imprisonment trends, as well as on the influence of community sanctions and measures on the latter.

Keywords: criminology**,** penology**,** imprisonment**,** trends in prison populations**,** Europe.

INTRODUCTION

The goal of this paper is to provide an overview of the latest *Council of Europe Annual Penal Statistics* and to study the trends shown by the data included in them during the previous ten years (2005–2014). These statistics are better known by their acronym SPACE, based on their French title (*Statistiques Pénales Annuelles du Conseil de l'Europe*). The SPACE statistics are elaborated annually for the Council of Europe by the unit of Criminology of the School of Criminal Sciences of the University of Lausanne. The School of Criminal Sciences is the current name of the Institute of Scientific Police created by Rudolf Archibald Reiss in 1909. Every year, two SPACE reports are published. The first one refers to *Prison Populations* and it is known as SPACE I[2], while the second one refers to *Persons Serving Non-Custodial Sanctions and*

1 E-mail: Marcelo.Aebi@unil.ch.
2 Aebi, M.F., Tiago, M.M. & Burkhardt, C. (2015). *Council of Europe Annual Penal Statistics SPACE I: Prison Populations. Survey 2014.* Strasbourg: Council of Europe

Measures and is known as SPACE II[3]. Both reports cover the 47 member states of the Council of Europe. In that context, as some countries have more than one Prison Administration, the SPACE I report covers 52 prison administrations[4]. The same is true for SPACE II, which covers 52 Probation Services. Data for both reports are collected by means of two questionnaires sent to every prison administration (SPACE I) and probation service (SPACE II) in Europe. In practice, as a few administrations are unable to answer the questionnaires, or can provide data only for some of the items included in them, the total number of countries included throughout the reports is usually slightly lower. Thus, the latest SPACE reports –which refer to the year 2014 and were published in March 2016 – include data on 50 prison administrations, representing 47 countries (SPACE I), and on 45 probation services, representing 39 countries (SPACE II)[5].

In the first part of this paper, the data from these reports are used to illustrate the magnitude of prison populations across Europe in 2014. After that, their evolution from 2005 to 2014 is shown. In order to explain the trends observed, we then concentrate on the 39 prison administrations that provided additional indicators and we analyse the evolution of the rate of entries into prison and the average length of imprisonment in these countries. Such indicators have an influence on the prison density, which is also presented paying particular attention to the issue of overcrowding. Finally, in order to understand the role of community sanctions and measures on the extent of prison populations, we compare the prison population rates (SPACE I) with the rates of persons placed under the supervision or care of probation agencies (SPACE II) in the 33 prison and probation administrations for which both indicators are available for 2014.

FINDINGS AND EXPLANATIONS

Map 1 shows *prison population rates* on 1st September 2014 in the 47 member states of the Council of Europe. The prison population rate corresponds to the number of inmates per 100,000 inhabitants. It includes pre-trial detainees. This indicator is commonly referred to as the *stock* of inmates and is also known as the *detention rate* or the *imprisonment rate*.

3 Aebi, M.F. & Chopin, J. (2015). *Council of Europe Annual Penal Statistics SPACE II: Persons Serving Non-Custodial Sanctions and Measures in 2014.* Strasbourg: Council of Europe.

4 In Bosnia and Herzegovina there are three prison administrations (one for the State level, one for the Federation of Bosnia and Herzegovina, and one for the Republic of Srpska), in Spain there are two (the National prison administration and the Prison administration of Catalonia), and in the United Kingdom there are three (in England and Wales, in Northern Ireland, and in Scotland).

5 Only the Federal prison administration of Bosnia and Herzegovina and the prison administration of the Federation of Bosnia and Herzegovina were unable to answer the 2014 SPACE I questionnaire. This means that the 47 member states of the Council of Europe are represented in the 2014 SPACE I report, but data for Bosnia and Herzegovina only includes the prisons that are under the authority of the prison administration of the Republic of Srpska. As a consequence, Map 1 and Figures 1 and 2 include data from 50 prison administrations. At the same time, the total for Spain corresponds to the sum of the regional subtotals of the Spanish national prison administration and the Prison administration of Catalonia, which explains why the readers can only count 49 prison administrations in Map 1 and Figure 2. In Figure 6 there are still 47 countries but only 48 prison administrations because the prison administration of Scotland did not provide the distribution of sentenced prisoners by offence. In Figures 3, 4 and 5 there are 38 countries because the prison administration of Armenia, Bulgaria, Estonia, Greece, Latvia, Montenegro, Romania, Russian Federation, Scotland and Ukraine did not provide data for the whole period under study (2005 to 2013/14). Finally, in Figure 7, there are 32 countries because Andorra, Armenia, Azerbaijan, Belgium, Republic of Srpska, Bulgaria, Cyprus, the Former Yugoslav Republic of Macedonia, Germany, Iceland, Liechtenstein, Lithuania, Poland, Russian Federation, Slovak Republic, Scotland and Ukraine were unable to provide data on the four indicators required.



Map 1: *Prison population rates per 100,000 inhabitants on 1st September 2014 in 47 European countries (50 prison administrations)*

It can be seen in Map 1 that the highest prison population rates can be found in Eastern Europe and the lowest in the Nordic countries. A few Western and Central European countries (Croatia, Germany, Italy, Netherlands, Slovenia and Switzerland[6]) also present relatively low prison population rates (i.e. lower than 100 inmates per 100,000 inhabitants).

On the basis of the prison population rates used to elaborate Figure 1, it is possible to calculate the *average* European prison population rate, which in 2014 corresponded to 136.2 inmates per 100,000 inhabitants. The average prison population rate calculated in such way – i.e. by adding the *rates* and dividing the total by 47 – is different than the one that would be obtained by considering Europe as a single entity, that is to say by adding all the *inmates* held in the 47 countries and putting that total in relation with the *total population of Europe*. This second form of calculation would give a disproportionate weight to the countries with large populations, in such a way that the total prison population rate for Europe in 2014 would rise to 199 inmates per 100,000 inhabitants. For that reason, we have used the first form of calculation throughout this paper.

Figure 1 shows the evolution of the *average* European prison population rate from 2005 to 2014. Data relate to the 1st September of each year[7].

6 In order to simplify the reading, we only enumerate countries with more than one million inhabitants.
7 As it is explained in the notes included in the SPACE I report, in a few countries the date of reference is not necessarily the 1st September (for details, see Aebi, Tiago & Burkhardt, 2015).

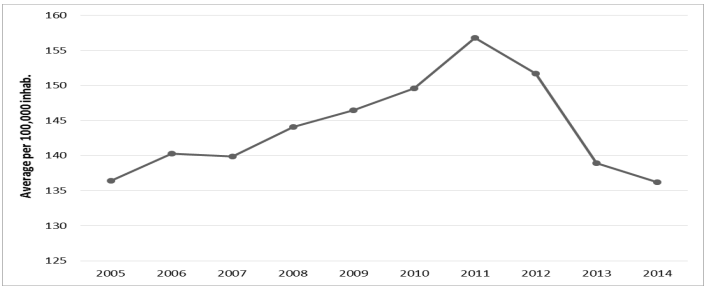


Figure 1: *Trends in the average European prison population rate per 100,000 inhabitants from 2005 to 2014 (N = 47 European countries; 50 prison administrations)*

It can be seen in Figure 1 that the average European prison population rate followed an upward trend from 2005 to 2011 and a downward trend since then. The decrease took place much quicker than the increase. In particular, the overall increase for the first period was 15%, while the decrease for the second period was 10.2%. The comparison of these percentages is problematic, as it is well known that this kind of rates can only decrease by 100%, but there is no limit to their increase. All in all, in 2014 the average European prison population rate was almost identical to the one of 2005. Before 2005, prison population rates were increasing mainly in Western European countries and decreasing in many Central and Eastern European countries[8]. This overall trend hides naturally some exceptions at the level of each country. A detailed analysis of the evolution year by year in each of the 47 countries would exceed the aim of this paper, but Figure 2 allows a comparison of their prison population rates in 2005 and 2014 by establishing the percentage change between these two years.

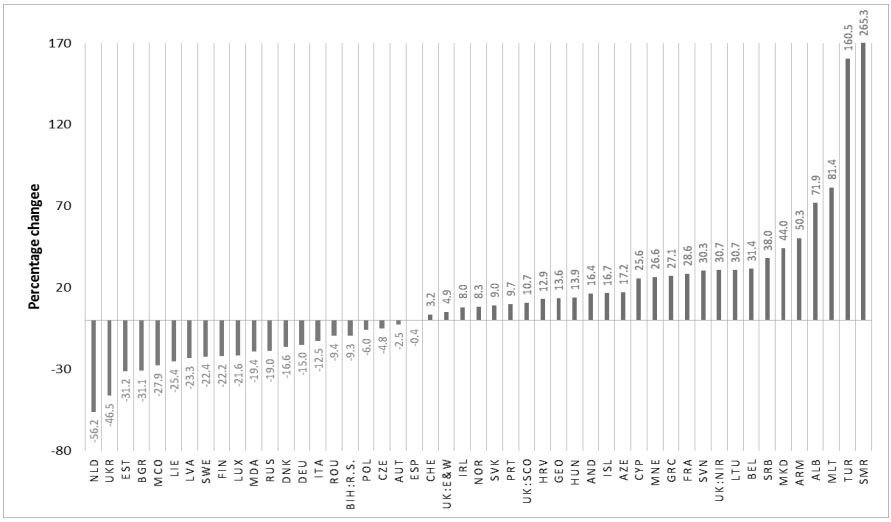


Figure 2: *Percentage change in the prison population rate per 100,000 inhabitants between 2005 and 2014, by country (N = 47 European countries; 50 prison administrations)*

Figure 2 shows that a slight majority of countries (26 out 47) have higher prison popula-

8 Aebi, M.F. & Stadnic (Delgrande), N. (2007). Imprisonment rates in Europe. *Criminology in Europe: Newsletter of the European Society of Criminology*, *6*(2), 1, 11–15.

tion rates in 2014 than in 2005. This Figure compares two points in time, which correspond to the beginning (2005) and the end (2014) of the period studied, and therefore cannot straightforwardly be compared to Figure 1, which shows the trend during that period. Moreover, the differences between the two Figures are also explained by the fact that Figure 1 – which indicates that the average European rates in 2005 and 2014 were similar – shows that the overall decrease started only after 2011. Nonetheless, Figure 2 corroborates that there are exceptions to the overall European trend. In that perspective, it is interesting for the readers from each country to compare the trend in their own country to that overall trend in order to establish similarities and differences. It seems relevant to point out also that the changes in prison population rates between 2005 and 2014 do follow a geopolitical logic. Almost half of the Central and Eastern European countries show a decrease (11 out of 25), while the others show an increase (14 out of 25); and the same is true for Western European countries (10 show a decrease and 12 show an increase).

The evolution of prison population rates is heavily influenced by the number of persons sent to prison and the length of their imprisonment. In that context, Figure 3 shows the rate of entries into penal institutions per 100,000 inhabitants in 39 prison administrations, representing 38 countries, from 2005 to 2013[9]. The rate of entries is commonly referred to as the *flow*. In order to allow comparisons, Figure 3 also shows the evolution of the prison population rate for the same 39 prison administrations. It can be seen that the evolution of the prison populations of these administrations is almost identical to the one shown for the 49 prison administrations included in Figure 1.

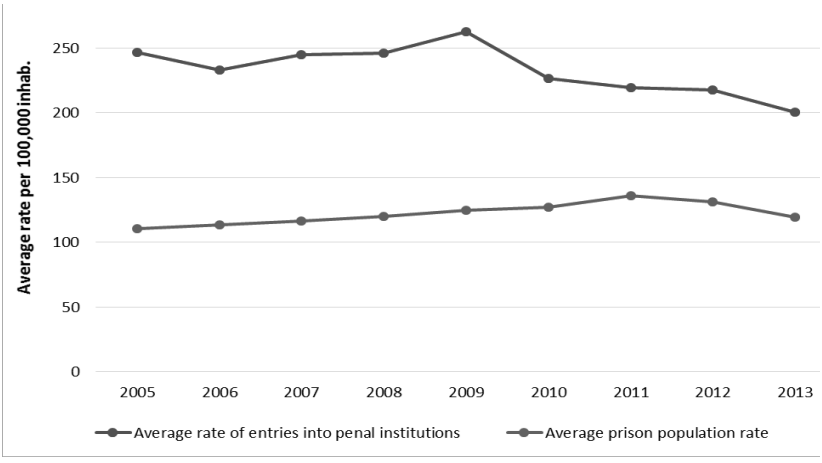


Figure 3: *Trends in the average rate of entries into penal institutions and in the average prison population rate (both per 100,000 inhabitants) from 2005 to 2013 (N = 38 European countries; 39 prison administrations)*

It can be seen in Figure 3 that the average rate of entries into penal institutions registered a peak in 2009 and has been decreasing since then. Before 2009, the trend was relatively stable; while from that year to 2013 the decrease reached 23.6%. All in all, in 2013 the average European rate of entries into penal institutions was 18.7% lower than in 2005. It can also be seen in Figure 3 that the decrease in the *flow* started two years before the decrease in the *stock*. This seems logic because, as we mentioned before, the total number of prisoners is influenced

9 The data on entries into penal institutions collected for the SPACE I report refer always to the previous year (for example, the 2014 report includes data for the whole year 2013).

not only by the number of entries, but also by the length of their stay in detention. Indeed, the latter can be estimated on the basis of the flow and the stock and is presented in Figure 4[10].

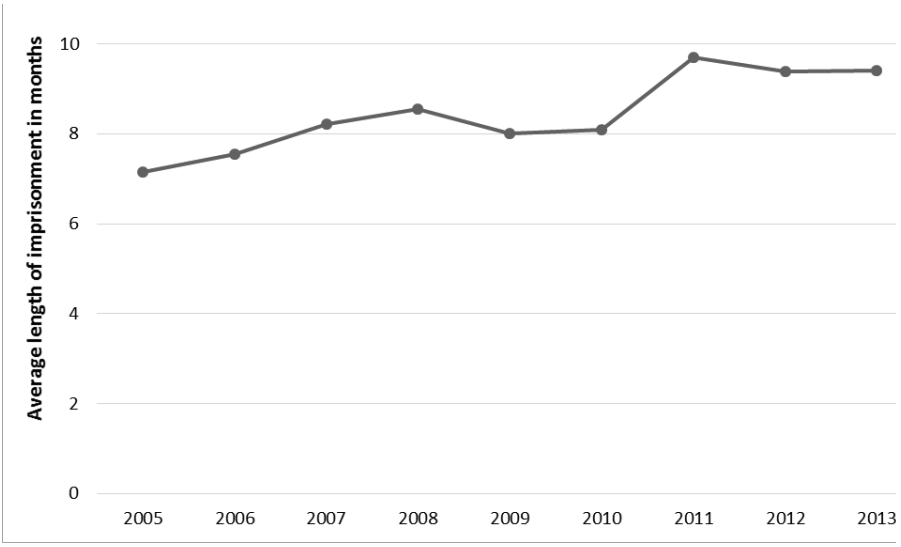


Figure 4: *Trends in the average length of imprisonment (in months) from 2005 to 2013 (N = 38 European countries; 39 prison administrations)*

Figure 4 shows that the average length of imprisonment in Europe increased from 2005 to 2011 – with a period of relative stability between 2008 and 2010 – and remained relatively stable, although slightly lower than in 2011, after that. The overall increase from 2005 to 2011 was 35.9%. This trend is explained by the fact that the average length of imprisonment is influenced both by the stock and the flow. Hence, the downward trend observed in the latter (see Figure 3) is somehow reflected in the evolution shown by the average length of imprisonment from 2011 to 2013 (Figure 4). In this case, the trends would have fit better if we have considered Europe as a single entity, but we have already explained the reason why we decided not to use such procedure. The trends shown in Figures 3 and 4 reflect thus, at least partially, the diversity that characterises Europe.

The decrease in the prison population rates, in the flow of entries and in the average length of imprisonment should have an influence on the prison density. The latter corresponds to the number of inmates per 100 available places in penal institutions (including pre-trial facilities). Figure 5 shows the evolution of the average prison density from 2005 to 2014 in the 39 prison administrations studied in this section. A ratio of more than 100 implies that there is a situation of overcrowding (i.e. there are more inmates than available places for them).

10 See Aebi, Linde & Delgrande (2015) for a detailed explanation of the method of calculation of the average length of imprisonment based on the indicators of flow and stock, which is known as the demographic model of stationary population.

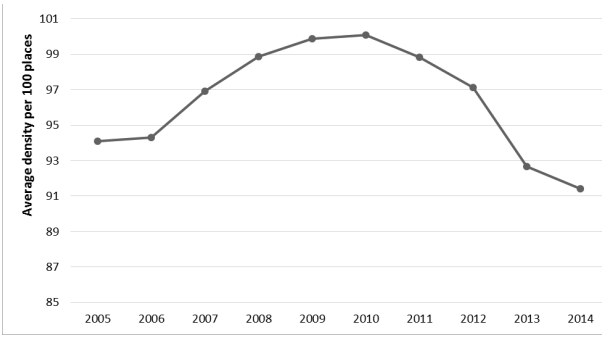


Figure 5: *Trends in the average prison density (inmates per 100 places) from 2005 to 2014 (N = 38 European countries; 39 prison administrations)*

It can be seen that our hypothesis is corroborated because prison density increased at the beginning of the series, reaching its maximum level in 2010, and has been decreasing since then. In particular, from 2005 to 2010, the overall increase of the prison density was 6.4%; while from that year until 2014 the decrease was 8.7%. All in all, in 2014 the average European prison density was 2.9% lower than in 2005.

According to Figure 5, European prisons were at the limit of their capacity in 2010. In practice, many of them were facing overcrowding during the whole period under study and are still facing it nowadays. This apparent contradiction is explained by the fact that Figure 5 reflects the European *average*, which implies that the weight of the countries with a prison density over 100 is compensated by the one of those with a lower prison density. The same is true at the level of every country because their individual prison density is also based on the average occupation of all their penal institutions. Some of them may be overcrowded (for example, the ones used for pre-trial detention or the ones built in the most populous cities), while others may have empty places.

Indeed, the notion of overcrowding is relative. The reason is that the capacity of penal institutions (i.e. the number of places available) is calculated in different ways across countries. In that context, a major distinction must be made between countries that calculate it according to the *design capacity* of the institutions and those that calculate it according to the *operational capacity* of the institutions. However, not all the countries specify the concept of capacity that they apply. As an example of countries that do provide such information, we present the cases of Scotland, which applies the concept of design capacity and of England and Wales, which applies the concept of operational capacity.

The National Offender Management Service and HM Prison Service of England and Wales define the *operational capacity* of a prison as "the total number of prisoners that an establishment can hold taking into account control security and the proper operation of the planned regime. It is determined by the Deputy Director of Custody on the basis of operational judgment and experience"[11]. This definition of operational capacity could be seen as valid for other countries too. On the contrary, the way in which that capacity is determined varies surely from country to country. In England and Wales it is the Deputy Director of Custody who takes the decision, but we do not have reliable information on who takes such a decision in the rest of the countries that use the operational capacity to establish the number of places available.

11 NOMS – National Offender Management Service and HM Prison Service of England and Wales (2015). *Population Bulletin: Monthly December 2015*. London: NOMS.

On the other hand, according to the definition of the US Bureau of Justice Statistics (2016), the *design capacity* of a prison refers to "the number of inmates that planners or architects intended for the facility". However, according to the Information Center of the Scottish Parliament (SPICe), the design capacity in Scotland refers to "the number of inmates intended for prison facilities based on minimum standards"[12]. Once more, we do not know how this capacity is calculated in other countries and, even in the case of Scotland, we do not know how the minimum standards are established.

These examples show that the countries have a large discretion when establishing the capacity of their penal institutions. As a consequence, it is not possible to conduct reliable comparisons across countries without collecting additional information on the exact way in which the capacity of the penal institutions is calculated.

Going back to the explanation of the decrease in prison population rates across Europe since 2012, another important factor included in the SPACE I report is the distribution of inmates according to the offence for which they have been sentenced. Figure 6 presents that distribution on 1st September 2014.

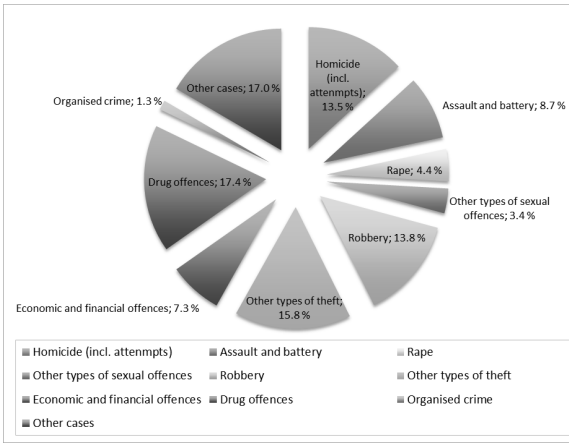


Figure 6: *Distribution of sentenced prisoners on 1st September 2014 according to the main categories of offences for which they are imprisoned (average for 47 European countries representing 48 prison administrations)*

Figure 6 shows that most sentenced prisoners are serving sentences for drug offences and violent offences, while those sentenced for property offences (i.e. theft) represent only 16% of the prison population. This is a major shift from the distribution observed only a few years ago. As we have explained elsewhere in detail[13], property offences represented traditionally the main category of offences for which offenders were sent to prison. Moreover, such distribution had an important impact on the kind of explanations of crime provided by the classic criminological theories. Indeed, many of these classic explanations are heavily challenged by the current distribution of sentenced prisoners.

Figure 6 also shows that prisoners have been sentenced mainly for drug offences (17.4%), robbery (13.8%), and homicide (13.5%). This kind of offences usually receives long prison

12 Ross, G. (2012). *SPICe Briefing: The Scottish Criminal Justice System: The Prison Service*. Scotland: Information Center of the Scottish Parliament (SPICe).
13 Aebi, M.F., Linde, A. & Delgrande, N. (2015). Is there a relationship between imprisonment and crime in Western Europe? *European Journal on Criminal Policy and Research*, *21*(3): 425–446.

sentences, which explains why their weight in the *stock* of prisoners is much more important than in the *flow* of entries. This means, for example, that only a relatively low number of persons are sent to prison every year for homicide but, as they remain in prison for several years, their percentage in the total number of prisoners is much higher.

The decrease in the number of persons sentenced for theft is related to the general decrease of this kind of offence in Europe since the mid-1990s[14]. At the same time, in most European continental countries, violent offences increased during the 1990s and 2000s, and started decreasing only in the 2010s. That trend is also corroborated by the distribution of sentenced prisoners according to the main categories of offences shown in Figure 6[15]. The missing link in that context is the evolution of cybercrime. There is no doubt that it has been increasing with the development of information technologies and the proliferation of computers, smartphones and other Internet connected devices. However, not only it is difficult to establish precisely its evolution, but even its prevalence is hard to assess. An effort in that sense is currently taken place in the United Kingdom through the *Crime Survey for England and Wales*[16], which should include since 2016 a series of questions on that topic. In that perspective, the questions designed to measure fraud and other cyber offences were tested through a field trial conducted in 2012. According to that trial, it was estimated that, in England and Wales, the total number of victims of fraud (committed most of the times with online support or entirely online) in the 12 months prior to interview was 3.8 million[17]. This is an extremely high number. Nevertheless, the number of persons sent to prison for this kind of offences remains very low. The reasons for this contradiction are probably related to the fact that many cyber offences are not reported to the police, that a few cyber offenders can be responsible for hundreds of offences, and that those offenders can be located anywhere in the world.

Finally, one could think that the decrease of prison populations could also be related to the development of community sanctions and measures, which should act as alternatives to imprisonment. Such sanctions increased constantly in Europe, especially since the 1990s. However, a detailed analysis of their evolution compared to the evolution of imprisonment, shows that community sanctions and measures have had a net-widening effect[18]. This means that they have been used primarily as supplementary sanctions and not as alternative sanctions. Figure 7 corroborates such conclusion by comparing the average European prison and probation populations on 1st September 2014 in 32 countries, as well as the flow of entries into prison and probation during the year 2013.

14 Van Dijk, J., Van Kesteren, J. & Smit, P (2007). *Criminal Victimisation in International Perspective*. Meppel: Boom Jurisdische; Aebi, M.F. & Linde, A. (2010). Is there a crime drop in Western Europe? *European Journal on Criminal Policy and Research*, *16*(4): 251–277; Tonry, M. (2014) Why crime rates are falling throughout the Western world. *Crime and Justice*, *43*: 1–63.

15 For details, see Aebi, Linde & Delgrande, 2015.

16 Formerly called the *British Crime Survey*.

17 TNS (2012). CSEW Fraud and Cyber-crime Development: Field Trial. Available online at: http://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/crimeinenglandandwales/yearendingdecember2015#fraud (last accessed, 26 April 2016).

18 Aebi, M.F., Delgrande, N. & Marguet, Y. (2015). Have community sanctions and measures widened the net of the European criminal justice systems? *Punishment & Society*, *17*(5): 575–597.

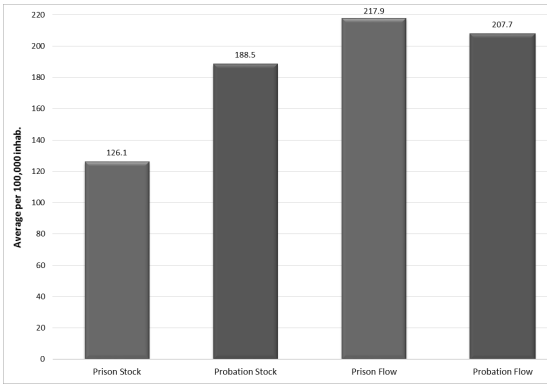


Figure 7: *Prison and probation average population rates per 100,000 inhabitants in 2014, and average rates of entries nto prison and probation during 2013 (N = 32 European countries; 33 prison and probation administrations)*

The left part of Figure 7 compares the average *prison population rate* to the average *probation population rate* (defined as the number of persons under supervision or care of probation services per 100,000 inhabitants) on 1st September 2014. It can be seen that the rate of persons on probation is roughly 50% higher than the number of inmates. Theoretically, if community sanctions (which should act as alternatives to imprisonment) did not exist, all the persons placed in probation should be in prison. Thus, the total number of prisoners would embrace the two categories included in the left part of the Figure 7 and the overall European prison population rate would be among the highest in the world. This does not seem plausible for a continent that includes a region like Western Europe, which has the lowest rates of homicides of the world[19]. On the contrary, it seems more reasonable to accept that sometimes probation is used for persons who would not have been sent to prison, which means that community sanctions have contributed to widening the net of the European criminal justice systems[20].

The right part of Figure 7 compares the average rate of *entries into prison* and the average rate of *entries in probation* (defined as the number of persons that are placed under the supervision or care of probation services) during 2013. Contrary to what we observed in the previous analysis, in this case it is the rate of entries into probation that is higher than the rate of entries into prison. This is explained by the differences in the length of stay in prison and the length of stay under the supervision or care of probation agencies. Hence in 2013 (N = 33) the average length of probation in Europe was approximately 13 months while the average length of imprisonment was 9.4 months, as we have seen in Figure 4.

CONCLUSION

In this paper it has been shown that the average European prison population rate (number of inmates per 100,000 inhabitants) reached a peak in 2011 and is decreasing since then. This means that the number of inmates held in European penal institutions is diminishing.

19 UNODC – United Nations Office on Drugs and Crime (2014). *Global Study on Homicide 2013: Trends, Contexts, Data*. Vienna: UNODC.
20 Aebi, M.F., Delgrande, N. & Marguet, Y. (2015). Have community sanctions and measures widened the net of the European criminal justice systems? *Punishment & Society*, *17*(5): 575–597.

This decrease is explained partially by a decrease in the rate of entries (per 100,000 inhabitants) into European penal institutions, which reached a peak in 2009 and has been following a downward trend since then. Another explanatory factor is the average length of imprisonment, which stopped increasing (and has indeed slightly decreased) after 2011. As a consequence, prison density across Europe is also following a downward trend, and the problem of overcrowding is becoming less prominent.

The decrease in the prison population rate is related also to a change in the type of offences for which prisoners have been sentenced. The percentage of prisoners sentenced for theft has decreased. This decrease is related to a general drop in this kind of property offence in Europe. On the contrary, the percentage of prisoners sentenced for violent and drug offences, which usually receive long sentences, has increased.

Finally, the rise of community sanctions and measures does not seem to have played a major role in the decrease of the prison population rate. Indeed, such sanctions and measures have had a net-widening effect.

REFERENCES

1. Aebi, M.F. & Chopin, J. (2015). *Council of Europe Annual Penal Statistics SPACE II: Persons Serving Non-Custodial Sanctions and Measures in 2014.* Strasbourg: Council of Europe.
2. Aebi, M.F., Delgrande, N. & Marguet, Y. (2015). Have community sanctions and measures widened the net of the European criminal justice systems? *Punishment & Society*, *17*(5): 575–597.
3. Aebi, M.F. & Linde, A. (2010). Is there a crime drop in Western Europe? *European Journal on Criminal Policy and Research*, *16*(4): 251–277.
4. Aebi, M.F., Linde, A. & Delgrande, N. (2015). Is there a relationship between imprisonment and crime in Western Europe? *European Journal on Criminal Policy and Research*, *21*(3): 425–446.
5. Aebi, M.F., Tiago, M.M. & Burkhardt, C. (2015). *Council of Europe Annual Penal Statistics SPACE I: Prison Populations. Survey 2014.* Strasbourg: Council of Europe.
6. Aebi, M.F. & Stadnic (Delgrande), N. (2007). Imprisonment rates in Europe. *Criminology in Europe: Newsletter of the European Society of Criminology*, *6*(2), 1, 11–15.
7. NOMS – National Offender Management Service and HM Prison Service of England and Wales (2015). *Population Bulletin: Monthly December 2015*. London: NOMS.
8. Ross, G. (2012). *SPICe Briefing: The Scottish Criminal Justice System: The Prison Service*. Scotland: Information Center of the Scottish Parliament (SPICe).
9. TNS (2012). CSEW Fraud and Cyber-crime Development: Field Trial. Available online at: http://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/crimeinenglandandwales/yearendingdecember2015#fraud (last accessed, 26 April 2016).
10. Tonry, M. (2014) Why crime rates are falling throughout the Western world. *Crime and Justice*, *43*: 1–63.
11. UNODC – United Nations Office on Drugs and Crime (2014). *Global Study on Homicide 2013: Trends, Contexts, Data*. Vienna: UNODC.
12. US Bureau of Justice Statistics (2016). *Terms and Definitions: Corrections*. Available online at: http://www.bjs.gov/index.cfm?ty=tdtp&tid=1 (Last accessed, 26 April 2016).
13. Van Dijk, J., Van Kesteren, J. & Smit, P (2007). *Criminal Victimisation in International Perspective*. Meppel: Boom Jurisdische.

UDC: 343.98(437.6)

CRIMINALISTICS TACTIC AND CRIMINAL INVESTIGATION IN SLOVAKIA: METHODS AND TECHNIQUES

Jozef Metenko, PhD[1]
Academy of Police Forces, Bratislava
Martin Metenko
Academy of Police Forces, Bratislava

Abstract: Criminalistics is oriented to search and evaluation of traces coming from committed crimes in all of these traces forms. These criminalistics "products" are used in criminal investigation. Studies have analysed the basic theoretical aspect and connection between Criminalistics tactics and Criminal investigation in Slovakia. Authors present the evolution from Criminalistics "methodic" to Theory of criminal investigation. It is partly understood as history of Police sciences, based on some historical aspects and consequences from implication of criminalistics and police knowledge from 70. to 90. in European security sciences. This study, is the partial result of research project "Methods for CSI - Výsk 139".

Key words: security research, criminalistics and forensic research, research results, criminalistics and forensic methods, investigation, evolution.

INTRODUCTION

The understanding between forensic and criminalistics explanation and the interpretation of world, for criminal investigation, is very important for all security and safety activities. There are frequently observed similar problems as in understanding what Criminalistic is and what Criminology is, especially in English language and in English speaking countries. Although Criminology is the discipline with the longest tradition in crime research, its history has had little to say about the place of scientific methods of criminal investigation. Studies that have analysed the history of scientific practices of criminal investigation have not come from the history of criminology. The history of criminology has analysed neither the details of the scientific basis of the techniques nor how they have actually worked. This research has always come from the "sister" discipline, criminalistics, which can be defined as the science dealing with the recognition, collection, identification, and interpretation of physical evidence (frequently know as traces), and the application of the natural sciences to law-science matters. There is a mutual relationship between criminology and criminalistics in regards to the questions, "why is crime committed, and in what way?" Concerning the first question, the answer is given by the research from the science of criminology; however, the answer to the second question is given by the research from the science of criminalistics. Criminal investigation is a procedure that is closest in place to criminalistics; its purpose is the apprehension, trial, prosecution, and sentencing of criminals. The goal of this paper is to demonstrate that the knowledge applied in criminal investigation comes from the discipline of criminalistics rath-

1 E-mail: jozef.metenko@minv.sk, martin.metenko@gmail.com.

er than science of criminology. In order to quickly apprehend the offender to protect public safety, it is necessary to use the tools of criminalistics. Now, the answer to the question, "in what way was crime committed?" becomes more important than identifying the reasons why an offender might commit a particular criminal act. Criminological explanation of an offender's behaviour does not assist investigators in the recognition, collection, identification, and interpretation of physical evidence. It only supports the general and special understanding of crime as a social phenomenon.

METHODOLOGY

Very important for this study is the language and its content in different countries and territories. Meaning of words is not the same in England and in New Zeeland, in Slovakia and Czech Republic for Criminalistics and Forensic science. The purpose of this paper is a revision of different methods and techniques that are applied in the criminal investigation process in Slovakia. The key sources of theoretical knowledge of criminal investigation in Slovakia are academics conducting their research and teaching at the Academy of Police Forces in Bratislava, as education university basis for Law Enforcement Agencies.

In order to better understand criminal investigation methods and techniques within the Slovak law enforcement system, one must be familiar with the criminology/criminalistics dichotomy. Slovak criminalistics belongs to law science, and in that way it differentiates itself from English speaking forensic science. Criminal investigation theories as a part of Police science theory belong to methods of criminalistics tactics, and therefore the science of criminalistics is the main topic of this paper.

The project "Methods for CSI - Výsk 139" which is the basis for this interpretation is a combination of literature reviews of the articles, journals, books and textbooks that were published between the years of 1993 and 2014 as well as criminal papers from real crime cases that were investigated by law enforcement departments in Slovakia, and observational research within natural settings. The data was gathered from the library of the Academy of Police Forces in Bratislava. As a result of not being able to conduct Internet searches on the topic or retrieve articles from the Internet, all the information was retrieved manually from library books, and afterwards photocopied and summarized. The observation was performed at the Department of "Compressed" Investigation in the some districts, especially from Bratislava, and East Slovakia territory. Direct observation was employed for the purposes of this project, and the continuous monitoring used in this research involved observing more than ten police officers doing their work under our managing on the Academy professors and researchers…. while manually recording their performance. Observational variables were descriptive, requiring no inference (i.e., all activity was merely observed and written down).

SOME NEW CONCEPTS AND TRENDS PRESENTED ON THE BASIS OF COMPLETED RESEARCH

The role of Criminalistics is to provide a particular investigation and criminal procedure, exact, objective and effective investigative techniques and procedures using proven engineering resources. But at the same time the role of Criminalistics in the theoretical and practical level is to motivate investigation in the implementation of criminal procedural law and the acceptance of new and innovative investigative procedures and from time to time to implement methods using newly certified technical resources. This is precisely the direction we see, when

we are talking about importance of Criminalistics and its content in criminalistics tactics. Therefore our understanding and interpretation is in area of theoretical and practical design.

The study aims to provide for both, theoreticians and practitioners of criminalistics a summary of Evidence for criminalistics development and in particular the development and use of methods for criminalistics investigation tactics. New or previously unpublished findings have their source mainly in research projects and conceptual work from the maternity department since 2004. The most direct effect, is the accrued knowledge based on project which ended 6/2008 "Methods and procedures of work at the crime scene".

A relatively new concept in criminalistics tactics is the consistent application of the theory of investigative traces. The concept of criminalistics clues prefers the currently relatively stable form and character. Resources and knowledge which schools present, especially Czech and Czechoslovak, formed the basis for part of historical journey through criminalistics tactics.

In this theory, the knowledge of criminalistics methodology (not to be confused with other term especially known in the past – criminalistics methodics) is reflected, particularly the efforts to harmonize the approach to make the methods and investigative techniques accurate. We do understand the forensic and in general the criminalistics examination in a broader sense - as a process of dealing with criminalistics and in this as a part – as dealing with criminalistics traces and forensic footprints, to present the results of investigation and specifically of detailed examination. But we understand the importance of interpretation in the strict sense as the connoisseur, expert and technical examination.

Especially where there are dedicated individual methods and their applications, we fully use the results and trends of our investigative predecessors and teachers. We use their opinions and results based on conditions, but at the same time in some cases also their perceive of the concept as a way to newer criminalistics opinions, ideas and results. Clearly therefore their knowledge and concepts are presented by the Slovak and the Czech criminalistics/forensic schools. This is particularly represented, or was represented, by the striking personalities of Slovak and Czech criminalistics, such as B. Němec, Pješčak, Porada, Straus, and Šimovček, or Krajník.

The research results and theoretical work of criminalists and at the same time, the knowledge gained by Slovak, Czech and other foreign authors such as Musil, Konrad, Vajda, Šimovček Belkin, Hejda, Viktoryová, Suchanek, Chmelík, Bačíková, Valerian etc., were also used in this long-term research

INTRODUCTION TO THE THEORY OF INVESTIGATION[2]

The investigations of Sherlock Holmes started a new journey of criminal investigation at the beginning of the 19th century. For criminal investigation, personal identification would no longer be based on empirical standards of recognition, (e.g. testimonials), but on a precise correspondence between the physical peculiarities of an individual, his natural identity, and his civic identity, or personal data. Holmes was the pioneer of scientific crime detection methods. Later on, Agatha Christie's Hercule Poirot added brainpower by using "the little grey cells". He was a conventional, clue-based detective who greatly depended on logic and psychology of the suspect's behaviour. Colombo's interrogation technique was to conduct a seemingly innocent interview, politely conclude it, and exit the scene, only to stop in the doorway

2 We hope, that for our readers it is clear, that names as Poirot, Holms, Colombo, are known as fictional literature heroes and not real criminalist.

or return moments later and ask, "Just one more thing...". The "one more thing" was always a jarring question regarding an inconsistency in either the crime scene or the suspect's alibi.

The era of the classical sleuth was replaced by the tough, hard-boiled cop with his tendency to use violence to get the job done and bring the offender to justice. The 1990s were characterized by the shift from cop-action hero to criminalist, or forensic science detective, from Hannibal Lecter to the characters portrayed in the television series "CSI". This type of criminalist often employed observation, forensic science, and profiling to solve cases. With the emphasis on intelligence rather than muscularity and a reliance on weapons, new kinds of detective-heroes have emerged. While these archetypes of criminal investigators are fictional, the movie industry has successfully mirrored the real life investigation methods and techniques employed by law enforcement officers. Regardless of the type of investigation method or detective, or whether or not the investigator is real or fictional, the subject matter revealed previously belongs to the discipline of criminalistics, or forensic science (in North America and the UK).

Although the term "criminalistics" is often used interchangeably with the term "forensic science", it is, in fact, as the American Academy of Forensic Sciences acknowledges, a distinct discipline that operates along with other disciplines under the umbrella of forensic science. The American Board of Criminalistics adopted Osterburg's (1968) definition of criminalistics. He defined it as "that profession and scientific discipline directed to the recognition, identification, individualization, and evaluation of physical evidence by application of the natural sciences in law-sciences matters." (p. 427). Merriam-Webster's online dictionary identifies criminalistics as an "application of scientific techniques in collecting and analyzing physical evidence in criminal cases".[3]

Krajnik[4] adds to this definition by stating the fact that European criminalistics also investigates memory evidence that is a part of our material environment.

Criminal investigation represents a knowledge-intensive and time-critical environment. Investigation, either simple or complex, is best accomplished in a systematic and methodical way where investigative objectives should be determined. The fundamental objective in criminal investigation is to seek the truth. During the course of seeking the truth, investigators gather evidence to prove the "facts in issue" along with the identity of the offender(s) involved. A significant factor in understanding crime is to understand society itself. One of the extensive challenges facing contemporary societies is an increasing number of criminal offences and the ways in which the criminal justice system is dealing with this problem. In North American and European countries, the model of criminal investigation is closely connected to forensic science. This discipline involves judgment, acquisition, identification and evaluation of material traces using scientific techniques in questions of law importance.

Forensic science benefits from many disciplines, including psychology, psychiatry, anthropology, odontology, osteology, pathology, botany, toxicology, biology, biochemistry, molecular biology, radiology, polygraph, firearm and tool mark examination, digital imaging enhancement, forensic data recovery and accounting[5]. Typically, a criminal investigation begins at the crime scene. As the criminal investigation is a dynamic process, it requires the cooperation of patrol officers and detectives who work together toward the mutual goals of solving the case while seeking the truth[6].

3 http://www.merriam-webster.com/dictionary/criminalistics.
4 Krajnik, V. et al. (2005). Kriminalistika. Bratislava: Akademia PZ v Bratislave.
5 Van Allen, B. (2007). Criminal Investigation: In Search of the truth. Toronto: Pearson Education Canada.
6 Geberth, V.J. (2006). Practical homicide investigation: Tactics, procedures, and forensic techniques, 4th ed. Boca Raton: CRC Press.

The crime scene is a very active and quickly changing environment where the evidence of the crime is (or was) located. The role of the first officers to arrive on the crime scene (usually patrol officers) is crucial because the success of the criminal investigation depends on actions and steps taken by them. The fundamental task of the first officers is to prevent destruction of potential evidence by protecting and preserving the crime scene[7]. The crime scene is not only the proof that a crime has been committed, but it is also a place where physical evidence may help to connect the perpetrator(s) to the crime[8]. Physical evidence has the potential to play a critical role in the overall investigation and resolution of a suspected criminal act; therefore, activities performed at the beginning of an investigation at a crime scene can have a significant impact on this process. Investigators use "the burning bridges theory" to explain the importance of securing the crime scene: "Every time anything is done at a crime scene, it represents another "bridge" burned. Whatever has been changed can never be restored to its original condition."[9]

Fisher[10] indicates seven main objectives of a crime scene investigation: "to reconstruct the incident, ascertain the sequence of events, determine the mode of operation, uncover a motive, discover what property was stolen, find out all that the criminal may have done and recover physical evidence of the crime". No two crime scenes are alike. After arriving at the crime scene, detectives assess the scene. Depending upon the apparent type of criminal act, they decide what forensic specialists are needed to be called in to process the crime scene[11]. The use of forensic science is one of the fundamental techniques in criminal investigation. A typical investigative technique that helps link the offender to the crime is the analysis of physical evidence, such as fingerprints or DNA. Another technique used in the criminal investigation is behavioural analysis, which "tries to identify the offender through the interpretation of psychological clues that are evident from the offender's behaviour both during and after the offence"[12]. It consists of psychological profiling, threat assessment, geographic profiling and violent crime linkage analysis system[13]. Methods and techniques of criminal investigation, or criminalistics tactics and techniques, help the investigators answer the question, "in what way crime was committed?" Successful answer to this question often leads to the offender and his/her apprehension, which is the main concern of law enforcement officers.

When trying to answer the question, "why crime was committed?" criminologists face a multitude of complex issues. Although they have numerous theories handy, it is difficult for any one theory to provide the exact answer due to uniqueness of each offender. When it comes to motivation, the nature/nurture dichotomy comes in to play. Human behaviour is shaped by the environment in which a person lives in combination with genes inherited from his/her ancestors. Until recently, no researcher could provide proof as to which factor affects human behaviour more; therefore, a correct and complete explanation of the question "why crime was committed" is virtually impossible. However, knowing the right answer turns out to be irrelevant when quick apprehension of the offender becomes the key concern of public safety. Consequently, the knowledge applied in criminal investigation comes from the discipline of criminalistics, rather than from science of criminology.

7 Fisher, B.A.J. (2004). Techniques of crime scene investigation, 7th ed. Boca Raton: CRC Press.
8 Geberth, V.J., *op. cit.*
9 Van Allen, B. *op. c*it., p. 145.
10 Fisher, *op. cit.,* p. 48.
11 Wecht, C.H. (2004). *Crime scene investigation: crack the case with real-life experts.* Pleasantville, New York: The Reader's Digest Association.
12 Van Allen, B. *op. cit*., p. 225.
13 Van Allen, B. *op. cit*.

OBJECT AND PURPOSE OF CRIMINOLOGY

Sacco & Kennedy[14] define criminology as an interdisciplinary science that "attempts to understand (a) the factors that prompt or fail to inhibit criminal motivation, (b) circumstances leading up to the act, and (c) the consequences of the act for the victim(s), for others in the community, and for society at large. Criminologists are also asked to suggest how we should respond to crime. Finally, criminologists monitor how changes in the laws and their interpretation affect how people behave in society and, in turn, how agents of social control respond to this behaviour".

The term "criminology" is derived from Latin word, "crimen" (crime) and the Greek word "logos" (science). In Europe, criminology was introduced by French anthropologist Topirand in 1879. Italian lawyer Raffael Garofalo used the term 'criminology' for the title of his book Criminologia in 1885[15]. The creation of the scientific field of criminology was necessary to understand the process of crime and the problems connected with crime. The need for the scientific examination of crime became clear at the end of the 19th and beginning of the 20th centuries when crime developed into a significant problem in central European society. The object of criminology can be specified from broad and narrow points of view. A broad perspective identifies criminology as the science of the criminal act. A crime itself is not an isolated event; therefore, criminologists called for a wider understanding of this social phenomenon. There was a need to expand the role of criminology to recognize antisocial characters of non-criminal actions as well as crime prevention, including victimology. According to Subert and Niksova, criminology is an independent science focusing on (a) the essence of crime as being a consequence of collective, dangerous social act, (b) the condition, structure, dynamics and tendencies of crime, (c) the circumstances and reasons for committing crime, (d) the personality of the offender, (e) the importance of the victim of crime and (f) target-oriented activities to prevent crime.

Criminology, as an empirical science, is oriented on general research known as theoretical criminology and applied criminology, where the knowledge from academic criminology is applied into the practice[16]. Kaiser identifies criminology as a methodological unit of empirical facts about crime, offenders, negative social visibility and the regulation of this kind of behaviour. Madliak defines criminology as a science about an offender's personality and the crime itself. According to him, criminology examines the structure, dynamics, conditions, sources and prognosis of the crime. According to Zapletal, criminology is a science about crime, offenders and their victims, as well as crime regulation and control. Although these definitions differ from one another, they do have one thing in common, which is that they all recognize crimes and their consequences as real events that can be examined empirically, and thus precisely described and explained[17].

The objects of criminology are negative social features that are defined by criminal law as crime, offenders, victims, conditions and causes of crime, sanctions and punishments, as well as prognosis of crime progress. The definition and object of criminology consist of several concepts that should be thoroughly described and analyzed. A crime is understood as a complex of penal (criminal) acts committed within a particular time scope. However, this definition was adopted from law practitioners. Different groups of criminologists define crime as a complex of socially harmful acts, but this definition is vague. A penal (criminal) act is an act of human

14 Sacco, V. F. & Kennedy, L. W. (2002). *The Criminal Event: An introduction to Criminology in Canada*, 3rd ed. Toronto: Nelson Thomson Learning, p. 8.
15 Ondicová, M. (2003). *Úvod do kriminológie.* In Kolektív autorov. Kriminológia – všeobecná časť, 1. diel, pp. 6-29. Bratislava : Akademia policajného zboru v Bratislave.
16 Turayova, Y & Mikus, P (2003). *Kriminologia, vseobecna cast 1. diel.* Akademia PZ v Bratislave.
17 Ondicová, M., *op. cit.*

behaviour that is specified in criminal law. Negative social features are non-criminal, antisocial incidents that are not penalized by criminal code but deviate from social laws and norms accepted by contemporary society[18]

The key object of criminology is crime as a collective event. If we want to explore the origins of a particular social/antisocial feature or event, we must observe and describe it first. This is a core mission of criminological aetiology. On the other hand, criminological phenomenology deals with crime statistics. Its main task is to present a picture about the extent and type of crime in a specific area within a particular time range, about the group of offenders, their age, gender, employment, recidivism rate and material losses caused by committing crime.[19]

An offender's personality is another subject of criminology. Personality is understood as an organic entity consisting of biological and psychological attributes that interacts with the environment characterized by social features and social relationships. The consequences of an offender's behaviour are closely connected to his/her victim. Although victimology is a separate scientific discipline in foreign countries, in Slovakia it belongs to the field of criminology.[20]

Modern criminology pays close attention to crime control, which is understood as the public effort to keep crime rates within acceptable boundaries or under reasonable constraint. Crime control is carried out by two means, repressive and preventive. Repressive crime control is achieved by the penal system stated in the criminal code. Preventive crime control consists of several strategies that are aimed at crime prevention. Social prevention is directed at social factors that are important in the process of socializing among humans. Situational prevention is focused on criminogenic situations, particularly on prohibiting opportunities to commit crime. Activities of victimological prevention intend to avoid possibilities of becoming a victim. The recipients of primary prevention are members of a society and every citizen of specially defined geographical or demographic category, such as youth. Recipients of secondary prevention are special risk groups of offender or victims who are oriented at criminogenic situations. Activities of tertiary prevention are directed at offenders and victims of recidivism[21].

Bearing in mind its scientific foundation, criminology aims to fulfil three purposes. First, its analytical function serves to understand the condition, structure, dynamics and tendencies of crime, as well as the circumstances surrounding and reasons for committing the action, along with target-oriented activities to prevent crime. The methodological function assists to provide its own research results to other law enforcement subjects aimed at crime prevention. Finally, the prognostic function helps to scientifically predict possible trends, forms and methods in crime development[22].

HISTORY AND DEVELOPMENT OF CRIMINALISTICS.

In order to understand the development and features of criminalistics in Slovakia, it is useful to identify a few general characteristics. First of all, it has emerged from the discipline of criminal law through a growing acknowledgement of the social dimension of crime. In addition, its development has been influenced by the evolution of political and social systems. Sometimes its very

18 *Op. cit.*
19 *Op. cit.*
20 *Op. cit.*
21 Meteňko, J., Kloknerová, M., Kliment, A. (2006) Prevencia kriminality mládeže v policajných činnostiach 2003-2005. Projekt výskumu a záverečná správa. Akadémia PZ v Bratislave, Bratislava 2006. 118 s. výsk. 115.
22 Turayova, Y & Mikus, P., *op. cit.*

existence was denied, and sometimes it was hijacked for ideological aims. Finally, it is receptive in terms of adapting theories and methods mainly from Austro-Hungarian monarchy and Bohemia, territory of which Slovakia used to belong to.

The history of criminalistics is, in fact, a history of criminalistics methods. The first method used in criminalistics was most likely interrogation, whereas the first techniques used for identification were anthropometric methods (descriptions of the person) and dactyloscopy (finger-print analysis). The first significant movement in criminalistics was the establishment of an organization called "Surete" (security) by Eugene Francois Vidocq (1775 – 1857) in France. Surete was a prototype of ancestral law enforcement agency that applied investigative methods that were highly sophisticated for that era. Some of them have survived until the present day.

In 1879, French police officer Louis Alphonse Bertillon introduced anthropometry as a method of measurement of human body parts. The introduction of the anthropometric method, as a part of the method of personal description, was a significant event in criminal investigation which laid the foundations for modern criminalistics. The founder of finger-print analysis is considered to be Czech scientist Jan Evangelista Purkyne. However, practical application of finger-print analysis was introduced by Englishman Henry Faulds in 1880. This particular technique was expanded by Charles Darwin's cousin, Francis Galton, in his book "Fingerprints," which was published in London and New York in 1892. This book was the groundwork for the formation of the identification registration system in England in 1894. The identification registration system was a combination of anthropometry and finger-print analysis in which a person's body part measurements were officially registered[23]. The work of Austrian criminal law professor and investigative judge Hans Gross and his first criminalistics textbook, "Handbuch fur Untersuchungsrichter als System der Kriminalistik" (1893), laid the foundations for teaching and understanding the nature of criminalistics during the Austro-Hungarian monarchy. Gross is believed to be the father of modern scientific criminalistics[24]. During his era, criminalistics was considered to be a supporting discipline of criminal law, known as "die straftrechtlichen Hilfswissenschaften"[25]. Criminalistics together with other sister disciplines, such as criminal (forensic) anthropology, criminal psychology, and criminal sociology, helped criminal law to fight the crime. According to Gross, criminalistics consisted of two subjects, phenomenology of the offender and investigative science. The main role of criminalistics was to study the criminal act. The structure of criminology and criminalistics according to Gross was as follows:

<table>
<tr><td colspan="6">CRIMINOLOGY (science of crime)</td></tr>
<tr><td colspan="2">Criminal anthropology</td><td colspan="2">Criminal Sociology</td><td colspan="2">Criminal phenomenology</td></tr>
<tr><td>Criminal dentistry</td><td>Criminal psychology</td><td>Crim statistics</td><td>Social crim psychology</td><td>Criminalistics</td><td>Subjective crim psychology</td></tr>
<tr><td colspan="3">Phenomenology of the offender</td><td colspan="3">Investigative science</td></tr>
</table>

Source: Straus, J. (2005). System Kriminalistiky. Policajna Teoria a Prax, Rocnik XIII. 3/2005, p. 5

23 Straus, J. et al. (2004). *Uvod do kriminalistiky*. Plzen: Vydavatelstvi a nakladatelstvi Ales Cenek, a. s.
24 Krajnik, V. et al. (2005). *Kriminalistika*. Bratislava: Akademia PZ v Bratislave.
25 Metenko, J & Kubikova, I (2005). *Pokroky v kriminalistike*. Bratislava: Akademia Policajneho Zboru v Bratislave, p. 17.

In Prague, the first finger-print analysis was introduced by Frantisek Protiwensky in 1891, and scientifically described in his book, "The science of dactyloscopy and person description," in 1903. In 1901, the photographic laboratory became a part of the police department where photographs of offenders were collected. In 1926, the Criminological Institute was established as a department of law faculty of Charles University in Prague. The first central investigative police department was created in 1928. Between 1930 and 1950, several authors contributed to the growth of Czechoslovakian criminalistics. Frantisek Kocian, Jozef Vavrovsky, Vladimir Solnar, Josef Sejnoha, Josef Lebeda, Vitezslav Celansky Rudolf Kostak, Otta Fanta and Ladislav Moravec were highly recognized for their contribution to the field.

The end of WW II meant a period of reorganization for the Czechoslovakian law enforcement system. Thus, on April 17th of 1945, Agency of National Security was created along with the Criminal Service of Czechoslovakia. The role of criminalistics was contingent upon the new political situation of the country.

The first domestic academic textbook of criminalistics, "View to Criminalistics," was published by the founder of the Institute of Criminalistics, Bohuslav Nemec in 1957[26]. The division of this book meant a slight shift from Gross' teaching to a new conception focusing on three fundamental elements of criminalistics: criminalistics tactics, criminalistics techniques and supporting sciences[27]. Nemec was a significant figure in Czechoslovak criminalistics during the years between 1950 and 1960. Apart from textbooks, he published a number of criminalistics books and encyclopaedias[28]. Czechoslovak criminalistics was further formed by the school of Soviet criminalistics largely via the work of A. Vinberg and R. S. Belkin, who together introduced a method of examination of mental (memory) evidence into criminal investigation. Belkin divided criminalistics into four essential subcategories: the general theory of criminalistics, criminalistics techniques, criminalistics tactics and the application of criminalistics methods[29].

The Soviet model was essentially developed by Jan Pjescak, who created the theoretical base for Czechoslovakian after-war criminalistics. According to Pjescak, the attention of criminalistics theory should be aimed at two key disciplines, criminalistics methodology in general, and then specifically on the basis of individual crimes[30]. Pjescak's first significant work, "Introduction to Criminalistics," was published in 1965. He issued the general theoretical principles of criminalistics in 1979, in the book "Socialistic Criminalistics". During the years between 1982 and 1986, Pjescak published numerous criminalistics textbooks, some of them with the cooperation of other Soviet authors. His work dramatically transformed Czechoslovak criminalistics, which made Pjescak one of the most significant figures in the history of the Czechoslovak criminal justice system. Besides his publishing activities, Pjescak established and managed a number of criminalistics faculties, and was also a founder of the first forensic laboratory in Slovakia, which is now a part of the Academy of Law Enforcement in Bratislava[31].

Until the split of Czechoslovakia on December 31, 1992, criminalistics was not an independent science; instead, it was a subcategory of criminal law taught and learned by lawyers in the Faculty of Law as a supporting discipline of criminal law. After the creation of the new, democratic country, there was an enormous need to give criminalistics the appropriate importance it deserved by defining its role, objects and problems, in order to separate this discipline from that of law. There was also the additional need to distinguish between the objects of criminalistics,

26 Straus, J. et al. (2004). *Uvod do kriminalistiky*. Plzen: Vydavatelstvi a nakladatelstvi Ales Cenek, a. s.
27 Metenko, J & Kubikova, I., *op. cit*.
28 Straus, J. et al., *op. cit.*
29 Straus, J. (2005*).* System Kriminalistiky. *Policajna Teoria a Prax*, Rocnik XIII. 3/2005, pp. 5-15.
30 Metenko, J & Kubikova, I., *op. cit*.
31 Krajnik, V. et al. (2005). *Kriminalistika*. Bratislava: Akademia PZ v Bratislave.

police science and criminal law. Criminal acts as defined by Gross were no longer the subject of criminalistics; instead, its focus was shifted to the examination of criminal evidence. With the alteration of the subject of criminalistics, there was a need to abandon some of the previous criminalistics methods such as searching for people and holding people in custody[32].

Contemporary criminalistics was greatly influenced by the creation and development of police sciences as well as other scientific disciplines. The objectives of the police sciences are consistent with the police services (policing). The central role of these objectives is interconnection of secret/public and police/safety activities. Although the focus of both criminalistics and police sciences is mutually linked, it is necessary to distinguish between them by respect of the methods of their investigation. Criminalistics investigates trace evidence using solely criminalistics methods, (e.g. methods of criminalistics examination/exploration). On the other hand, when criminalistics uses methods of other sciences, the application of these methods is performed in a way that is customized to the specificity of criminalistics research objects, rules, and needs. However, this is not accomplished by pure mechanical application of these methods; rather, transformation and actively adapting to the needs of criminalistics science is also a necessary factor. In contrast, police sciences employ methods of search/inquiry and proving/ providing evidence[33].

THE OBJECT AND CATEGORIES OF CRIMINALISTICS

The structure of criminalistcs in Europe is not uniform. Some West European countries took the British-American model which describes criminalistics as a forensic science. According to this model, forensic science is a criminalistics technique that is employed for technical solution of judicial problems. Additionally, this model contains crime scene investigation techniques. Some of these techniques are used in central European models under criminalistics tactics. For a number of central European law practitioners, criminalistics is understood as a legal science[34]. But some others aspects use concept oriented to interdisciplinary, or better multidisciplinary science witch is not oriented only to law science as part of social sciences[35]. Owing to the legal aspect of the criminalistics, forensic science and the science of criminalistics cannot be linked to each other. Because they are not identified in the Criminal Code, some of the forensic science techniques, such as electro-technical examination, examination of digital evidence or metallographic examination, do not belong to legal methods, and therefore forensic science is viewed as a different discipline than criminalistics. The legal aspect plays a critical role in the differentiation between the two models[36]. Criminalistics is an independent science that "examines the manifestation of the event in form of physical and memory characteristics / traces"[37]. In criminalistics, this manifestation is called trace - evidence. Trace - evidence is the object of the science of criminalistics. Criminalistics

32 Simovcek, I. (1998). *Niektore teoreticke otazky kriminalistickej vedy*. Kriminalisticke dni na Slovensku. Zbornik materialov z vedeckej konferencie konanej dna 20.-21.5.1998, pp. 5-13; Metenko, J & Kubikova, I., *op. cit.*
33 Metenko, J.(2004). *Vztah kriminalistiky k policajným vedam z hladiska ich predmetu a metod.* Sbornik odbornych sdeleni z mezinarodni konference „Pokroky v kriminalistice" 22.9. – 23. 9.
34 Straus, J., *op. cit.*
35 Meteňko, J., (2012) *Kriminalistická taktika*, Akadémia PZ v Bratislave, Bratislava 2012, 1. vydanie, 267 s., ISBN 978-80-8054-553-6; Metenko, J., Bačíková, I., Samek. M., (2013) Kriminalistická taktika, Brno: Václav Klemm – vydavatelství a nakladatelství 2013, 1. vydanie, 307 s., ISBN 978-80-87713-08-2.
36 Metenko, J (2006). *Vztah forenznych vied a kriminalistiky z hladiska niektorych metod.* Zbornik z II. odborneho seminara Casta – Papiernicka 8. 3. 2006. Bratislava: Kriminalisticky a expertizny ustav Policajneho Zboru; Metenko, J., Bačíková, I., Samek. M., (2013) Kriminalistická taktika, Brno: Václav Klemm – vydavatelství a nakladatelství 2013, 1. vydanie, 307 s., ISBN 978-80-87713-08-2.
37 Krajnik, V. et al., *op. cit*., p. 17.

differentiates two types of trace - evidence, substance and memory. Both are mass traces. Non mass traces not exist – it is not possible out form material.[38]

Naturally, criminal investigation based on material evidence provides a higher level of precision[39]. (It is necessary to note that in criminalistics, we differentiate between evidence and trace evidence. Evidence is a term for proving something, and is basically regarded as a proof, whereas trace evidence is meant as an imprint used for identification.) Contemporary criminalistics is broken down to two main groups, criminalistics techniques and criminalistics tactics. Criminalistics techniques focus on an examination of material (physical) trace evidence, while criminalistics tactics examine mainly – or partly memory trace evidence.[40]. Regardless of the different categories of evidence, criminalistics is focused on finding, seizing and examining the evidence[41]. Criminalistics distinguishes between three categories of achieving this goal: (a) modus operandi – method of committing a crime, (b) criminalistics trace evidence and (c) criminalistics identification.

Modus operandi/ method of committing a crime

Considerable emphasis in criminal investigation is placed on a detailed description of the method of committing the crime, which is known as modus operandi (or MO). Three major components of MO play a role in criminal investigation, and they are listed as follows: The components pertaining to an action characterize the physical and psychological activity of the offender while committing a crime. Material components consist of tools and items necessary for committing the crime. Finally, multifaceted components are a complex group of activities and information required for committing the crime.

Human behaviour is determined by numerous factors. Similarly, the behaviour of the offender depends on the interaction between these factors. Criminalistics divides these factors on objective and subjective determinants. Objective determinants do not depend on offender's choice. In general, they are social/cultural conditions, victim(s)/target(s), the relationship between the offender and the victim/target, the crime scene, the time, the accessibility of tools (weapon, etc.), and the existence of co-offender(s). Subjective determinants depend on and are connected to the offender(s) specifically. They are the physical (somatic) characteristics of the offender (i.e. his/her strength, body build), psychological and motor characteristics of the offender (his/her level of intelligence, ease of mobility, hobbies, and sexual behaviour), age, gender, criminal experience and educational level (qualification, skills).

Knowledge of the method of committing a crime offers additional, very important information. It enables investigators to create criminalistics versions, and provides data for criminal profiling[42].

Criminalistics trace evidence

In criminal investigation, trace evidence gives investigators a picture of the criminal act along with the behaviour of the perpetrator and his/her victim(s). The knowledge of the trace evidence mechanism and its creation lays the foundation for criminal investigation methods

38 Meteňko, J., (2012) *Kriminalistická taktika*, Akadémia PZ v Bratislave, Bratislava 2012, 1. vydanie, 267 s., ISBN 978-80-8054-553-6; Metenko, J., Bačíková, I., Samek. M., (2013) Kriminalistická taktika, Brno: Václav Klemm – vydavatelství a nakladatelství 2013, 1. vydanie, 307 s., ISBN 978-80-87713-08-2.
39 Krajnik, V. et al., *op. cit*.
40 Straus, J., *op. cit.*
41 Konrad. Z. (2007). *Metodika vysetrovani jednotlivych druhu trestnych cinu – cast kriminalisticke vedy?*. Zbornik vedeckych a odbornych prac z medzinarodneho teoreticko-praktickeho seminara zo dna 23. 2. 2007, pp. 35-39. Bratislava: Akademia PZ v Bratislave.
42 Porada, V. et al. (2007). *Kriminalistika*. Bratislava: vydavatelstvo pravnickej literatury IURA EDITION, s.r.o.

and techniques. The essence of trace evidence is in mutual association of two objects that provide information about criminal act. When two objects have an effect on one another, they create changes. These changes illustrate and reproduce characteristics of affected objects. Each change in a physical environment or a human mind that is influenced by a criminal act is considered to be trace evidence. As a result of this, criminalistics distinguishes between material (physical) trace evidence and memory trace evidence. Three major changes must come into effect in order to produce trace evidence: change that is generated by the criminal act, change that exists until the time of its seizing, and change that can be assessed by criminalistics methods and techniques[43]. Trace evidence is widely recognized as one of the subjects of scientific examination[44].

Material (physical) trace evidence is divided into five categories: Trace evidence that gives information about (a) the structure of outer surface of the objects, such as finger-prints or ballistics evidence, (b) the structure of the inner surface of the objects, such as biological, chemical or pyrotechnical evidence, (c) the functional and dynamic features of the objects, such as voice, posture while walking, or hand-writing, (d) characteristics of the objects that created the trace evidence, such as finger-prints created by blood, foot-prints that provide insight into walking patterns, and (e) features of the objects created by change, such as peripheral trace evidence, (moving an object from one place to another), slits or bruises[45].

Although memory trace evidence has physical features, (like changes in brain cells), the methods of their examination is quite complex[46]. Memory trace evidence is formed by the five human senses (sight, hearing, touch, smell and taste), but it is very difficult to examine the exact way in which it is created. Additionally, it is influenced by the personality of the person who created it, (the person's short and long term memory as well as his/her emotional state, etc.), and is not accessible immediately. Once the person dies or if he/she is not willing to share his/her memory, the trace evidence is lost. All memory trace evidence is formed as a reflection of the human mind, which is influenced by the organic or inorganic environment. The basic impulse that creates the memory trace evidence is a perception that is generated by the pressure of the environment on the human senses.[47]

The examination of memory trace evidence is achievable merely by methods which allow a person to interpret his/her own experience by way of recollection of a specific event. This can be done using legal methods of psychological manipulation. As a result of this, memory trace evidence is examined using a combination of methods of criminalistics tactics, such as criminalistics versions, interrogation, confrontation, verification of the statement on the scene, recognition, and in a few cases, criminalistics experiment and criminalistics reconstruction.[48]

Criminalistics identification

Once trace evidence is formed during a criminal act, investigators strive to find out who created the evidence, and what object was used. Criminalistics identification includes examining these objects (living and non-living) that may have contributed to the formation of trace

43 Porada, V. et al., *op. cit*.; Musil, J. et al. (2001). *Kriminalistika – vybrane problemy teorie a metodologie*. Praha: Policajni Akademie Ceske Republiky.
44 Krajnik et al., *op. cit.*
45 Porada, V. et al., *op. cit*.
46 Meteňko, J., (2012) *Kriminalistická taktika*, Akadémia PZ v Bratislave, Bratislava 2012, 1. vydanie, 267 s., ISBN 978-80-8054-553-6; Metenko, J., Bačíková, I., Samek. M., (2013) Kriminalistická taktika, Brno: Václav Klemm – vydavatelství a nakladatelství 2013, 1. vydanie, 307 s., ISBN 978-80-87713-08-2.
47 Porada, V. et al., *op. cit*.
48 Bacik, R. (2007). *Kriminalisticke moznosti skumania pamatovych stop*. Rigorozna praca. Bratislava: Akademia Policajneho Zboru v Bratislave.

evidence. During the process of criminalistics identification, the object is not only identified, but also individualized. Individualization of the object is the process by which investigators examine general and specific features of the object.

Criminalistics identification is divided according to four categories. In relation to the subject (person who performed the identification), criminalistics distinguishes identification made by an expert witness or recognition by the witness (lay person). Identification made by scientific methods of examination consists of finger-print examination, ballistics, biological identification etc. In relation to the identified objects, criminalistics differentiates between identification of people and identification of non-living objects. Identification of people is usually made on the base of anatomic and anthropological features of the human body, functional characteristics of motor signs, (human gesticulation, hand-writing), the human voice, biological traces, and track traces (foot-print, lip-print, teeth). Identification of non-living objects is conducted more often by ballistics, track traces, tool marks and microscopes. The last category distinguishes identification on the basis of results; for instance, whether the object was identified or not. Individual identification is achieved by confirmation (witnesses, DNA, etc). In the case of the process of incomplete identification, the identification is finished, but the object was not identified. Here, examiners conduct partial identification by grouping the object into a bigger category (type of vehicle). Identification according to identifying features is made on the basis of specific characteristics of the object, such as functional, dynamic, structural, etc.[49] As a result of its capability to be scientifically examined, criminalistics identification belongs to both criminalistics methods, criminalistics tactics and criminalistics techniques. Therefore, identification enables the examination of material and memory trace – evidence.[50]

METHODS OF CRIMINALISTICS

Criminalistics methods developed during the historical progress of criminalistics, through its own scientific growth and also through the adaptation and adjustment to methods from other sciences. However, criminalistics examination can be done by criminalistics methods only. These methods must meet four strict criteria. The methods must (a) not contravene lawful norms, (b) be scientifically based, (c) be verified by criminalistics practice and (d) be accepted by criminalistics practice. Satisfaction of the lawful (legal) norm is a central criterion for the application of criminalistics methods. Its importance lies in the outcome of the criminal investigation. If the evidence was gathered using an illegal method (for instance, the use of physical or psychological force during the interrogation), evidence usually becomes inadmissible in court. Scientific base criterion is determined by the current situation of the progress in the scientific world. When new knowledge is scientifically recognized, the method can be changed or altered, and the old method is eventually discarded. Verification criterion is fulfilled when the scientific basis of the method is confirmed in an existing practical situation. Recognition criterion is linked to the verification principle; however, the time that elapses from the verification of a particular method to the complete application of this method into the practice is essentially longer[51].

Porada et al.[52] and Musil et al.[53] identify three groups of criminalistics methods. The first group consists of "methods of universal perception". These methods are generally employed by

49 Porada, V. et al., *op. cit*.
50 Krajnik, V. (1998). *Kriminalisticka identifikacia v kriminalistickej taktike*. Kriminalisticke dni na Slovensku. Zbornik materialov z vedeckej konferencie konanej dna 20.-21.5.1998, pp. 61-63.
51 Krajnik et al., 2005, *op. cit*.; Gaspar, R. (2006). *Procesne ukony a kriminalisticko-takticke metody*. Rigorozna praca. Bratislava: Akademia Policajneho Zboru v Bratislave.
52 Porada, V. et al., *op. cit*.
53 Musil, J. et al., *op. cit*.

all examiners, such as observation, description, comparison, measurement and experiment. The second group involves "methods taken from other sciences". These methods of examination were created by other sciences, such as physics, chemistry, and biology, and criminalistics includes them in its method of examination. The last group is composed of "specific methods of criminalistics science" and these are applied exclusively in the field of criminalistics, such as knowledge gathered from criminal investigation, law enforcement or judicial practice.

Criminalistics methods are divided into two major groups. The first, methods of criminalistics techniques, examines material (substantive) trace evidence (finger-print analysis, DNA, etc.), while the second, methods of criminalistics tactics, usually studies memory trace evidence (crime scene examination, interrogation, search, etc.)[54]

Methods of criminalistics techniques

The rapid development of scientific disciplines and the colossal growth of modern technologies has improved the methods and techniques of criminal investigation, along with the process of the identification of material trace evidence. Therefore, methods of criminalistics techniques focus on the identification of people, items, and occasionally animals. With respect to the scientific procedure used for the examination of trace evidence, criminalistics techniques are divided into three major categories. The first, methods that use procedures based on optical principles, takes advantage of the miniature structure of trace evidence and the possibility of examining it without causing any further damage. Magnifying glasses and microscopes are tools widely used by forensic specialists. The application of microscopes, (binocular, comparing, biological, metallographic, and electronic scanning), is exclusively achievable at forensic laboratories. Magnifying glasses can be used at the crime scene and forensic laboratory. The second category, methods of criminalistics techniques that use procedures based on electro-magnetic light, employs X-rays, ultra-violet, infrared and nucleus light for further identification of material trace evidence. Last, among methods that use chemical and physical procedures, analyses of drugs, blood, toxins, fuels, emissions, plastics, etc., are commonly applied[55].

The application of knowledge from scientific disciplines into forensic science is the key factor that helps link the offender to the crime by means of material trace evidence. Forensic specialists employ numerous techniques according to the characteristics of the crime. Frequently used techniques are finger-print analysis, (dactyloscopy), DNA analysis, forensic pathology, forensic biology, forensic anthropology, ballistics, forensic audio-expertise, firearm and tool mark examination, digital imaging enhancement, forensic data recovery and accounting[56]

Methods of criminalistics tactics

The significance of criminalistics tactics as a method of collection, examination, exploration and application of evidence lies in its contribution to the process of criminal investigation. In the 1950s, Bohuslav Nemec defined "the objects of criminalistics tactics as (a) a science about crime and criminal acts, (b) study about methods of offenders' activities, (c) generalization of criminalistics knowledge and their practical application, (d) active summary and statistics, (e) effective functioning of law enforcement and (f) investigative process"[57]. Later on in the 60s, the objects of criminalistics tactics shifted to investigative methods and techniques of criminal investigation. Additionally, characteristics of the offender, methods of committing crimes and their classification were added. During the 70s, academics agreed that

54 Krajnik et al., 2005, *op. cit.*
55 Porada, V. et al., *op. cit*.
56 Porada, V. et al., *op. cit*.; Krajnik et al., 2005, *op. cit.*
57 Zavalidroga, S. et al (1995). *Kriminalisticka Taktika*. Bratislava: Akademia PZ v Bratislave, p. 6.

criminalistics tactics should focus on the examination and application of methods related to the investigation and prevention of dangerous activities[58].

Criminalistics tactics assist in finding the facts in issue, and therefore they have to satisfy numerous requirements. Tactics must be legally approved, scientifically verifiable, appropriate, and accessible; finally, their application is required to be ethical[59].

At present, methods of criminalistics tactics focus on the examination of memory trace evidence, but frequently search other traces - evidence. Each method examines evidence from a specific point of view. However, this type of evidence does not exist in a vacuum; memory is frequently interconnected with material evidence and the material environment. Existing methods of criminalistics tactics include (a) crime scene investigation, (b) criminalistics search, (c) criminalistics versions, (d) interrogation/interview, (e) confrontation, (f) verification of the statement on the scene, (g) recognition, (h) criminalistics experiment and (i) criminalistics reconstruction. In some cases, criminalistics documentation, planning and management of criminalistics examination are added to the methods of criminalistics tactics[60].

CONCLUSION

The basis for process of investigation and the basis for any investigative activity, are basically the knowledge and use of methods of criminalistics tactics. Methods of criminalistics tactics often have the same name as a method of investigation. This is logical, because the Theory of investigation took its basic knowledge from Criminalistics Methodology. Criminalistics Methodology has always formed the basis for the criminal, but also any other investigation. No matter if it was recognized as a separate Theory of police science, or as historical part of classical criminalistics – known as Criminalistics Methodics. Resources are always in Criminalistics and criminalistics tactics and especially in its methods.

Given the potential scope of the study, the analysis and the system of methods of criminalistics tactics, we want to address this topic also in future studies. We hope we will be able to participate in the next year in Belgrade and to present on the conference as continuation of the research "Methods for CSI - VYSK 139", for which is this study partial output.

REFERENCES

1. Bacik, R. (2007). *Kriminalisticke moznosti skumania pamatovych stop*. Rigorozna praca. Bratislava: Akademia Policajneho Zboru v Bratislave.
2. Barta, M. (2008). *Nedostatky vyskytujúce sa pri realizácii ohliadky miesta činu*. Kriminalistika. Seminarna praca. Nepublikovane. Akademia Policajneho Zboru v Bratislave.
3. Clarke, R.V. & Eck, J. E. (2005). *Crime analysis for problem solvers in 60 steps*. Retrieved from: www.popcenter.org/learning/60Steps/
4. Fabian, S. (2009). *Criminalistics tactics: Methods and techniques of criminal investigation in Slovakia*. British Columbia Institute of Technology, Centre for Forensics & Security Technology Studies, Crime & Intelligence Analysis. 2009.
5. Fisher, B.A.J. (2004). *Techniques of crime scene investigation*, 7th ed. Boca Raton: CRC Press.
6. Gaspar, R. (2006). *Procesne ukony a kriminalisticko-takticke metody*. Rigorozna praca. Bratislava: Akademia Policajneho Zboru v Bratislave.

58 *Op. cit.*
59 Gaspar, R., *op. cit.*
60 Krajnik et al., 2005, *op. cit.*

7. Geberth, V.J. (2006). *Practical homicide investigation: Tactics, procedures, and forensic techniques,* 4th ed. Boca Raton: CRC Press.

8. Hencovska, M. (1993). *World Factbook of Criminal Justice System.* Faculty of Law

9. Pavol Jozef Safarik University.

10. Hrasko, J. (1998). *K niektorym problemom o uplatnovani domovej prehliadky v policajnej praxi.* Kriminalisticke dni na Slovensku. Zbornik materialov z vedeckej konferencie konanej dna 20.-21.5.1998, pp.123-129.

11. Konrad. Z. (2007). *Metodika vysetrovani jednotlivych druhu trestnych cinu – cast kriminalisticke vedy?.* Zbornik vedeckych a odbornych prac z medzinarodneho teoreticko-praktickeho seminara zo dna 23. 2. 2007, pp. 35-39. Bratislava: Akademia PZ v Bratislave.

12. Krajnik, V. (1998). *Kriminalisticka identifikacia v kriminalistickej taktike.* Kriminalisticke dni na Slovensku. Zbornik materialov z vedeckej konferencie konanej dna 20.-21.5.1998, pp. 61-63.

13. Krajnik, V. et al. (2005). *Kriminalistika*. Bratislava: Akademia PZ v Bratislave

14. Krajnik, V. & Straus, J. (2000). *Kriminalisticka taktika*. Bratislava: Akademia PZ v Bratislave.

15. Metenko, J.(2004). *Vztah kriminalistiky k policajným vedam z hladiska ich predmetu a metod.* Sbornik odbornych sdeleni z mezinarodni konference „Pokroky v kriminalistice" 22.9. – 23. 9. 2004. Praha: Policajni Akademie Ceske Republiky.

16. Metenko, J. et al. (2004). *Kriminalisticke metody a moznosti kontroly sofistikovanej criminality*. 1. vyd. Katedra kriminalistiky a forenznych discipline. Bratislava: Akademia PZ v Bratislave.

17. Metenko, J. (2005) *Nove trendy v kriminalistickej dokumentacii*. Kriminalistika v prikladoch. Zbornik z I. odborneho seminara. Casta – Papiernicka 10.3.2005. Bratislava: Kriminalisticky a expertizny ustav Policajneho Zboru.

18. Metenko, J (2006). *Vztah forenznych vied a kriminalistiky z hladiska niektorych metod.* Zbornik z II. odborneho seminara Casta – Papiernicka 8. 3. 2006. Bratislava: Kriminalisticky a expertizny ustav Policajneho Zboru.

19. Metenko, J. (2008) Metódy a postupy práce na mieste činu - slovenská časť projektu : Projekt výskumnej úlohy. / Rieš. výsk. úl. Jozef Meteňko. - 1. vyd. - Bratislava: Akadémia PZ, 2008 Výsk 139

20. Metenko,J. (2011). Skúmanie miesta činu a skúmanie na mieste činu. In Pokroky v kriminalistike 2011 EU SEC II/B. Bratislava: Akadémia Policajného zboru, 2011. ISBN 978-80-8054-523-9, s. 19-18

21. Meteňko, J., (2012) *Kriminalistická taktika*, Akadémia PZ v Bratislave, Bratislava 2012, 1. vydanie, 267 s., ISBN 978-80-8054-553-6.

22. Metenko, J., Bačíková, I., Samek. M., (2013) Kriminalistická taktika, Brno: Václav Klemm – vydavatelství a nakladatelství 2013, 1. vydanie, 307 s., ISBN 978-80-87713-08-2.

23. Meteňko, J., Hejda, J., (2009) Sytémové zmeny vo formách kriminalistickej dokumentácie. In.: Krajníková, M., Masnicová, S., Gýmerská, J., Ed., „Pokroky v kriminalistike 2009" Zborník z medzinárodnej konferencie konanej v dňoch 9.-10.11.2009, Katedra kriminalistiky a forenzných disciplín, Akadémia PZ v Bratislave, Bratislava 2009.

24. Meteňko, J., Kloknerová, M., Kliment, A. (2006) Prevencia kriminality mládeže v policajných činnostiach 2003-2005. Projekt výskumu a záverečná správa. Akadémia PZ v Bratislave, Bratislava 2006. 118 s. výsk. 115.

25. Metenko, J & Kubikova, I (2005). *Pokroky v kriminalistike*. Bratislava: Akademia Policajneho Zboru v Bratislave.

26. Musil, J. et al. (2001). *Kriminalistika – vybrane problemy teorie a metodologie*. Praha: Policajni Akademie Ceske Republiky.

27. National Police, Slovak Republic: *Structure and organization, Education/Training*. Retrieved
28. July 28, 2008, from: http://polis.osce.org/countries/details.php?item_id=29&lang=fr
29. Ondicová, M. (2003). *Úvod do kriminológie*. In Kolektív autorov. Kriminológia – všeobecná časť, 1. diel, pp. 6-29. Bratislava : Akademia policajného zboru v Bratislave.
30. Ondicová, M. (2008). *Vzťahy biologickej, psychologickej a sociálnej podstaty človeka ako prvopáchateľa trestného činu.* Dizertačná práca vo vednom odbore: 92-65-9 Kriminológia, Kriminalistika. Akademia Policajneho Zboru v Bratislave.
31. Ondrus, M. (2007). *Kriminalisticko-takticke metody v skratenom vysetrovani*. Rigorozna praca. Bratislava: Akademia Policajneho Zboru v Bratislave.
32. Osterburga, J. W. (1968). Police Science: What problem must criminalistics solve. *The Journal of Criminal Law, Criminology and Police Science*, 59(3), 427.
33. Porada, V. et al. (2007). *Kriminalistika*. Bratislava: vydavatelstvo pravnickej literatury IURA EDITION, s.r.o.
34. Rossmo, D.K. (2000). *Geographic Profiling*. Boca Ranton, Florida: CRC Press.
35. Sacco, V. F. & Kennedy, L. W. (2002). *The Criminal Event: An introduction to Criminology in Canada*, 3rd ed. Toronto: Nelson Thomson Learning.
36. Simovcek, I. (1998). *Niektore teoreticke otazky kriminalistickej vedy*. Kriminalisticke dni na Slovensku. Zbornik materialov z vedeckej konferencie konanej dna 20.-21.5.1998, pp. 5-13.
37. Straus, J. (2005*).* System Kriminalistiky. *Policajna Teoria a Prax*, Rocnik XIII. 3/2005, pp. 5-15.
38. Straus, J. et al. (2004). *Uvod do kriminalistiky*. Plzen: Vydavatelstvi a nakladatelstvi Ales Cenek, a. s.
39. Svitok, S. (1998). *Vyznam previerky vypovede na mieste*. Kriminalisticke dni na Slovensku. Zbornik materialov z vedeckej konferencie konanej dna 20.-21.5.1998, pp. 131-135.
40. Turayova, Y & Mikus, P (2003). *Kriminologia, vseobecna cast 1. diel*. Akademia PZ v Bratislave.
41. Van Allen, B. (2007). *Criminal Investigation: In Search of the truth.* Toronto: Pearson Education Canada.
42. Viktoryova, J. & Zanovit, J. (2007). *Zamyslenie sa nad taktikou vykonania vysetrovacieho pokusu.* Kriminalisticky Zbornik, rocnik 3, pp. 41-46.
43. Wecht, C.H. (2004). *Crime scene investigation: crack the case with real-life experts.* Pleasantville, New York: The Reader's Digest Association.
44. Zavalidroga, S. et al (1995). *Kriminalisticka Taktika*. Bratislava: Akademia PZ v Bratislave.
45. http://www.merriam-webster.com/dictionary/criminalistics

UDC: 343.211.3-053.6
343.91-053.6

PHENOMENOLOGICAL CHARACTERISTICS OF JUVENILE CRIMINALITY IN RELATION TO JUVENILE JUSTICE (JUSTICE FOR CHILDREN AND YOUTH)

Tatjana Velkova, PhD[1]
FON University, Faculty of Detectives and Security,
Faculty of Law, Skopje

Abstract: Over the last eight years the juvenile crime in the Republic of Macedonia has demonstrated unusual phenomenological characteristics vis-à-vis the application of the modern concept of juvenile justice. Namely, after two delays and one amendment that barely came into effect in relation to the implementation of the contemporary and codified Law on Juvenile Justice from 2007, the Legislature passed a new legal act - the Law on Child Justice. During this period, the juvenile crime has seen a significant reduction, both in terms of the reported crimes, on the one hand, and the accused and convicted minors (children), on the other hand, which cannot be attributed to the application of the modern legislation. Hence, one can rightfully ask: what is happening with the children – the youth in Macedonia? Have we reached the levels of social disorganization high enough to offer other deviant "modes for escaping the reality"?! Or, should we assume that the size of the juvenile population has dramatically shrank over the years?!

The author of the paper tries to find a scientifically verified answer to this puzzling question. Or else, we are left with the paradox of the national legislation and the absurd conclusion: the Republic of Macedonia is a peculiar country: it is enough for a law to be passed, it does not even need to be applied, it can be changed, all while the situation with the gravest of all illegal phenomena - the juvenile crime is remarkably improving?!

Despite the "era" of the absurd, our responsibility to the future generations requires an objective approach to the position of the youth in the criminal justice system as well as their behaviour in the context of the current, increasingly criminogenic social conditions and processes.

Keywords: juvenile justice, child justice, juvenile crime, criminal sanction, position in the criminal justice system, prevention, repression.

INTRODUCTION

The juvenile crime in Macedonia has a new name - it is now officially called the crime of the child?! In addition, younger minors by law are now called the children aged between 14 and 16 years and the older minors – the children aged between 16 and 18 years?! This makes the juvenile prison into a prison for children?! These novelties (particularly terminological and contrary to our language, culture and legal tradition) in 2013 were brought to us by the

1 E-mail: tatjana.velkova@fon.edu.mk.

new Law on Child Justice,[2] which has come into the place of the Law on Juvenile Justice[3] of 2007. According to the new legal regulation, juvenile justice is now justice for children and thus designed and passed was a new legal act through a play of words, and in the context of the same, or possibly even worse social reality. As a matter of fact, it seems that such practices of "revising" the laws are the easiest way to show that something is being done, as creating the conditions for the law to be implemented in real life requires much more: a real effort based on strong will and strong commitment to real changes! This brief introduction to the situation with juvenile justice in our country, as well as the criticism of the ease with which "legal reforms" are approached, aims at presenting the general legal framework within which the gravest illegal deviancy of minors thrives - the juvenile crime. This corresponds to the period after our legal system adopts the highest standards of juvenile justice - the justice of the children.

What is actually happening with the phenomenological characteristics of juvenile crime in the country, in the period from 2007 to 2014? This period entails both the year when the modern juvenile code has been codified (2007) and the year when the same law has been completely "changed" (2013).

VOLUME AND DYNAMICS OF JUVENILE CRIME ACCORDING TO THE NUMBER OF THE REPORTED, ACCUSED AND CONVICTED MINORS

In order to draw valid conclusions about the phenomenological characteristics of juvenile crime in the country, statistical indicators are used included in the Statistical Yearbooks for perpetrators of crimes as the most reliable official indicators. Moreover, the interpretation will take into consideration the shortcomings of the statistical records, primarily related to the existence of "dark figures" of juvenile crime.

Table 1 presents the phenomenological characteristics of the volume and dynamics of juvenile crime.

Table 1: *Volume and dynamics of the reported, accused and convicted minors in the period 2008-2014*[4]

Year	Total Reported	Basic index	Total Accused	Basic Index	Total Convicted	Basic Index
2008	1355	1	981	1	715	1
2009	1519	1,12	1030	1,04	748	1,04
2010	1244	0,91	750	0,76	547	0,76
2011	1163	0,64	1002	1,02	722	1
2012	1001	0,74	778	0,79	556	0,77
2013	1005	0,74	657	0,66	473	0,66
2014	972	0,71	712	0,72	461	0,64
TOTAL:	8.259		5.919		4.222	

2 Official Gazette of RM No. 148 from 29.10.2013
3 Official Gazette of RM No. 87 from 12.07.2007 (not in force)
4 Annual Statistical Reports for 2008-2014 of the State Statistical Office

Even at first glance, the performance of the official statistical evidence points to a striking downward tendency in (except in 2009) the number of the reported, accused and convicted children. The number of warrants against the reported children are also declining, i.e. the court has issued warrants in only 75% of the reported cases, which means that the public prosecutor applied the principle of opportunity in 25% of the cases. Only half of the reported children have been convicted eventually.

More precisely, in 2014, 972 children were reported, while in 2008 the number was 1355 children - a difference of 383 reported children, or a decrease of 28% in the reported cases. The registered decrease in 2014 is even more pronounced relative to 2009 and the gap in the reported children amounted to 547, or a decline in the number of reported children by 36%. A similar positive trend can be identified in the reduction of the number of the accused and convicted persons, as reflected in the amounts of basic indices for the accused and convicted children. This positive tendency of decline in the overall volume of the reported, accused and convicted children is satisfactory, but it still leaves unanswered the questions about the etiology of this tendency.

THE TYPOLOGY OF JUVENILE CRIME

In order to observe the typology of crime committed by children, we present Table 2.

Table 2: *Reported children by type of crimes committed in the period 2008- 2014*

Year	Crimes against life and body	Crimes against freedoms and rights	Crimes against honour and reputation	Crimes against gender freedoms and morality	Crimes against health	Crimes against public finances and economy	Crimes against property	Crimes against public security	Crimes against traffic security
2008	84	7	1	18	18	21	1023	4	77
2009	103	2	1	17	12	12	1192	1	88
2010	107	2	4	24	14	14	937	10	61
2011	88	1	0	14	11	14	917	14	43
2012	60	6	1	10	16	10	773	9	50
2013	66	5	0	19	8	4	745	8	28
2014	64	5	0	25	23	5	654	6	29
TOTAL	572	28	7	137	102	80	6231	52	376

Year	Crimes against legal circulation	Crimes against public order	Other type of crimes	TOTAL per year
2008	25		24	1355
2009	8		13	1519
2010	1		14	1244
2011	7		9	1163
2012	1		13	1001
2013	0		5	1005
2014	1		4	972
	43		82	8.259

From the indicators in Table 2, we conclude that in the period from 2008 to 2014 the children most frequently committed criminal acts against property (6231 or 76.5%), crimes against life and body (572 or 6.9%), criminal offenses against public order (549 or 6.6%), followed by crimes against traffic safety (376 or 4.5%) and crimes against the sexual freedom and morality (137 or 1.65%) of the total number of the reported minors. It is important to note that the most pronounced upward tendency in the reported crimes committed by the minors are those related to crimes against public order with a triple growth between 2008 and 2014, i.e. 53 and 156 reported crimes respectively. With this tendency to increase, the crimes related to disturbing the public order (violent behaviour, preventing an authorized person in establishing public security, the disobedience of orders from authorized person, participating in a crowd and others crimes), almost equate to crimes against life and body. In other words, the degree of social discipline of children and their respect toward holders of official authority, as well as the rational behaviour and conscience, are turning steadily in the negative direction.

Or, the indifference and inconsideration of children to the other are, day by day, growing stronger and more visible. We believe that these situations are far more worrisome, than the "satisfaction" about the mare reduction of the volume of total crime. After all, the conditions in which the personality of the child (minor) is being shaped and developed is under the continued influence of unfavourable conditions and processes of social disorganization. This puts the violence in causal correlation with social reality. To these situations of crimes committed by children, we would add their behaviour in the context of infringements, especially offences against public order and peace. Some recent observations[5] point to the fact that children often commit road safety offences, followed by offences against public order and peace, and a share of 20% belongs to offences relating to consumption of drugs. In other words, violence and social disobedience are also common in the infringement practices, particularly as the child is trying to prove him/herself or to "escape from reality" by entering the world of vices.

TERRITORIAL DISTRIBUTION OF JUVENILE CRIME

Skopje remains the most affected area in the country, the city where half of the reported crimes in Macedonia have been committed. This is proportionate to the volume of the pop-

5 Velkova Tatjana, Juvenile Perpetrators of Violations and Enforcement of the Law on Juvenile Justice, Macedonian Review of Penal Law and Criminology no. 1-2 / 2010, Skopje

ulation living and commuting daily to/from Macedonia's capital. The largest number of the reported juveniles committed crime on the territory of the municipality Center, followed by the municipalities Karposh, Aerodrom and Kisela Voda. The territorial distribution is illustrated in Table 3.

Table. 3: *Reported juvenile offenders in 2014, according to the place of execution of the crime*

Skopje	482
Municipality Gazi Baba	82
Municipality Gorce Petrov	35
Municipality Karposh	60
Municipality Kisela Voda	54
Municipality Center	116
Municipality Chair	37
Municipality Suto Orizari	18
Municipality Aerodrom	55
Municipality Butel	15
Municipality Saraj	10
Municipalities in the Republic of Macedonia with more than 10 reported juveniles	
Kumanovo	107
Kriva Palanka	69
Tetovo	49
Bitola	30
Strumica	20
Kocani	20
Veles	16
Kavadarci	16
Negotino	11

In the remaining 38 municipalities less than 10 minors are reported, among which the bigger municipalities such as Prilep, Ohrid and Shtip are, this points to a significant "downsize" of the toughest illegal behaviour of the minors (children). Until just few years ago, the juvenile crime was much more present and pronounced in these cities.

OTHER TYPES OF DEVIANT BEHAVIOUR

The infringement behaviour among children (minors) is also an area of juvenile criminal legislation contained in the Law on Child Justice and in Chapter XV of the former Law on Juvenile Justice. Although after the adoption of the Law on Juvenile Justice, numerous attempts have been made to "bring to life" the legal provisions, in practice the most effectively applied provision was the one related to the procedures against minors but only those executed by the courts. In other words, the provisions were not applied in the case of procedures led by the commissions established by public administration organs, in this case the Ministry of Interior of the Republic of Macedonia. The remaining provisions concerning the procedures for me-

diation and reconciliation, as well as those related to sanctions were not applied. A key disadvantage is also the lack of a single methodology for monitoring the infringements committed by the minors (children). This shortcoming has been reflected in a former research conducted by the judges for juveniles in some of the major courts in Skopje, Kumanovo and Shtip. The study relied purely on descriptive views on the scope and the structure of the infringement without taking into consideration data that in fact are, for the most part, incomparable.

The findings from the analysis of the collected information and data indicate that the majority of the infringements committed by juveniles are against traffic security. In fact, more than half of the offenses are related to driving a motor vehicle before entitlement to or without a possession of a driving license, driving a motorbike without protective helmet or violation of traffic safety. Next are the offenses against the public order, physical attacks and provocation and participation in a fight. Roughly 20% of the infringement behaviour constitute under-age drinking and consumption of drugs, that given the prevalence of excessive alcohol consumption and drug abuse among the minors, we consider this share in the total number of registered cases of infringement rather small. Economic offences are very limited and these primarily involve isolated cases of circumvention of customs fees. The absence of the summary court records cannot give us precise dimensions of the volume of the juvenile criminal behaviour. This is primarily because of the time gap between the date of execution and the date of trial of minors, as well as due to the existing allocation of cases according to offence areas and not according to the competencies defined by Law on Juvenile Justice/ Law on Child Justice. And this negative practice has been recognized as well as addressed. However, the main issue lies in the lack of monitoring of the phenomenological features with the use of a uniformed methodology.

Precise data were only obtained for the offence related to consumption of narcotic drugs, an infringement covered with the Law for Public Order and Peace. In fact, according to the annual reports of the Ministry of Interior of the Republic of Macedonia in the period 2007-2009 the year, the offence drunkenness and enjoyment of narcotic drugs marks a sizable decline in volume. This will be discussed in detail in the next section.

ON THE DARK NUMBER OF JUVENILE OFFENCES BEHAVIOUR

Since the courts have provided only "descriptive indicators", by using the data obtained from the Ministry of Interior of the Republic of Macedonia, we will elaborate the indicators of annual reports for the years 2007, 2008 and 2009. The reports contain dark numbers on offences related to consumption of narcotic drugs (an infringement covered by Article 20 of the Law for Public Order and Peace), so we justifiably assume that these volumes are among the highest.

Table 4: *Submitted requests for initiation of infringement proceedings against indulgence in narcotic drugs and psychotropic substances pursuant to Article 20 of the Law for Public Order and Peace in 2007, 2008 and 2009.*[6]

	2007	2008	2009
Requests for initiation of infringement proceedings pursuant to Article 20 of the Law for PO&P	692	641	551
OFFENDERS	702	645	553

6 Annual Reports of the Ministry of Interior of the Republic of Macedonia for 2007, 2008 and 2009

MALE	659	606	518
FEMALE	43	39	35
JUVENILES AGED 16 AND YOUNGER	12	2	4
JUVENILES AGED 16-18	25	59	24

The indicators for the period 2007-2009 show a tendency of slight stagnation in the volume of the reported offences related to consumption of narcotic drugs by about 10%, while the number of the reported minors in 2009 marks a nearly twofold decline - 24 reported minors in 2009 as opposed to 59 in 2008. Our opinion is that the presented indicators and their tendency are not reflecting the real situation of the spread of drug addiction among the minors and young people in general. For example, the data published in the "Local Strategy for Drugs of the City of Skopje" show that there were 8345 registered drug addicts, of which 178 minors[7] in Macedonia in 2007. In the same year, the offences related to consumption of narcotic drugs have been charged against 12 minors under 16 years and 25 minors aged 16-18 years[8], i.e. only 37 reported minors as opposed to nearly five times higher number of the registered minor drug addicts for the same year.

A rough summative analysis leads us to the conclusion that in 2007 only one in five registered consumers of drugs has been charged with an offence, which means that four registered minor drug addicts were not reported, and thus, were not punished even once during the year, although by being addicted they have been violating the law each day. This fact leads us to the conclusion that the number of reported juveniles does not even closely reflect the extent of the socio-pathological phenomena, especially the expansion of toxicomany among the youth. This conclusion is reinforced by the arguments for criminal behaviour of minor addicts who are not registered, which suggests that the dark number of executed offences among minors is enormously high, the highest in enjoying narcotic drugs. Drug addiction just like other socio-pathological phenomena results in the physical and social decay of a deviant. The social decay is conditioned primarily by the consequential psychological inability to work productively and generate income, as well as uncontrolled spending of the existing resources (alcoholics and drug addicts). With other socio-pathological phenomena on the other hand (vagabondage, resorting to begging, hazard games), people perpetuate the extremely negative attitude to work and positive socialization.

By analysing the number of the reported minors in Table 4, we find more than twofold decrease in the number of the reported minors in 2009 compared to that in 2008 (61 vis-à-vis 28 minors). The twofold gap in the number of the reported minors is another confirmation that the state-legal intervention in terms of sanctioning measures - especially those aimed at treating the drug addiction among the minors cannot be addressed before emergence, let alone prevented or suppressed. In other words, increasingly reinforced is the need for comprehensive social interventions in prevention of, above all, the social tragedy, and then the deviant behaviour such as violation of legal norms.

Namely, the pronounced socio-pathological behaviour despite violating the existing legal norms, goes also against the moral and custom norms of human dignity, which increasingly boils down the human existence to the satisfaction of the primary urges. Thus, processes of human development and self-actualization are reversed (degraded and ruined) - geared towards modes of animal survival.

Drug addiction is a difficult, mass-deviant and delinquent phenomenon with tendency of growth in volume and complexity as well as in increasingly severe forms of manifestation. It

7 Local Strategy for Drugs of the City of Skopje, prevention, rehabilitation and re-socialization, harm reduction and city security 2008-2013, September 2008, p.11
8 *ibid*, p.17

is in a close consequential-causal relationship with other socio-pathological phenomena and criminality. Drug addiction negatively affects primarily the physical and mental health and the existence of the addict and that of his/her family, the family cohesion and social status, which in turn poses risk to the social values and social development, and, therefore, it requires a continuous social engagement for its prevention and suppression. Thence, the resolved cases of infringement by the courts are quite a small, almost insignificant dam raised in front of the lifted tide by this socio-pathological phenomenon. The social reaction to drug addiction must be a complex, multidimensional and coordinated activity of diverse stakeholders in the sectors of health, education, justice, police, social services, media, NGOs, and, overall, all bodies and institutions including the institution of the family. The nature of the activities must be primarily preventive, meaning organized, coordinated and continued in the eradication of the causes that lead to drug addiction in the first place.

THE NEW LEGISLATION AND SANCTIONING OF CHILDREN (MINORS)

The types and structure of imposed punitive sanctions against minor children are displayed in Table 5

Table 5. *Types and structure of penal sanctions against children in the period from 2008 to 2014*

Year	TOTAL Imposed penal sanctions	Disci-plinary measures	%	Measures of reinforced surveillance	%	Measures of detention in corrective institutions	%	Juvenile impris-onment	%
2008	715	118	16,5	561	78,5	25	3,5	11	1,5
2009	748	86	11,5	633	85	15	2	14	1,9
2010	547	107	19,5	409	75	22	4	9	1,5
2011	722	92	12,7	608	84	20	3	2	0,3
2012	556	57	10,3	471	85	21	4	7	1,25
2013	473	80	9,6	381	81	12	2,5	0	0
2014	461	63	13,7	370	80	25	5,5	3	0,6
TOTAL	4.222	603	14 %	3.433	81,5 %	140	3,5 %	46	1 %

The variation of the number and types of penalties and sanctions imposed on children in Table 5 and across the seven years (2008-2014) is not accidental. According to the data on the perpetrators of crimes in the Statistical Yearbook of the State Statistical Office of the Republic of Macedonia, despite the identification of a steady decline in imposed punitive sanctions (except for 2011), we find that 14% of the total punitive sanctions imposed disciplinary measures, 81% resulted in measures of intensified surveillance, only 4% are educational measures of institutional character and only 1% of the measures constituted detention in child prison (i.e. juvenile prison). In this context, there are no significant yearly deviations in the volume of imposed punitive sanctions across types in the period from 2000 to 2007.[9]

Thence, we conclude that the number of imposed penal sanctions declines alongside the declining number of reported and convicted juveniles in the studied period. The structure of

9 Kambovski Vlado and Tatjana Velkova (2008), Juvenile Justice - Documents of the United Nations-Law on Juvenile Justice with comments, Skopje, p.27

sanctions is almost unchanged and judicial authorities are continuously imposing and executing primarily the non-institutional educational measures (strengthened surveillance and disciplinary measures). Therefore, in view of the severity of imposed penal sanctions, the penal policy towards children is relatively soft and fair, according to the new Law on Child Justice.

NON-JUDICIAL PROCEDURES AGAINST CHILDREN

PROCEDURE FOR INTERMEDIARY AND RESTITUTION PROCESS

Although the non-judicial procedures (the procedures for intermediary and restitution process and the procedures for mediation) have been one of the biggest novelty in the juvenile criminal law, their application did not start until 2014, or only after 7 years of the adoption of the first modern juvenile law in Macedonia. When the application of these procedures started within the competence of the Centres of Social Affairs (CSAs) and authorized mediators, the activities were still only symbolic. In an earlier[10] research, we conclude that there is:

- A small number of guided intermediary procedures and procedures for restitution by the CSAs in Macedonia, an average of 1.5 procedure by each of the 30 CSAs in Macedonia. Given the reasonable assumption that the majority of the procedures are implemented by the CSA Skopje, we conclude that the majority of the centres have not put into practice these non-judicial proceedings;

- Unconsolidated methodology in the monitoring of the non-judicial procedures as reflected in the volume of these activities that is displayed as four times smaller in the electronic database.

To compare the ratio of non-judicial procedures versus court procedures that have resulted in a penal sanction against children, we introduce Table 6 (excerpt of Table 5) to present the data on imposed punitive sanctions on juveniles in 2014:

Table 6. *Types of sanctions imposed on juveniles in 2014*

Year	TOTAL Imposed penal sanctions	Disciplinary measures	%	Measures of reinforced surveillance	%	Measures of detention in corrective institutions	%	Juvenile imprisonment	%
2014	461	63	14	370	80	25	5,4	3	0,6

By comparing the data on the number of procedures for intermediary process and restitution (36 procedures) and the data on the type and volume of the imposed punitive sanctions on children (461 from Table 6) for 2014, we find that 72% of the total procedures against children are the procedures for intermediary process and restitution. Given that the Law on Child Justice was adopted in late 2013, this percentage may be assessed as a satisfactory start after a yearlong application. If, in turn, we bring in relation the data from the electronic database Lirikus and the total number of initiated procedures, then we identify an insignificantly low number of procedures for intermediary process and restitution (8 of 4222 or 0.2% of total judicial procedures against children). In other words, the participation of non-judicial procedures in 2014 in the total number of procedures, is less than symbolic. With this indicator, it cannot be concluded about the quality of implementation of this non-judicial proceeding, despite the entry into force of the second legal proposition which has prescribed it - the Law on Child Justice (LCJ).

10 Velkova Tatjana (2015), Justice of Children (juvenile justice) - Terminological Harmonization or a Step toward Practical Implementation,16/12/2015, Skopje

MEDIATION PROCEDURE

Mediation procedure (Article 79-85 of the LCJ (Article 78 of the LJJ) is reserved for those crimes for which the Law prescribes a fine or imprisonment of up to 5 years. If the procedure is finalized, in place of the prescribed sanctioning measures achieved is a written agreement for compensation of material damage and moral satisfaction of the victim.

By electronic communication with the members of the Chamber of Mediators, as well as with the president of this Chamber, the following information has become available to this study. The mediation procedures for children were led by only one mediator from the existing list of 30 mediators for mediation in certain cases where children have committed crimes. In 2015, only 14 mediations were conducted, of which 13 under the recommendation of the public prosecutor, and one under the recommendation by the court. Of the 14 procedures, 12 procedures were successfully resolved, whereas in 2 procedures the decision has not been reached. The outcome of the 12 successful procedures has been an agreement for apology by the minor and compensation for the damage caused, while the two failed procedures have resulted in unresolved claims for compensation by minors' parents. The reason behind hiring only one mediator for non-judicial procedures against children is the fact that these services are provided free of charge (?!), according to the statement of the President of Chamber of Mediators of the Republic of Macedonia. In terms of the location, 12 procedures have been conducted by a mediator in Skopje and two in Tetovo. The scope and participation of this non-judicial proceeding against juvenile offenders is symbolic – or, only 3% of the total number of procedures that have imposed penal sanctions on children. Hence, also in the context of this non-judicial procedure, we find a small share of non-judicial mediation in resolving the cases of children.

From the indicators of criminal sanctions against juveniles and the imposed penal sanctions, we conclude that the introduction of these non-judicial procedures have also been unable to procure a more significant effect on the behaviour of the children-minors. What is then the catalyst of relatively improved trends in the illegal behaviour among children-minors as "described" by the phenomenology of the crime among children-minors?!

PERSONAL DISORDERS AMONG MINORS

The author of this paper is of the opinion that an unexplored phenomenon of personal disorder among young people, especially among the population of male adolescents, is increasingly prevalent in this region. This has entrusted the criminology and the medicine with a new task. The author has a personal, yet unexplored observation about the choices for exit solutions younger children resort to. For example, in recent months, as a professor and a parent, I was approached by several young people - males with their parents, seeking help for an exit from a difficult and prolonged psychological state. One of these young people I have encountered in a psychiatric hospital in Skopje. He was under strong influence of drugs and with dysfunctional motor skills and thinking. We think that these young males do not have problems as a consequence of consumption of narcotic drugs, but the problems are the result of their inability to reflect and embrace the real difficulties and problems. In other words, instead of actions to cope with and overcome the problems, they fall in depression or develop other mental disorders. This is another indicator that their social development and maturation are much lower than their cognitive development. In the context of the bio-psychological development under the influence of the hyper-hormonal production during puberty, we consider that their maturation is accompanied by painful episodes of depressive suffering. Consequences include, but are not limited to the following: termination of school-

ing, self-withdrawal and confrontational attitude toward others, unrealistic wishes and finally, undergoing treatment in the context of the most difficult cases. Dispute the aforementioned personally observed cases, we often receive information that some youth have serious health disorders. Therefore, our opinion is that the personal disorders should become subject of a separate medical and criminological research that would test the hypothesis that adolescents unable to cope and fit in reality are susceptible to mental disorders.

CONCLUSION

The reduction in the volume of the crime of children (juvenile criminality) as a positive development cannot be attributed to the adoption and entry into force of the new criminal legislation of Justice of the Child - Juvenile Justice. This assumption is supported by the identified non-application, or rather symbolic application of the new legal mechanisms - the non-judicial procedures and the application of the types of penal sanctions after the entry into force of the new modern regulation. At the same time and notwithstanding the decline in the volume of juvenile crime, an increase is recognized in the crimes committed against public order and a high percentage of dark number in other types of deviant behaviour - infringements for example. Therefore, the children (i.e. juveniles) have demonstrated significant changes in behaviour, geared towards higher accumulation of violence and development of personal disorders in response to current social reality. In conclusion, the new legislative harmonization appears rather out of place. In fact, the phenomenological characteristics of the juvenile crime in the Republic of Macedonia are largely a consequence of the decline in the number of juvenile population (due to outward immigration) and the frustration among those who have remained.

REFERENCES

1. Arnaudovski Ljupcho (2005), From concept "criminal in *minore*" to the concept of the Law on Juvenile Justice[Од "криминалец во мало" до концептот за Закон за малолетничка правда], Judicial Review No.1 / 2005, Association of Judges of the Republic of Macedonia, Skopje, 2005.
2. Velkova Tatjana (2010), Juvenile Perpetrators of Violations and Enforcement of the Law on Juvenile Justice [Малолетни сторители на прекршоци и спроведување на Законот за малолетничка правда], Macedonian Review of Penal Law and Criminology no. 1-2 / 2010, Skopje
3. Velkova Tatjana (2015), Justice of Children (juvenile justice) - Terminological Harmonization or a Step toward Practical Implementation [Правда на децата (малолетничка правда)- терминолошко усогласување или чекор кон практична имплементација], Scientific Conference of Association for Penal Law and Criminology of Republic of Macedonia,16/12/2015, Skopje
4. Kambovski Vlado and Tatjana Velkova (2008), Juvenile Justice - Documents of the United Nations-Law on Juvenile Justice with comments [Малолетничка правда- документи на Обединетите нации- Закон за малолетничка правда со коментари], 2ri Avgust C, Skopje
5. Annual Reports of the Ministry of Interior of the Republic of Macedonia for 2007, 2008 and 2009.
6. Annual Statistical Reports for 2007-2014 of the State Statistical Office.
7. Local Strategy for Drugs of the City of Skopje, prevention, rehabilitation and re-socialization, harm reduction and city security 2008-2013, Department of Public Affairs of the City of Skopje, September 2008, Skopje
8. Official Gazette of RM No. 148 from 29.10.2013
9. Official Gazette of RM No. 87 from 12.07.2007

UDC: 341.44(497.11)

EXTRADITION AS A TYPE OF INTERNATIONAL CRIMINAL - LEGAL ASSISTANCE ACCORDING TO REGULATIONS OF THE REPUBLIC OF SERBIA[1]

Željko Nikač, PhD[2]
Academy of Criminalistic and Police Studies, Belgrade
Boban Simić, LLM
Academy of Criminalistic and Police Studies, Belgrade

Abstract: The paper discusses the issue of extradition of persons as a form of international criminal legal assistance, legal assistance legislation in Serbia and the role of the Ministry of the Interior of the RS.

The first part defines the concept, elements, principles and legal sources of international criminal legal assistance. The legal basis in Serbia is the Law on International legal assistance in criminal matters, which covers extradition of a person (extradition of the accused or convicted), transfer of criminal prosecution, execution of criminal judgments and others. The central part of the paper deals with the extradition - the concept, legal nature and content. The paper further describes the legal solutions related to the extradition of accused and convicted persons to a foreign country and the RS, giving an overview of cooperation with international criminal courts and the role of the police. In conclusion, emphasis is placed on the international position of Serbia and the application for admission to the EU.

Keywords: international legal assistance, Law on international legal assistance in criminal matters, extradition, the Ministry of the Interior of the RS and the EU.

INTRODUCTION

At the beginning of the third millennium crime has progressed to unprecedented proportions and threatens to destroy all the achievements of human civilization. This particularly applies to organized crime, terrorism and the most serious forms that know no boundaries, physical and other barriers. Criminal organizations and criminals exhibit exceptional flexibility, solidarity and do everything to avoid the responsibility before the law. An important feature is the unavailability of the perpetrators to the police, prosecution, court and others. This applies to the escape of suspects, accused or convicted persons mostly abroad in order to avoid justice.

The fight against crime means that countries take available measures and activities aimed at preventing crimes and prosecution and imposition of sanctions. An important element is

1 The paper is the result of work on the projects: "Development of institutional capacities, standards and procedures for countering organized crime and terrorism in the conditions of international integration", which is managed by the Ministry of Education, Science and Technological Development of RS with no.179045; Internal scientific research project managed by The Academy of Criminalistic and Police Studies "Management of police organization in preventing and combating security threats in the RS", Cycle of scientific research 2015-2019.
2 E-mail: zeljko.nikac@kpa.edu.rs.

the satisfaction for the victim, as part of general and special prevention. International organizations play an important role in the fight against crime.

International criminal cooperation is one of the most important programs for crime prevention, which includes international police and international criminal law (judicial) assistance.[3] International police cooperation is a precursor to criminal legal aid provided by judicial bodies and conditions for the processing of persons for criminal offenses. International judicial cooperation is a form of criminal cooperation that takes place through the courts and other judicial bodies (advocacy, judicial police, magistrates), depending on the legal system.

The procedure begins with the rogatory letter as the initial act in which one country asks another country for enforcement actions on its territory against a person for a criminal offense. The process of decision-making is not transmitted to the authorities of other countries; it is just a request for assistance in the work of the criminal proceedings. Contacts take place through national authorities: police, courts and others. In practice it is often the case that contacts are made through diplomatic and consular representatives and then the request through the Ministry of Justice continues through judicial officers.

International police cooperation includes police and criminalistics aspects of the crime, while the judicial authorities deal with criminal law aspects. Both forms of cooperation provide a functional unity in the fight against crime at national and international levels, as part of cooperation and international legal assistance.[4]

In the legal system of Serbia, there are several forms of international criminal cooperation. The central place is given to extradition of accused and convicted persons, as one of the important mechanism of international criminal legal assistance.

INTERNATIONAL CRIMINAL - LEGAL AID

The concept of international legal assistance is defined differently depending on the content, duration and other factors. More broadly, assistance includes any act or action by the state to cooperate in a particular criminal matter that takes place before, during and after criminal proceedings (e.g. the execution of the judgment).[5] In the narrow sense, the international legal assistance consists of providing assistance to the competent foreign authorities during the criminal proceedings. In addition to this, the literature mentions primary and secondary criminal legal cooperation.[6]

The principles that underpin the international criminal cooperation are also different and depend on the dominant legal system and other elements. The most important of these are the principles of reciprocity, identity, specialties, execution under the law of the host (locus regit actum) and others.

The principle of reciprocity is one of the primary principles and in case there is no international agreement, cooperation is extended to all future cases. In fact, reciprocity means that the state calls to a case from the past and applies for criminal assistance, while the legal means earlier ad hoc mechanism (an international treaty, a unilateral act) on the basis of which the State based the request and future actions in the same way.[7] The principle of identity means

3 Nikač Ž, *Transanacionalna saradnja država u borbi protiv kriminala: Evropol i Interpol*, ZUNS, Beograd 2003, pp.81-84.
4 Nikač Ž, *Međunarodna policijska saradnja*, KPA, Bgd. 2015, pp.231-235.
5 Bejatović S, *Međunarodna krivičnopravna pomoć i međunarodni krivični sud*, Pravni informator, Intermex, Bgd. 2007, pp. 16-20.
6 Simović M, Blagojević M, *Međunarodno krivično pravo*, Panevropski univerzitet Apeiron, Banja Luka 2009, pp. 337–340.
7 Pena U, Sikić N, *Nastanak i razvoj međunarodne policijske saradnje*, Internacionalna asocijacija kriminalista, Banja Luka 2011, pp.32–39.

that the international criminal cooperation offers in case that the offense is provided in the legislation of the applicant and the requested State.[8] The principle of specialty obliges the requested state that is within the limits of submitted request, the procedure and the imposition of sanctions is only for a crime for which cooperation is accepted. The principle of execution under the law of the host means that the action of the international criminal legal assistance is undertaken in accordance with regulations of the requested State.[9]

Legal sources of international criminal legal assistance were systematized as the rest of the sources in the formal and material sense. Some authors mention the division into major and minor, but the most important functional division is between international and internal sources.

The European Convention on Mutual Assistance in Criminal Matters (1959) is one of the most important legal sources, as well as the Additional Protocol to the Convention (1978), which entered into force in 1982 (in RS 2009).[10] The Convention is the most important source for the so-called minor international criminal assistance and it consists in obtaining evidence, the communication files, documents or information on the punishment of the country conducting the procedure. The Convention covers the following forms of assistance: a) letters rogatory, b) the delivery of court documents and records, c) joining the court witnesses, experts and defendants, and d) the submission of data from court records. There are special forms of international legal assistance, such as, for example, information in connection with criminal proceedings. The Convention applies in the field of general crime, but also is related to so-called war crimes. Refusal of assistance is possible for a political offense, or in cases of compromising the sovereignty, national security, public order and essential national interest. Subjects of cooperation are the judicial authorities - the courts. The process of providing assistance starts with the request to another state and applies the principle of locus regit actum, while content and other issues are regulated in more detail by other provisions.

Further we mention the Convention on Offences and Other Acts Committed on Board Aircraft (1963), the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Women and Children (2000), the UN Convention against Transnational Organized Crime (2001) and others. Our country has signed and ratified bilateral agreements on international legal aid and cooperation with countries such as Austria, Belgium, Bulgaria, Czech Republic, Denmark, France, Greece, the Netherlands and others. Similar agreements have been concluded with the former Yugoslav states, as well as with Montenegro (2006).[11]

Internal sources of international criminal cooperation are provided by national legislation. In our country, cooperation is generally indicated in the RS Constitution[12] which provides international relations based on the principle of reciprocity.

In criminal matters the most important sources are the Code of Criminal Procedure (CCP)[13] and the Law on international-legal assistance in criminal matters (LILACM).[14] Most of this area is regulated by a special law, while the application of the CCP refers to other procedural questions.

8 Jović V, *Međunarodno-pravni standardi u kontekstu međunarodne i policijske saradnje*, Međunarodna i nacionalna saradnja i koordinacija u suprotstavljanju kriminalitetu, Internacionalna asocijacija kriminalista, Banja Luka 2010, pp. 41–42.
9 *Ibid.*
10 *Sl.list SRJ-Međunarodni ugovori* br.10/01.
11 www.pravniportal.com. /Profi sistem, Redakcija, 20/12/2015
12 *Sl.glasnik RS* br.98/06.
13 *Sl.glasnik RS* br. 72/11, 101/11,121/12,32/13,45/13 i 55/14.
14 *Sl.glasnik RS* br.20/09.

LAW ON INTERNATIONAL - LEGAL ASSISTANCE IN CRIMINAL MATTERS

Law was adopted in 2009 as a special regulation governing the procedure for providing assistance in cases where there is no international treaty or when some of the questions are not regulated by it (Article 1). Legal-technical regulation is quite large (VI Sections, 104 provisions), but it is relatively precise and clear.

With regard to jurisdiction international legal assistance is provided in the proceedings for an offense which, at the time of the request for assistance, falls within the jurisdiction of the Court of the State of the applicant. In the same way, providing help and in proceedings instituted before the administrative authorities for the offense punishable under the laws of the applicant and the requested state, when the decision of the administrative authority can be the basis for initiating criminal proceedings.

Subjects of cooperation are states, judicial and other authorities, as well as specific international bodies and organizations such as the International Court of Justice, the International Criminal Court, the European Court of Human Rights and institutions established by international treaties adopted by the RS (Art. 3). An example of cooperation includes the demands that the Hague tribunal has been submitting to us, for prosecuting defendants for war crimes committed in the former Yugoslavia during the 90s of the last century.[15] National authorities for providing international legal assistance are domestic courts and public prosecutors, while individual actions in the procedure can be performed by the Ministry of Justice, Ministry of Foreign Affairs, Ministry of Internal Affairs and others (Art. 4).[16]

In the process of providing international legal help our bodies respect international principles, standards and principles. The principle of reciprocity is a basic principle and the Ministry of Justice at the request of the judicial authority shall notify the (non)existence of reciprocity in this legal matter. In the event there is no data it is accepted that reciprocity is assumed (Article 8). National authorities are required to maintain the confidentiality of the information received in the course of the mutual legal assistance, especially personal information. The data can be used only for the purpose for which they were provided in criminal or administrative proceedings regarding the letter rogatory (Art. 9).

A letter rogatory is an initial act which formally starts an international legal assistance procedure. The law specifies the content of the official language (English or requested state certified interpreter), delivery of documents (through the Ministry of Justice, through diplomatic channels, in urgent cases through the Interpol, etc.) (Art. 5-11).

Article 7 has laid down the general requirements for providing international legal assistance, as follows: a) a criminal offense which is the subject of international legal assistance shall be provided by law, b) proceedings for the offense before a national court or the criminal sanction is not fully executed, c) prosecution, or the execution of criminal sanctions is not excluded due to obsolescence, amnesty or pardon, d) a request for mutual legal assistance does not apply to political offense (associated with political offences) or work which consists in the infringement of military duties) assistance should not hurt the sovereignty, security, public order or other essential interests of the Republic of Serbia.[17]

International legal assistance can be provided regarding the criminal offense of international humanitarian law which does not become obsolete. With regard to fulfilment of assumptions the opinion is given by the competent judicial authority, while on the fulfilment of the other conditions opinion is given by the Minister of Justice.

15 Stojanović Z, *Međunarodna pravna pomoć u krivičnim stvarima*, IP JUstinijan, Bgd.2004, pp.155-182.
16 Op. cit. u nap.14.
17 *Ibid.*

Forms of international legal assistance in criminal matters (Article 2) are as follows: extradition of accused or convicted persons, transfer of criminal prosecution, execution of criminal judgments and other forms of assistance.[18]

Transfer of criminal prosecution is a form of aid provided in Art. 41-55, while respecting the basic conditions (Article 7). The authorized body is the Public Prosecutor's Office competent for prosecution for acts ex officio. The law regulates the procedural and legal issues in the function of transfer of criminal prosecution, and one of the most important is the requirement for the detention of persons, before filing a letter rogatory (Art. 47,48,55).[19]

The execution of a criminal judgment is a form of aid under Art. 57-82 of the law, while respecting the basic conditions. It is a known mechanism of cooperation between the countries which is based on confidence in international relations. Those are the cases of enforcement of foreign criminal judgments in our country and our judgments abroad, as well as the specific modalities of execution of the judgment to the transfer of persons. More specifically, there are important issues such as the conditions for enforcement, jurisdiction, the course of proceedings, recognition of foreign judgments, legal resources, transfer of persons and others. In this part one of the major issues is the detention of persons, before filing the request. Great importance is given to the provisions relating to the transfer of persons to the State (Art. 68, 69, 77-82).

Other forms of mutual legal assistance under Art. 83 include the following:

- Execution of procedural actions (calling, service of documents, examination of the defendant, examination of witnesses and experts, crime scene investigation, search of premises and persons, temporary seizure of objects)

- Implementing measures (surveillance and recording of telephone and other communications, optical recording, controlled delivery, simulated business services, simulated legal affairs, undercover investigator, computer search and processing of data)

- Exchange of information's, service of documents and objects (in connection with proceedings in the requesting State, without the letter rogatory, audio and video-conferencing, joint investigation teams) and

- Temporary surrender of persons (apprehended for questioning the authority of the requesting state).[20]

Assumptions for providing these forms of aid are general and specific (Article 84). In implementing assistance (Art. 85) the principles shall be respected (e.g. Specialties), procedures (letter rogatory, documentation), international standards (e.g. coercion), competence (the Ministry of Justice, courts, police, etc.), rules on detention (temporariness, the urgency, the rights of detainees), the terms (short) and others. In recent years, joint investigation teams are actually based on the agreement of the Ministry of Justice and the foreign body (Art. 96). Because of the proceedings pending before our authorities there is the possibility of addressing foreign bodies, such as, for example, issuing of documents to RS citizens abroad (Art. 100-101).[21]

18 Op.cit. u nap.16, str.183-202.
19 *Ibid.*
20 *Ibid.*
21 *Ibid.*

EXTRADITION AS A FORM OF INTERNATIONAL COOPERATION

According to historical data, extradition is a known mechanism that is mentioned in Babylon, Egypt and China, on the basis of a cooperation agreement with primarily religious characteristics. Extradition was an act of mutual trust and cooperation between countries in the fight against forms of crime. The oldest known document is a treaty of peace and alliance between Egyptian Pharaoh Ramesses II and Hittite king Hatusilija (1280 BC), which emphasized the importance of the principle of reciprocity and cooperation in the fight against crime.[22] In the antique period, there were no extradition treaties for offenses in the field of so-called general crime, but contracts on extradition of suspects and convicted persons for acts of predominantly political or religious nature. The cradle of democracy - Ancient Greece provided refuge and asylum to persons persecuted for religious and political offenses.[23] The medieval extradition treaties characteristically involved the extradition of persons accused and convicted of the so-called war crimes, because the prevalent opinion was that participation in war is the most important state interest, and avoiding the compulsory military service was a serious criminal offense. Since the mid-nineteenth century till today contemporary view of extradition has prevailed.[24]

The legal nature and content of the extradition are important from the standpoint of modern understanding of the term. Famous authors Grotius and De Vatel emphasize the principle *aut dedere aut iudicare* according to which the receiving State, in which a refugee whose extradition is requested is, is required to prosecute or extradite a person to be tried for a criminal offense. The principle is the underlying purpose of extradition and affirms universal jurisdiction as a basis for international cooperation of states. There is also a different opinion (Pufendorf, Bilo) according to which the extradition is a form of moral obligation of the state, which is legal only in the event of an international agreement.[25] In modern doctrine and practice the first understanding is prevailing, while the second is rated as unacceptable for cooperation in the international community.

The concept of extradition is variously defined, but we opted for the traditional attitude that this is an act of international legal assistance in criminal extradition of foreigners or stateless persons to a foreign state at its request, to stand trial for a criminal offense or to serve their sentence.[26] Material and legal basis for extradition is the issuance of a wanted person notice in accordance with the purposes and principles of criminal law, while not issuing is dangerous for public order and the country where the person is.[27] Formal legal basis of extradition is a contract that the states concluded, or an international convention which was signed and ratified. Essentially the most important elements of extradition are: procedure laid down and regulated by law, the relationship between states as subjects of international law (the relationship); the subject of the extradition request and the extradition of persons who have been charged or convicted of a criminal offense under the law of the country of the claimant; offense for which extradition is sought was committed within the jurisdiction of the claimant, and outside the jurisdiction of the requested State and the objective of extradition is conducting a criminal investigation and the imposition of criminal sanctions.[28]

22 Bassiouni M.Ch, *International Extradition, A summary of the Contemporary American Practice and Proposed Formula,* Wayne Law Review, Vol. 15, 1969, p. 733.
23 Dimitrijević V, *Političko krivično delo i ekstradicija*, JRKK br. 2, Bgd. 1980, str. 179.
24 Ibrahimpašić B, *Politički delikt,* NIO Veselin Masleša , Sarajevo 1963, str. 114.
25 Jekić-Simić Z, *Ekstradicija u jugoslovenskom pravu*, Pravni život br.10, Bgd. 1986, pp. 1067-1078.
26 Grupa autora, Pravna enciklopedija, I tom, Savremena administracija , Bgd. 1985, pp.343-344.
27 Živanović T, *Osnovi krivičnog prava (opšti deo),* Bgd.1935, pp. 198.
28 Op.cit. u nap.3, pp.243-252.

Jurisdiction is seen as the responsibility of the state in relation to the individual, based on several principles: territorial, nationality, trade and universal.[29] The territorial principle implies jurisdiction of the state for acts committed in its territory, until the procedure is more complicated when the offense was committed on the open sea and expanses without jurisdiction. The principle of citizenship is the power of the state to prosecute its nationals for offenses committed in the home country and when it is in the territory of another country. Precautionary principle means competence in cases of threats to national security (e.g. USA) which limits the sovereignty of another country. The principle of universal jurisdiction applies in cases where the offense is committed outside the territory of the country when the perpetrator is outside the personal jurisdiction of the state or is not a citizen.[30]

Excluding political crimes from extradition is an important issue in the context of international criminal legal aid.[31] Belgian extradition act provided for the right of asylum to foreigners who were expelled because of their support for freedom, as well as exemption of political crimes from extradition. Limit the "assassination" clause according to which "an attack on the head of the government or its family members, constituted an act of violence, assassination or poisoning, shall be considered as a political offense or an act connected with such work".[32] In modern doctrine and practice, there are still open questions concerning the definition of "political acts" and "terrorist act", the interpretation of judicial and executive bodies, the legal nature of the institution of exclusion and others. The current division is into "clean" and "relative" offenses where the former are offenses against the state and public interests, and the latter threaten private interests and have the elements of a classic crime.[33]

The relationship of terrorism and asylum is an important issue in the context of extradition and international legal assistance. In the basis of the right to asylum are the reasons of humanity and protecting the rights of a different political stance, which is an individual right. Terrorists are trying to get out of the hand of justice and avoid responsibility for misdeeds committed, and abusing the right of asylum. According to Article 14 of the UN Universal Declaration of Human Rights, "no one can invoke the right to asylum in cases of criminal prosecution based on work that is not of a political nature, as well as from acts contrary to the purposes and principles of the United Nations".[34] In the case of terrorism, sovereignty is not absolute and the state cannot allow its territory to be used for terrorist acts against other countries.[35]

The legal basis of extradition includes national and international law. Internal sources in our country are the Constitution - that allows the extradition of a citizen to a foreign country and, in particular international criminal courts.[36] In relation to extradition to international courts most important source of is the Law on Cooperation with the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (known as the Law on Cooperation with the Hague Tribunal).[37] International basis of extradition are many and among them are the most important treaties, conventions and related documents. Among them, there

29 Op. cit. u nap.2, pp.84–89.
30 Vasilijević V, *Međunarodna krivična dela u nacionalnim krivičnim zakonima*, JRMP br. 1–3, Bgd. 1997, pp. 128-130.
31 Bassiouni M.Ch., *Ideologicaly Motivated Offenses and the Political Offense Exeptions in Extraditions – A Proposed Juridical Standard for Unruly Problem*, De Paul Review, Vol. 14, No 2, 1969, p.244–246.
32 Krapac D, Birin V, *Međunarodna krivičnopravna pomoć*, Informator, Zagreb 1987, p. 14–15.
33 Barton L.I, *Political Crime in Europe*, University of California, USA, California Press, 1979, p.3.
34 The UN Universal Declaration of Human Rights was adopted in 1948.
35 Kreća M, Ristić M, *Izvori međunarodnog javnog prava*, Savremena administracija, Beograd, 1985, p. 96-98.
36 *Politika* 06/08/2014, Ustav ne brani uzručenje , intervju sa prof dr M.Škulićem, PF Beograd.
37 *Sl. list SRJ*, br. 18/02 and *Službeni list SCG*, br. 16/03.

are a prevalent number of bilateral agreements, of which there have been more than 1,500, and the main proponents of this model of cooperation are the United States and Western countries. Multilateral treaties are less present, but are important for the unification of law and development of practice. From major multilateral treaties, agreements and conventions we will mention: European Convention on Extradition (1957) with two Additional Protocols (1975, 1978), Benelux Convention on Extradition and Judicial Assistance in Criminal Matters (1962), Plan Nordic countries and the Nordic contract (1962) the Berlin convention on the extradition of persons sentenced to a term of detention in the country of nationality (1978) and others. In the United States concluded the following important international documents: Agreement on extradition of criminals and protection of Anarchism (1902), Code of private international law (1928), the Convention on Extradition (1933) and the Inter-American Convention on Extradition (1981). Great Britain and the Commonwealth countries have institutionalized cooperation by adopting the Plan on the surrender of offenders (1966). Also, the Member States of the Arab League concluded a special Agreement on Extradition in 1952. More conventions in related areas are adopted such as e.g. The European Convention on the Suppression of Terrorism (1977), which was ratified by the FRY as a legal successor to Yugoslavia[38]

The most recent document is Framework Decision on the European arrest warrant and the surrender procedures between Member States, adopted by the European Commission in 2002.[39] The decision represents a legal basis for extradition of persons within the EU and established the European Arrest Warrant (EAW), as faster extradition mechanism that replaced the classical extradition in the EU.

EXTRADITION OF ACCUSED AND SENTENCED PERSONS ACCORDING TO LILACM

The extradition of accused and convicted persons is a form of mutual legal assistance in criminal matters referred to in Article 2 LILACM. The current law has known cases of extradition of accused or convicted persons to a foreign country and extradition of accused or convicted persons to the Republic of Serbia.

a) The extradition of accused or convicted person to a foreign country relates to the conduct of criminal proceedings for a criminal offense prosecuted under the Criminal Code and the law of the requesting State, which is punishable by imprisonment of one year or a more severe punishment. The second solution refers to the extradition of the convicted person for the execution of criminal sanctions pronounced by a court of the requesting State for an offense for at least four months. If the request relates to more crimes, some of which do not satisfy the provisions, extradition may be allowed for these crimes (Art.13).[40] This mode is characterized by the principle of specialty, because extradited person may not be prosecuted or extradited to a third country for offenses committed before extradition, which is not subject to extradition. The exception is when the person has voluntarily waived or guarantees, although it had possibilities, not left the territory of which the extradited within 45 days of parole or executed criminal sanctions, or returned to the territory of that State (Article 14).[41]

38 *Sl. list SRJ – Međunarodni ugovori*, br. 10/01.
39 *Council Framework Decision of 13 June 2002 on the European arrest warrant (EAW) and the surrender procedures between Member States*, Decision 2002/584/JHA, Official Journal L 190 of 18/7/2002. More: http://europa.eu/scadplus/leg/en/lvb/l33167.htm (26/01/2016). The integral version of the decision available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002F0584:EN:HTML (26/01/2016).
40 Op.cit. u nap.14.
41 *Ibid.*

The process is starting upon the letter rogatory with the necessary documentation (Article 15). In practice is possible concurrence of the request (Article 17) when several states at the same time filed a request for the extradition of persons, due to the same or different crimes. A decision on extradition shall be made after assessment of the circumstances of a crime, taking into account the place of the offense, the weight, the order requires citizenship, the possibility of extradition to a third country, etc.

Assumptions for the extradition of accused and convicted persons are generally (Article 7) and special: a) that the person is not a citizen of the Republic of Serbia; b) that the crime was not carried out on the territory of RS, against it or its citizen; c) against a person without a criminal record due to work on the request for extradition; d) that under domestic law, there are conditions for the reopening of criminal proceedings for an offense for which the person was sentenced before a national court; e) that the established identity of the person whose extradition is requested; f) that there is sufficient evidence for a reasonable suspicion, or that there is a final court decision that the person has committed; g) that the requesting State has provided guarantees that in the event of a conviction *in absentia* a process will be repeated in the presence of extradited persons; h) that the requesting State has provided guarantees that it will not be imposed or carried out the death penalty prescribed for the offense which is the subject of extradition (Article 16).[42]

The procedure for extradition shall be conducted in several stages and depending on it will take place before the investigating judge (čl.18-22), higher deposition (Art. 23-31) and the Ministry of Justice (Art. 32-36).[43] Several important issues are regulated with the same provisions: search of persons and premises, seizure of objects, a lesson about the rights, the hearing person, custody, adoption decision (refusal of extradition, the fulfilment of requirements for extradition), simplification of extradition, the decision of the Minister (extradition, Unlawful, disposal, temporary extradition) and others.

The handover of the accused or convicted person is the last step in the extradition procedure and this action executes Ministry of Interior of the RS. Police executes decision of the competent authority by which is permitted the extradition of accused or convicted person to a foreign country. Specialized lines of work of the police contact national foreign services to agree about the place, time and manner of surrender persons. Surrender of persons must be executed within 30 days of the decision of local authorities. If the requesting State without reasonable excuse fails to take the accused or convicted person on agreed day of surrender, the person shall be released. At the reasoned request of the requesting State it is possible to designate another day for surrender of persons (Article 37).[44]

The extradition of accused or the convicted person Republic of Serbia is a form of extradition according to the provisions LILACM. Assumptions for the extradition of accused or convicted persons to our country are as follows: a) that the person is in the territory of a foreign state, b) that person is subject of criminal proceedings before a national court c) that the domestic court sentenced by legally binding decisions a criminal sanction against that person.

The procedure is initiated by letter rogatory to a foreign country upon request of the competent court to the Ministry of Justice, with supporting documents. The principle of specialty means that if a foreign country accepts our request, against a person can be prosecuted or executed criminal sanctions only for the offense for which extradition is granted. The exception is when the person has voluntarily waived this right, and the foreign state is not set such a requirement as mandatory (Article 38).[45]

42 *Ibid.*
43 Op.cit. u nap.3.
44 Op.cit. u nap.14.
45 *Ibid.*

The conditions for the imposition of criminal sanctions are in line with the decision of a Foreign State and our bodies are bound by the decision of the extradition of a foreign body. If a foreign state granted extradition subject to certain conditions relating to the type or the amount of criminal sanctions that may be imposed or enforced, when imposing criminal sanctions national court is bound by these conditions. If it comes to the execution of criminal sanctions imposed on the domestic first-instance court shall reverse the decision on criminal sanction, in accordance with the conditions laid down if they are in compliance with the regulations (Article 39). In the event that the extradited person has been detained in a foreign country for an offense for which it was extradited, the time spent in detention will be included in the criminal sanction that consists in the deprivation of liberty.[46]

Conducting person through the territory of RS the modality of international criminal legal assistance and it concerns the transit of persons across our country. It is a situation that foreign state requires surrender of a person from the other foreign country, which can be carried out through the territory of our country. The procedure for the conducting persons through our territory starts with a letter rogatory to our bodies, with the necessary documentation. Decision on approval of transit through our territory is issued by the Minister of Justice, with the examination of compliance with the general (Article 7) and special conditions (Article 16). The costs of conducting persons through the territory of the Republic are covered by the requesting State (Article 40).[47]

In short, in terms of extradition as a form of international criminal legal assistance the RS respects all national and international norms, principles and standards of the developed world. In terms of crime, the principle of the anti-crime solidarity is of particular significance for operational work of the police, especially in the fight against organized crime, terrorism and other serious forms of crime.

INTERNATIONAL CRIMINAL COURTS AND EXTRADITION

In addition to the extradition of accused and convicted persons to our country and instances of extraditing persons by the authorities of our country at the request of foreign countries, the issue of extraditing persons to international criminal courts was also raised in the last decade of the past century.

a) The idea of international criminal justice appeared two centuries ago and was actualized after WWI when the question of individual criminal responsibility for committing war crimes was raised. According to Art. 227 of the Versailles Peace Treaty (1919) the issue of criminal responsibility of the German Emperor Wilhelm II for the violation of the highest moral and respect of international treaties was raised.[48] The peace treaty foresaw the establishment of a special ad hoc tribunal for the trial of the highest state representative of Germany, who was charged with violation of the laws and customs of war and violations of the highest principles of humanity. However, the German emperor fled the country and received political asylum in the Netherlands, which rejected the request for extradition, so justice was not served, and just the idea of an international criminal court remained.

b) After World War II the international community was faced with the consequences of the conflict, with an unprecedented number of victims and enormous material damage. During the war the most serious crimes were committed against civilians, including international crimes such as genocide and grave breaches of the norms of international humanitarian law. The official policy of Germany and its allies was the ethnic cleansing of the nations like

46 *Ibid.*
47 *Ibid.*
48 Avramov S, Kreća M, *Međunarodno javno pravo*, Službeni glasnik, Beograd, 1988, pp. 261–269.

the Jews (the Holocaust), Slavs and Roma, their physical annihilation and confiscation of their property. After the war, the question of the responsibility of individuals arose. At the conference (Moscow, 19-30/10/1943) the Allied forces adopted the Declaration on the atrocities and other conclusions and then signed the Agreement on establishment of the International Military Tribunal (Nuremberg Tribunal) and punishment of war criminals (London, 08/08/1945). Further they adopted the Agreement on Allied prosecution and punishment of the major war criminals of the European Axis and the Statute of the Court.[49] According to Article 6 of the Statute established the jurisdiction of the ad hoc Tribunal at Nuremberg for the following international crimes: a) crimes against peace, b) war crimes and c) crimes against humanity. The actual court jurisdiction for these international crimes was widely understood regardless of geographic orientation, the individual charges and membership of an organization or group that commits crimes.[50] States were bound by the unconditional cooperation with the Nuremberg court whose requests had priority, particularly with regard to extradition of accused for the crimes in question. The tribunal's principles and rendered judgment influenced the individualization of criminal responsibility and the development of international criminal justice. The same can be said of the Tokyo Tribunal for war crimes committed in the Far East where cooperation with the authorities was also required, particularly with regard to extradition.

c) After World War II there were several armed conflicts in which there were indications of international crimes, but because of the lack of political will, response and the individualization of criminal responsibility were absent. In the last decade of the twentieth century there was a civil war in the former Yugoslavia, and there were strong indications of war crimes having been committed, so the UNSCR no. 817 / 93 (25.05.1993) established an ad hoc International Criminal Tribunal for the former Yugoslavia.[51] The Hague Tribunal has jurisdiction over serious violations of the Geneva Conventions, violations of the laws or customs of war, genocide and crimes against humanity that have taken place on the territory of Yugoslavia since 01/01/1991. The task of the Tribunal is to determine individual criminal responsibility for the above offenses on the basis of the procedure.

Since its establishment, there were several debates over the formation, legal opinions and court operations. Professional critics are pointing out to the forefront of political influence on the courts and the decision-making process. The tribunal continues to work until today, regardless of the number of justified complaints, and the countries of the former Yugoslavia and other entities have the obligation to cooperate with the court. It means they have to respect the decision of the tribunal and to implement Art. 29 of the Statute, which provides for mandatory extradition of persons upon request of the court, regardless of the legal restrictions.[52]

Cooperation of the RS and the Tribunal has had several phases and today it is at a high level. The legal basis of cooperation includes the Federal Republic of Yugoslavia Government Regulations on cooperation with the International Criminal Tribunal,[53] then the Government Regulation on cooperation with the International Criminal Tribunal [54] and the Law on Coop-

49 Srzentić N, Stajić A, Lazarević Lj, *Krivično pravo – opšti deo*, Savremena administracija, Beograd, 1997, pp. 17–20.
50 Kreća M, *Međunarodno javno pravo*, PF, Beograd, 2014, str. 664–683.
The author lists a broader range of international crimes such as aggression, war crimes, crimes against humanity, genoide, etc.
51 Kaseze A, *Međunarodno krivično pravo*, Beogradski centar za ljudska prava, Beograd, 2005, pp. 394–401. /Original: Antonio Cassese, International Criminal Law, Oxford University Press, 2003/
The UNSC Resolution is based on previous Resolutions no. 780/92 (06/10/1992) and no.808/93(22/02/1993).
52 Op.cit. u nap.2, pp.252-272.
More in: *Glava VII Povelje UN i međunarodno krivično pravo*, Međunarodna politika, br. 1018-1022, Beograd, 1993, pp. 23–25.
53 *Sl. list SRJ* br. 30/01.
54 *Sl. glasnik RS* br. 14/02.

eration with the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.[55] The Law on Cooperation with the Hague Tribunal has a central role in the extradition procedure (Art. 18-31), because there are no anticipated exceptions, no privileges and immunities for heads of state. The Ministry of Justice submits a request for surrender of persons to the competent court, confirms the indictment and issues an order for deprivation of liberty. The judge determines the mandatory detention of the person whose surrender is requested and who must have a lawyer. In urgent and justified cases (hide, escape) detention is determined immediately before submitting the request for surrender of the person. In the event that the Court does not submit a request with the confirmed indictment, the accused must be released within 48 hours. In this part of the procedure the police have an important role and powers of detention of accused persons (Art. 23). This applies particularly to persons for whom there is still no court order issued, or is wanted by the local authority or tribunal. The police are obliged to arrest persons and immediately hand them over to the jurisdiction of the court which continues to act in accordance with the law (detention, appeal against the decision to surrender).

d) The International Criminal Court was established in Rome in 1998 and its position and other issues are regulated by the Statute. Our country did not participate in the conference but later acceded to and ratified the Statute (06/09/2001), and accordingly assumed the obligation to cooperate with the Court.[56] The objectives of the establishment of the Court referred to the idea of creating a supranational tribunal, establishing individual criminal responsibility and punishment of the perpetrators of the worst atrocities in the mind of the developed part of the world.[57] In terms of competence, under the principle of complementarity, the primacy of national courts is recognised in relation to the ICC. The Court assumes the prosecution in case of inefficient procedures before national courts (procrastination, bias, failure to bring the accused to justice).[58]

In article 86 of the Statute it is established that the general obligation of cooperation between the countries with the Court mainly takes place through diplomatic channels and via the Interpol. The statute does not expressly provide for the manner of execution of certain procedural actions, but according to the regulations of most countries these follow the requirements of the ICC acting national courts, public prosecution and police.[59] Initially, a priority request is issued by the ICC (Art. 89), and in particular in the case of surrender of persons required by the court. In this context, an important step is the international police cooperation, which should lead to locating people, the arrest and surrender or extradition of persons.

The Republic of Serbia adopted the Law on Cooperation with the International Criminal Court.[60] The Ministry of Justice is a body for cooperation with the ICC, as the official communication through diplomatic channels is performed through the Ministry of Foreign Affairs. As with the previous regulations, the most important part of the Law applies to the issues of deprivation of liberty, determination of custody and surrender of persons to the ICC (Art. 20-30).[61]

55 *Sl.list SRJ* br. 18/02 i br. 16/03.
56 *Statut Međunarodnog krivičnog suda*, Rim 17. 07. 1998, JRKK br. 03/98, Beograd, 1998, pp. 179-261
57 Majić M, *Osnovne karakteristike Statuta MKS,* Bilten Okružnog suda u Beogradu br. 54, Beograd, 2001, pp. 5-13.
58 Op.cit. u nap.58.
59 The first states to pass special laws following the adoption of the ICC Statute were Canada - *Crimes Against Humanity and War Crimes Act* (2000), Norway – The Act of the Implementation of the Rome Statue (2001), Switzerland – the Federal Law on Cooperation with the ICC (2001), France (2002) etc.
60 *Sl. glasnik RS* br. 20/09.
61 *Ibid.* There is a more detailed elaboration on certain legal and procedural issues such as mandatory defence (Art. 21), status of the paarties to the procedure, deprivation of liberty (Art. 23), jurisdiction of the court, release, decision-making, appeals, surrender of persons to the ICC, etc.

Serbia readily welcomed the establishment of the ICC, and enacted the said law and established certain authorized bodies for cooperation. The leading role in this cooperation is assigned to the Prosecution of War Crimes and Office of the War Crimes within the Ministry of the Interior of the RS and they have achieved outstanding results and a high level of cooperation with the Tribunal. This particularly applies to the extradition of persons, but also to all other forms and types of cooperation with the tribunal, other countries and international organizations (Interpol, Europol).

CONCLUSION

Criminal law area is part of the legal system of each country which has great significance in the defence of goods and protection of universal values, as well as the last defence of extrajudicial behaviour in society. States treat national criminal law as an expression of sovereignty and rarely accept concessions and transfer of jurisdiction. However, life in contemporary society and everyday problems indicate that the state alone cannot cope with the growing crime. This particularly refers to terrorism, organized crime and other forms of most serious crime, which involve a high degree of social danger, international dimension and other features of modern crime. Particularly aggravating circumstances include criminal solidarity and cooperation of organized criminal groups in the world without barriers and the use of modern technical and technological achievements.

In order to counter crime states must cooperate within the international community. Therefore, they strive to harmonize the norms of national legislations with international instruments and standards, and to promote international contacts, forms and ways of cooperation. This process encompasses international criminal-legal assistance which aims to facilitate the prosecution of all criminal offenses and offenders, especially those trying to remain beyond the reach of justice. International cooperation and contacts of state and international organizations articulate the adoption and signing of international conventions, declarations, resolutions and other international documents, as well as the merging of various forms of associations and forms of cooperation. This is the case with the EU, which has replaced the traditional system extradition, speeding up the extradition of persons and contributing to the efficiency of the criminal proceedings.

The Republic of Serbia has signed a number of documents in the field of international criminal cooperation and accordingly harmonized its legislation to a large extent. The principle of reciprocity is prevalent in the international legal aid, and Serbia went a step further and adopted extensive interpretation where there is no signed international treaty, but it is rather assumed mutuality and norms are widely interpreted with a view to prosecuting the perpetrators (e.g. the famous case of the Countryman 2014, RS and China).

In addition to bilateral cooperation the RS has significant regional and multilateral cooperation in the joint fight against crime, which is particularly applicable to the international criminal-legal assistance and extradition as its most important part. Inherent jurisdiction in this area lies with the Ministry of Justice and the judicial authorities - public prosecutors and courts, and then the Ministry of the Interior and the police as an important part of the Ministry of Foreign Affairs through which diplomatic communications take place. An important international aspect of criminal cooperation exists between the RS and the Hague Tribunal, and the subsequently established International Criminal Court.

To recapitulate, we can say that the principle *aut dedere aut iudicare* (either extradite or judge) is still leading in the field of extradition of persons and the fight against crimes, regardless of the procedural mechanisms. The meaning of this principle is that the hand of justice reaches all perpetrators of crimes to prosecute every crime.

REFERENCES

1. Avramov S, Kreća M, *Međunarodno javno pravo*, Službeni glasnik, Beograd, 1988.
2. Barton L.I, *Political Crime in Europe*, University of California, USA, California Press, 1979.
3. Bassiouni M.Ch, *International Extradition, A summary of the Contemporary American Practice and Proposed Formula,* Wayne Law Review, Vol. 15, 1969.
4. Bassiouni M.Ch., *Ideologicaly Motivated Offenses and the Political Offense Exeptions in Extraditions – A Proposed Juridical Standard for Unruly Problem*, De Paul Review, Vol. 14, No 2, 1969.
5. Bejatović S, *Međunarodna krivično-pravna pomoć i međunarodni krivični sud*, Pravni informator, Intermex, Bgd. 2007.
6. Council Framework Decision of 13 June 2002 on the European arrest warrant (EAW) and the surrender procedures between Member States, Decision 2002/584/JHA, Official Journal L 190 od 18. 7. 2002. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX-:32002F0584:EN:HTML http://europa.eu/scadplus/leg/en/lvb/l33167.htm (26. 01.2016).
7. Dimitrijević V, *Političko krivično delo i ekstradicija*, JRKK br. 2, Bgd.1980.
8. Evropska konvencija o međusobnom pružanju pomoći u krivičnim stvarima (1959) i Dopunski protokol uz Evropsku konvenciju o međusobnom pružanju pravne pomoći u krivičnim stvarima (1978), *Sl.list SRJ-Međunarodni ugovori* br.10/01.
9. Evropska konvencija o suzbijanju terorizma (1977), *Sl. list SRJ – Međunarodni ugovori*, br. 10/01.
10. Glava VII Povelje UN i međunarodno krivično pravo, Međunarodna politika, br. 1018-1022, Bgd.1993.
11. Grupa autora, Pravna enciklopedija, I tom, Savremena administracija , Bgd.1985.
12. Ibrahimpašić B, *Politički delikt,* NIO Veselin Masleša , Sarajevo 1963.
13. Jekić-Simić Z, *Ekstradicija u jugoslovenskom pravu*, Pravni život br. 10, Bgd.1986.
14. Jović V, *Međunarodno-pravni standardi u kontekstu međunarodne i policijske saradnje*, Međunarodna i nacionalna saradnja i koordinacija u suprotstavljanju kriminalitetu, Internacionalna asocijacija kriminalista, Banja Luka, 2010.
15. Kaseze A, *Međunarodno krivično pravo*, Beogradski centar za ljudska prava, Beograd, 2005. Original: Antonio Cassese, International Criminal Law, Oxford University Press, 2003.
16. Krapac D, Birin V, *Međunarodna krivičnopravna pomoć*, Informator, Zagreb 1987.
17. Kreća M, *Međunarodno javno pravo*, PF, Bgd.2014.
18. Kreća M, Ristić M, *Izvori međunarodnog javnog prava*, Savremena administracija, Bgd.1985.
19. Majić M, *Osnovne karakteristike Statuta MKS,* Bilten Okružnog suda u Beogradu br. 54, Bgd.2001.
20. Nikač Ž, *Međunarodna policijska saradnja*, KPA, Bgd.2015.
21. Nikač Ž, *Transanacionalna saradnja država u borbi protiv kriminala: Evropol i Interpol*, Zavod za udžbenike i nastavna sredstva, Bgd.2003.
22. Pena U, Sikić N, *Nastanak i razvoj međunarodne policijske saradnje*, Internacionalna asocijacija kriminalista, Banja Luka, 2011.
23. *Politika* 06.08.2014, Ustav ne brani uzručenje , intervju sa prof dr M.Škulićem, PF Bgd.
24. Radulović D, Međunarodno krivično pravo, Pravni fakultet, Podgorica, 1999.
25. Rezolucija SB UN br.817/93 (25.05.1993) oosnivanju *ad hoc* Međunarodnog krivičnog tribunala za bivšu Jugoslaviju (engl.ICTY).

26. Simović M, Blagojević M, *Međunarodno krivično pravo*, Panevropski univerzitet Apeiron, Banja Luka, 2009.
27. Srzentić N, Stajić A, Lazarević Lj, *Krivično pravo – opšti deo*, Savremena administracija, Bgd.1997.
28. *Statut Međunarodnog krivičnog suda*, Rim 17. 07. 1998, JRKK br. 03/98, Bgd.1998.
29. Stojanović Z, *Međunarodna pravna pomoć u krivičnim stvarima*, IP JUstinijan , Bgd.2004.
30. Univerzalna deklaracija UN o pravima čoveka usvojena je 1948.godine.
31. Uredba Vlade RS o saradnji sa Međunarodnim krivičnim tribunalom, *Sl. glasnik RS"* br. 14/02.
32. Uredba Vlade SRJ o postupku saradnje sa Međunarodnim krivičnim tribunalom, *Sl. list SRJ* br. 30/01.
33. Ustav RS, *Sl.glasnik RS* br.98/06.
34. Vasilijević V, *Međunarodna krivična dela u nacionalnim krivičnim zakonima*, JRMP br.1–3, Bgd.1997.
35. Zakon o saradnji sa Međunarodnim krivičnim sudom, Sl. glasnik RS br. 20/09.
36. Zakon o saradnji sa Međunarodnim krivičnim sudom, Sl. glasnik RS br. 20/09.
37. Zakon o saradnji sa Međunarodnim tribunalom za krivično gonjenje lica odgovornih za teška kršenja međunarodnog humanitarnog prava počinjena na teritoriji bivše Jugoslavije od 1991. godine (skraćeno: *Zakon o saradnji sa Haškim tribunalom*), *Sl. list SRJ*, br. 18/02 i *Službeni list SCG*, br. 16/03.
38. ZKP, *Sl.glasnik RS* br. 72/11, 101/11,121/12,32/13,45/13 i 55/14.
39. ZMPPKS, *Sl.glasnik RS* br.20/09.
40. Živanović T, *Osnovi krivičnog prava (opšti deo),* Bgd.1935.
41. www.pravniportal.com. /Profi sistem, Redakcija, 20. 12 2015/

UDC: 377:343.983(498)

ROMANIAN EDUCATIONAL SYSTEM OF FORENSIC SCIENCE

Georgică Panfil, PhD[1]
Police Academy "Alexandru Ioan Cuza", Bucharest
Marius Andrița
Mihaela Marin

Abstract: The article presents the main characteristics of Romanian educational system dedicated to train personnel in the field of forensic science. The education part for every system tends to be essential, especially when referring to a layer with such complexity and sensitivity as the one of forensic science. The authors tackle the characteristics of initial training institutions (for inferior and superior police officers), as well as some of aspects related to the continuous training possibilities in this field. Current paper also underlines the importance of forensic science as an integrated part of Police forces, as the forensic scientists from Police are the only/first authorities to directly interact with the crime scene. Also, details related to the educational system of "Alexandru Ioan Cuza" Police Academy, from the point of view of its specificities, the curricula, the training process and the scientific research related to the field of forensic science. Some aspects related to quality assurance in the field of forensic science (related to quality management implemented by the two Institutes of Forensic Science – one integrated to the Ministry of Justice, the other to the Ministry of Internal Affairs) Furthermore, the article also presents the main changes and evolutions from an institutional point of view referring to Romanian Police Academy.

Keywords: new technologies, forensic science, management, education, Police Academy.

INTRODUCTION

Current article is dedicated to an objective and scientific approach of the educational system used in Romania in the field of training forensic specialists and experts. It should be stated from the beginning that in Romania, forensic science is a rather restrained domain, as – although everyone can study about it – only police officers get to interact with the crime scene, and only some of those police officers get to be called "forensic scientists", or "criminalists".

Within the Romanian Police, Forensic Science tends to be a very special and sensitive area. Thus, it has to be said that the domain of Forensic Science (the preferred term used to refer to in the Romanian language it being 'Criminalistics') has lately been gaining more and more importance due to its role in linking the criminals to the crime scene and, as follows, providing law enforcement institutions with the material means to sustain aspects related to the guilt or innocence of a person in court. Due to the specific nature and, for some part, to the limitations of the Criminal Law of Romania, testimonial proofs are often unsure to be

1 panfil.george@gmail.com

used, as a witness or a suspect has the right to change his statement at any moment of the trial. For this reason, physical evidence provided by criminalistics is of great value for our system. Beyond this, as a difference between our country and others, is has to be stated that in Romania Forensic Science is only carried out by police workers. We do not allow the presence of private personnel at crime scene; furthermore, only dedicated personnel can carry out the tasks linked to forensic domain – for example an investigator will only coordinate the activities linked to crime scene, but will not interfere with searching and discovering the traces, also he will be involved in specific activities but not the ones from forensic domain.

Currently, Forensic Science is being taught in almost all Law Faculties, being part of the general training of the future lawyers, prosecutors, judges and other categories of personnel to be licensed in the field of Law. However, though, none of the categories presented above will be able to actually practice real forensic. This is because the dedicated personnel to practice forensic science (the part related to crime scene investigation) is to be found only within the structures of the Ministry of Internal Affairs (at current point, the experts and specialists from the National Institute of Forensic Expertise from the Ministry of Justice only cover the laboratory analysis and have no role related to direct interaction with crime scene itself). We do not have any type of private personnel with the legal ability to actually be involved within the crime scene investigation, forensic identification, laboratory analysis and other specific activities. The private laboratories of forensic science only provide advisory opinions and only if demanded by the judge. As follows, the job of forensic scientist is reserved for police cadets and officers.

As a discipline dedicated for training and practice of police-involved personnel, some of the methods and techniques are only available for these categories of workers. Within the Police Academy and Cadets Schools, Forensic Science is being taught to all of the students, and especially to the (future) forensic specialists. In our opinion, some aspects related to this science can be taught to every law student, but for certain this is a domain strictly linked to police work and therefore to public order and national security domain.

ROMANIAN EDUCATIONAL SYSTEM IN THE FIELD OF INTERNAL AFFAIRS (POLICE)

Currently, the policy of the Romanian Ministry of Internal Affairs is to train its own personnel, thru its internal institutions, and basically without the use of external sources. However, there are few exceptions from this general rule of internal training of personnel, and these are directly related to the necessity of specialists in areas of expertise in which the Ministry of Internal Affairs cannot provide training (in different domains such as medicine, engineering, IT, chemistry, biology etc.). Therefore, for these categories sources are usually external.

The educational system at the level of Romanian Ministry of Internal Affairs consists of two distinct layers, similar for some parts but quite different on others: initial training and continuous development. While initial training is concentrated on selection and initiation of cadets and students in the area of police work (they originate from external environment, being usually fresh high-school graduates) thru college and academic educational system; continuous training deals with refreshing, improving, updating and sometimes resetting the level of knowledge for existing police officers.

As previously mentioned, the initial training system consists in two types of training institutions (those dedicated to training "officers" and those dedicated to training "agents"). By comparing the two dimensions of a police career (agents and officers), some similarities but

also differences will be noted. From the perspective of common points, both types of institutions (cadet schools and Police Academy) offer free training and education (all costs are covered by the Ministry of Internal Affairs, subject to signing a contract for 8-10 years). Furthermore, graduating from any of the above-mentioned schools guarantees a place to work for undetermined period. Basically being a police officer is a life-time job, but in normal conditions, one can retire from the police work after 30 years of experience without problems. It must be observed that all of the initial training institutions prepare future policemen in all areas of police work, such as fraud investigation, forensic science, public order, organized crime, etc. Another similarity is related to the fact that the number of positions for admission is established by an analysis developed at the level of Ministry. Also, the prerequisites for joining the Ministry of Internal Affairs are similar in every educational institution: candidates must have no criminal records, minimal age of 18, passing relevant aptitude tests (medical examination, psychological tests, physical examination, endurance tests) and of course, to pass the admission exam (consisting in history – exclusively for the Police Academy, Romanian language and an optional foreign language). In both the Police Academy and cadets schools the studied disciplines vary from law disciplines to police sciences and auxiliary disciplines. Both categories, agents and officers, are of capital importance for the public order system itself and, from our point of view, should be perceived with equal respect. Courses of cadet schools last from 6 months to 2 years, being focused on general police issues and with only few disciplines in the area of law sciences (merely criminal procedure and penal law). At graduation, the professional degree of "agent" is brandished, which, as stated before, is an inferior position and cannot provide access to management positions. The cadet schools, ranked as colleges, are only recognized within the Ministry of Internal Affairs and thus one cannot benefit from advantages linked to international recognition of studies.

The Romanian Police Academy is organized as a university and it is structured and operational following both the regulations of the Ministry of Internal Affairs and the laws governing the general academic system originating from the Ministry of Education. The courses are organized either on 3 years (following regulations of Bologna system) or 4 years (related to law faculties), depending on the studies program chosen by the candidates at their admission. For both cycles, the students are trained, beyond the police disciplines, into a consistent mass of law and social disciplines. Upon graduation, they receive, beside the professional degree of "officer", a bachelor diploma – either in the area of Police Studies, or Police Studies and Law Sciences. All diplomas are recognized worldwide and provide the possibility to continue studies in different educational systems (abroad or thru master and doctoral programs). The degree of officer provides the possibility – in time – to occupy different managerial positions, and, in most of the situations, the officer is the one to coordinate agents.

TRAINING FORENSIC SPECIALISTS WITHIN ROMANIAN POLICE ACADEMY

As stated before, access to the courses of the Romanian Police Academy is based on passing an exam. Following the results after the first year of studies, each student gets to choose his domain (fraud fighting, organised crime, intelligence, etc.). For the students willing to work within the area of forensic science, however, this rule is not applicable, as they must follow a selection procedure, including an interview, one practical test and a test to prove the digital competences. Following this selection, one class of students per year is created – with a typical number of 15 to 20 students.

From the point of view of their basic training, the students from the forensic profile will follow an intensive two-year period of training, with usually 4 to 6 hours per week in the domain of forensic science, while the rest of the time is dedicated to other disciplines, usually from the field of law disciplines. The classes are mixed, most of the time being dedicated to practical applications, but only after theoretical elaboration on the matter. Within the forensic classes different domains of this science are being tackled, such as fundamental principles, forensic examination of traces, fingerprinting, forensic databases, international cooperation in the field of forensic, ballistics, forensics-dedicated software, crime scene investigation etc. At the end of the third year of studies, the students must present a dissertation within the domain of forensic science and they must pass a complex graduation exam.

The training in the field of forensic science is not limited to the bachelor level. Within the Academy there are a number of master programs developed to provide an environment for continuous training for the working policemen. As such, there is also one master programme dedicated to forensic science, following the Bologna system (4 semesters). Most of the disciplines from the master programme are intended to enhance the level of knowledge for the operatives, while there are some completely new ones – such as *Forensic analysis of the data storage devices* or *Forensic Interpretation of Bloodstains*. The courses of the master programme are designed in such a manner as to provide the possibility for working police officers to attend them outside their working hours (afternoons and weekends).

SCIENTIFIC RESEARCH RELATED TO FORENSIC SCIENCE

When tackling the subject related to education, especially as this article is related to an academic environment, one should also include the aspects connected to the scientific research, inherent especially in a field with a high level of complexity and dynamicity such as forensic science. From this point of view, we might add that scientific research is directed both to teaching staff and students. Scientific research is being built on multiple layers, structured from accessing research grants funded by different entities (such as the European Union), to development of articles and research materials and also the development of scientific events, such as workshops and international conferences. The Forensic Department of the Police Faculty has managed to develop two internationally recognised scientific journals (Forensic Science Forum and European Journal of Public Order and National Security), as well as two annual international conferences dedicated to forensic science. Furthermore, the master program was developed based on European funding.

INSTITUTIONAL ENHANCEMENTS

"Alexandru Ioan Cuza" Police Academy is a unique university because of its objective. As any educational system, it can be upgraded, and these upgrades are desirable, considering that its graduates are active officers of the Romanian Ministry of Internal Affairs.

A first step towards this direction consists in making use of technology and the internet during and after lectures. Now, more than ever, these two resources are widely available, and that is why they should be used for educational purposes. World renowned universities have already adopted such methods, based on the internet, to support their students. For this purpose, they created e-learning web platforms where podcasts, video lectures and courses can be found. Also, there are a few web sites that allow teachers to keep in touch with their

students, assign papers and even take tests. This approach can be motivating for students: knowing that studying can be easier and more accessible, these websites have even developed smart phone apps. The future of education does not contain anymore chalk, blackboard, notebooks and pen, but it has tablets, smartphones and laptops.

Regarding the forensics educational system within "Alexandru Ioan Cuza" Police Academy, this upgrade is mostly welcomed, because the nature of this profile involves interactive lectures and an online platform this seems to be perfectly in place. Another technological upgrade consists in providing copies of national database applications or in allowing local access, so that students can get used to working with such applications as AFIS, IMAGETRAK, CDN and IBIS.

The second idea in upgrading the Police Academy's educational system, is related to a unique feature of this university that consist in offering its students a chance to practice their new knowledge gained during a semester, with officers of the Romanian Ministry of Internal Affairs. Every year during February and July, the Police Academy students must complete a month of practical training, according to their profile specialty. They can observe how police officers work and can also participate in their work. But, here there are also a few things that can be developed further.

An efficient upgrade consists in a unitary practice session, to make sure that the curricula items are respected by their tutors. Due to various reasons students are sent to their hometown Police Inspectorates, Police Academy having restricted control and cannot assure that all items mentioned in the curricula are respected. Also a good improvement would consist in creating a "Student Agenda" and a "Tutor Agenda", following a template, with pointed items that must be checked on completing them, grading being done based on these Agendas.

CONCLUSION

The Romanian system of education dedicated to forensic science is only concentrated on the institutions from the field of public order and national security (or internal affairs). Furthermore, only police officers (or constables) are able to work within this domain (referring to the direct interaction with the crime scene), and in most of the cases after graduating a specialised training programme. For the existing police officers, the Romanian Police Academy provides a competitive environment for consolidating and refreshing their level of knowledge in the area of forensic sciences. Of course, like in every domain, improvements can be made, from the point of view of supplementary specialisation of the professors, as well as the acquisition of new devices and software for education.

It has to be emphasised that there are currently two institutions in the field of forensic science from Romania - the National Institute of Forensic Expertise (NIFE - from the Ministry of Justice) and the National Forensic Science Institute (NFSI – from the Ministry of Internal Affairs) both of which are part of the European Network of Forensic Science Institutes (ENFSI) – thus ensuring the quality required for the effective development of personnel, as all of the forensic structures are accredited and the personnel is subject to different types of certifications in the field of Forensic Science. As follows, this has an immediate influence on the educational system related to initial and continuous training for future and actual forensic workers – be they the ones from Police (NFSI - and the only ones entitled to interact with crime scene) or from NIFE.

REFERENCES

1. G. Panfil, Common issues in training police officers in Romania, paper presented to eLearning and Software for Education Conference, Bucharest, Romania, 2015
2. G. Panfil, I. Slabu, Romanian challenges in the field of law enforcement training, paper presented to The police college research days in Zagreb, Zagreb, Croatia, 2015.
3. G. Panfil, Place and role of Forensic Science within Romanian System of Public Order and National Security, article published within European Journal of Public Order and National Security, Issue ½ of 2014.
4. www.academiadepolitie.ro

UDC: 343.982.32
621.397.4

TECHNIQUES FOR BETTER ANALYZING VIDEO SURVEILLANCE INFORMATION IN CRIMINAL INVESTIGATION

Li Yongtao, PhD[1]
National Police University of China, Shenyang

Abstract: With the fast development of video surveillance systems in modern society, people and their activities at almost every corner of a public area are, willingly or unwillingly, being "watched" by a video surveillance camera and stored in a Memory for a certain period. Once a criminal offense is committed in or near a surveilled area, the stored images of people and their activities will provide significant information for tracking and locating a criminal suspect. Chinese criminal investigators, like their counterparts worldwide, through analyzing the video surveillance information, have successfully solved numerous criminal cases. In this process, they have developed some techniques for better analyzing video surveillance information in the process of profiling and locating a criminal suspect. The author, based on his personal police experiences and empirical researches in this field, will summarize and evaluate such techniques broadly used in the practices of criminal investigation in China.

Keywords: video surveillance; criminal investigation; information analysis; spatial temporal trajectory

INTRODUCTION

With the development of modern surveillance systems, solving a criminal case by analyzing the information stored in surveillance systems is a common practice worldwide[2]. Such is also the case in China. In accordance with *article 48* in the *Criminal Procedure Law of the People's Republic of China 2012*, audio-visual materials and electronic data can be used as evidence to prove the facts of a case. Surely, when collecting such videos and photos, criminal investigators should strictly observe legal rules and regulations stipulated by the law so that the chain of evidence is not contaminated[3]. Such materials should be used only for investigating a crime instead of being used for other purposes. Where the privacy of a person or a company is involved in the surveillance information, confidentiality should be maintained. Usually, such video surveillance systems are located in public areas, acting as "electronic eyewitnesses" safeguarding the security of the public areas. So privacy is not a question at all to any citizens if

1 E-mail: lyt1207@163.com.
2 See Grabosky, P. (1998). Technology and crime control. *Trends and Issues in Crime and Criminal Justice,* (78), 1-6, and Girod, R. J. (2014). *Advanced Criminal Investigations and Intelligence Operations*. London: CRC Press.
3 The rules and regulations for collecting and processing evidence from the crime scene, including audio-visual materials and electronic data, are stipulated in detail in the Criminal Procedure Law of the *People's Republic of China* and in the *Police Regulations for Handling Criminal Cases*. However, these rules and regulations are not the focuses of this article. For those readers who are interested in such issues, please refer to these two documents.

they are performing moral and legal activities. However, to individuals who have committed a crime, the video surveillance systems provide great help to police in locating those offenders and proving their guiltiness.

In recent years, criminal investigation practices show that the video surveillance information is playing increasingly important roles in collecting clues, analyzing case circumstances, locating criminal suspects, interrogating criminal suspects, prosecuting criminal suspects, and conducting other judicial activities. Certainly, due to the limitation of economic conditions, geographic environment, video surveillance system planning, monitoring, and other factors, troubles are often than not encountered in the process of applying the video surveillance information into criminal investigation. For example, problems such as the not well-planned geographical layout of video surveillance systems, the existence of blind areas, the low quality of pictures will often bring difficulties to the criminal investigators in the process of tracing suspected persons or vehicles, which to certain extend delays the opportunity of locating and apprehending criminal suspects in time. Therefore, criminal investigators should be apt at summarizing effective methods for analyzing video surveillance information so as to overcome the defects existed in video surveillance systems. Based on summarizing recent investigative practical experiences, the following techniques are of importance for promptly solving a criminal case through locating suspected persons and/or vehicles.

TECHNIQUE OF DIRECT OBSERVATION

The technique of direct observation is a method to make full use of the visibility attribute of the video surveillance recordings in which relevant personnel watch or observe the video surveillance content directly with the aim to discover suspected individuals or vehicles. Such an observation technique is the most common and primary method in criminal investigation practice, as well as the precondition for applying further video surveillance investigative measures. Generally speaking, where a crime was committed within an area under video surveillance, criminal investigators may, by directly watching the video surveillance recordings, discover the physical features of an offender, the number of offenders, the modus operandi, the tools used for committing the crime, the coming and leaving routes to the crime scene, the objects being offended, and other related information. Such information is highly valuable for criminal investigators to accurately analyze case circumstances, profile and locate criminal suspects. For instance, a burglary was reported to the police at 2 o'clock on July 29, 2014, in which the burglar robbed a villa house of cash and jewelry worth of more than 90,000 Yuan[4]. Through observing the video surveillance recordings collected from the community management, criminal investigators found a teenager who was, from 19:20 to 19:25 on July 28, roaming around the crime scene without holding anything, but left the community at 20:56 with a bag crossing his shoulder and back. Particularly, criminal investigators found that this teenager did not have an access control card to unlock the gate but waited until others unlocked the gate, then followed them passing the entrance. Based on such observations, criminal investigators identified him as the major suspect and the following-up investigation proved he was.

Direct observation technique is certainly not an aimless watching for pleasure. Video surveillance recordings are like neutral and passive "eyewitnesses"; it is a criminal investigator's responsibility and wisdom as well to extract information from them. While watching, criminal investigators should actively "communicate" with the video surveillance systems just like interviewing an eyewitness. A competent criminal investigator should be apt at noticing those suspicious individuals, vehicles, and other phenomena.

4 This case was solved by the author and his police co-workers at Xiamen Public Security Bureau where the author had participated in policing practices during 2014-2015.

TECHNIQUE OF ABNORMAL BEHAVIOUR ANALYSIS

Having a guilty mood and being afraid to be discovered or arrested is a common psychological phenomenon of most criminal offenders. Driven by such a psychology, an offender will intentionally or unintentionally adopts certain tricks to disguise the evil conduct in the process of committing a crime, which will reflect some abnormal behavior. Criminal investigators may identify major criminal suspects or vehicles by observing video surveillance recordings and thoroughly analyzing latent information underlying such abnormal behaviors.

Applying the abnormal behavior analysis technique needs both logic thinking and routine life experiences as well. For example, on March 9, 2015, a healthy newly born baby was found dead in a rubbish container near an urban community[5]. The corpse was wrapped in a red plastic bag and placed in another big black plastic bag. There were seven deadly knife wounds on the body. Obviously, it was an infanticide. By watching the video surveillance recordings tediously but thoroughly, criminal investigators noticed a woman, unlike others throwing the rubbish bags carelessly into the rubbish container, was placing a black plastic bag into the rubbish container slowly and gently. Such an abnormal behavior led her to be identified as the major suspect. Thirty hours later after the crime was reported, criminal investigators located this woman and she confessed her crime without any resistance. She was a newly-coming migrant worker from a remote rural area and got pregnant with her boyfriend. The boyfriend soon deserted her and ran away. She had no money to do an abortion operation and had to wait for the birth of the baby. She gave birth to the baby all by herself in a relative's house. Shame, fear, hatred, and desperation drove her to kill the innocent baby. When placing her baby into the "rubbish cradle", she was feeling so guilty and displaying her gentleness as a mother. In another case, in the process of monitoring the traffic video surveillance systems, police found that a car's sun visors at both the driver and the passenger's sides were unfolded at night during the driving. Such abnormal behaviors told police that the persons in the vehicle were afraid of being recorded by the video surveillance systems, which revealed their guilty psychology. Police stopped the car at a next checkpoint and seized two kilos of heroin in the car boot.

TECHNIQUE OF EXCLUDING SUSPECTS FROM ONE-WAY ENTRANCE SURVEILLANCE

Under some specific circumstances, there is only a one-way entrance to a crime scene, which means that the coming and leaving routes of a suspect or vehicle will be also a single one. Once it is determined there is only one entrance to the crime scene, investigators may watch the entrance video surveillance recordings to discover all persons or vehicles passing the entrance around the time period when the crime was committed, then exclude one by one through follow-up checking and interviewing to narrow down a suspicious person or a vehicle, and finally locate the offender(s). For example, on March 14, 2014, a murder was committed at a residential community in a southeast city in China[6]. All witnesses stated that the killer was a female in a wind coat, with long hair, riding electricity-driven motor-bike. Investigators found that there was only one entrance open in this community that vehicles might pass. Through watching the entrance video surveillance, police soon discovered the suspected target and obtained more detailed features of the suspect which provided great help to police for profiling the offender, and the police solved the case within three days.

5 Ibid.
6 Ibid.

TECHNIQUE OF CALCULATING TIME AND SPEED

In real life, when an individual wants to commit a crime, usually he or she will have to move between the dwelling place, the crime scene, and other places. Therefore criminal investigators will often need to calculate and analyze the relationship between distance, speed and time to verify whether an individual is involved in a specific case. As we all know, there is a determined relationship between distance, time and speed. If an unusual relationship between the three factors is noticed, the suspiciousness of the related target is ascending. For instance, Ms Li, a 28-year-old divorced woman working at a club as a waitress, was reported missing at a busy road near the railway station in a big city[7]. Criminal investigators found that Ms Li disappeared mysteriously after she had answered two mobile calls. This mobile was not registered with an authentic personal identity and had only made two calls to Ms Li, then was powered off and never powered on again. Though Ms Li disappeared at a busy road between two video surveillance checkpoints, there was a 50 meters blind zone near where she lost. Criminal investigators collected video recordings from the two surveillance checkpoints and found that it took most vehicles only 30 seconds to cover the distance between the two checkpoints, but one jeep car spent 20 seconds more under the same traffic conditions. Consequently, this vehicle's owner was targeted as the major suspect and was investigated further. It was proved that the vehicle's owner (a 38-year-old man) conspired with his released inmate in committing the crime of robbing, raping, killing and dissecting Ms Li.

TECHNIQUE OF TRACKING SPATIAL-TEMPORAL TRAJECTORY

Space and time are the necessary conditions for the existence and movement of anything, and the movement of anything within certain spatial-temporal dimensions will inevitably leave certain traces and tracks. As a special social existence, criminal activities will also unavoidably leave relevant traces and tracks within certain spatial-temporal dimensions. Through conducting comprehensive analyses of the movement trajectory of a criminal suspect within certain spatial-temporal periods, investigators are able to ascertain his or her real identity and major crime facts.

In criminal investigation practice, investigators should know how to make full use of the video surveillance systems as a whole to analyze a criminal suspect's movement tracks and potential dwelling places through applying the spatial-temporal trajectory tracking technique. Criminal investigators may track down an offender's spatial-temporal movement trajectory and profile his/her activities through concentrating video surveillance information collected from different locations around the crime scene or along the likely routes coming to or leaving the crime scene, which will help investigators to determine the investigative areas for locating the offender(s). The following is a case in point. On December 13, 2013, a residential house in a city community was burglarized and robbed of 80,000 Yuan worth cash and jewelry[8]. Police located three individuals as major suspects through observing the community video surveillance recordings. Unfortunately the three offenders were soon out of sight and disappeared in a lane because there were no video surveillance systems there. Surprisingly, investigators found that someone withdrew 5,000 Yuan from the stolen credit card three hours later af-

7 The author gathered this case from Xiamen Public Security Bureau when he was participating in policing practices during 2014-2015.
8 Ibid.

ter the burglary was committed[9]. The bank video surveillance recordings showed that the withdrawer was exactly the identical female suspect who appeared at the crime scene. Video surveillance recordings around the bank showed that the female suspect walked southwards from the bank and then disappeared again. Concentrating all information available and combining experiences accumulated from similar cases, criminal investigators concluded that the three offenders most probably were recidivists who committing crimes hither and thither. Following such an investigative hypothesis, they should have registered in one of the hotels nearby where the female disappeared. In the following-up neighborhood canvass, criminal investigators discovered the three offenders in the hotel video surveillance recordings, which was 100 meters away from where the female disappeared. However, the three offenders had checked out ten hours ago before the investigators found their lodging place. What made it worse was that the three offenders used stolen identity cards for registration in the hotel. Yet a fox can never hide its tail completely. Investigators estimated that the offenders had probably fled from the city by means of taking a coach or a train. Investigators thereby examined passenger information and found two of the three offenders bought train tickets with the same stolen identity cards they used for the hotel registration but the third one bought the ticket with his real identity card. The other two offenders' identities were soon verified as well and they were all arrested.

In this case, investigators successfully applied the technique of tracking offenders' spatial-temporal trajectory from the crime scene to the bank, then to the hotel and the railway station for locating the offenders. In the coming years, criminal offenders will keep on fleeing hither and thither for committing crimes and avoiding punishment as well. Wherever they go, however, they will unavoidably leave behind certain movement trajectory in the spatial-temporal dimensions, which will provide valuable clues for investigators to locate them and verify their criminal activities.

CONCLUSION

Modern communication methods have become indispensable elements in our daily life, so is the case to criminal suspects. In the process of analyzing video surveillance recordings, where a criminal suspect is observed making a call, surfing the internet, sending a message, or using other communication methods, such information shall be collected, correlated and analyzed in-depth. To make better use of the video surveillance information in criminal investigation, criminal investigators need to know not only how to utilize patent features that can be observed directly in the video surveillance recordings, but also how to dig out latent information underlying beneath. This mainly includes extracting bank credit card information, mobile information, GPS information, hotel registration information, internet chatting information, travelling information, and other information through thoroughly analyzing video surveillance recording contents. Such information will be very helpful for locating a suspect's identity and lodging place.

With the development and improvement of the video surveillance facilities and systems, it is indisputable that the video surveillance information will play increasingly important roles in preventing and investigating crimes. On the one hand, we are making efforts to improve the quality of the surveillance facilities; on the other hand, we need to continuously improve the criminal investigators' capacity in analyzing video surveillance information, making full play of an investigator's initiative, promptly summarizing effective techniques and experiences, so as to make better use of video surveillance information for solving a criminal case.

9 The victim left her identity card with the credit card together and used her birthday as the credit card code. So the offenders decrypted the code without difficulties.

REFERENCES

1. Chen Gang, Xu Lei. Shipin jiankong tuxiang zhenchafangfa yanjiu (A study on video surveillance image investigation methods). Journal of Chinese People's Public Security University (Science Edition), 2012(3).
2. Girod, R. J. (2014). *Advanced Criminal Investigations and Intelligence Operations*. London: CRC Press.
3. Grabosky, P. (1998). Technology and crime control. *Trends and Issues in Crime and Criminal Justice,* (78), 1-6. http://aic.gov.au/documents/4/2/9/%7B4291E338-C2CE-41CF-B947-DB268AD13B13%7Dti78.pdf
4. Hao Hongkui. Lun shipin jiankong xitong zai zhencha zhong de yunyong (On the application of the video surveillance systems into criminal investigation). Journal of Shangdong Police College, 2008(5).
5. Li Na. Guanyu shipin zhencha shijian jineng de sikao (Thinking of video investigation practical skills). Journal of Hebei Public Security Police Vocational College, 2014(2).
6. Liu Liming. Xingzhen gongzuo "hechengzhan" linian qianyi (On the idea of "integrated war" in criminal investigation work). Gongan Yanjiu (Policing Studies), 2013(3).
7. Lu Juan. Xinxihua tiaojianxia xiandai jingwu yunxing moshi xiangguan wenti tantao (Some issues concerning modern policing operation model under the circumstances of informationalization). Gongan Yanjiu (Policing Studies), 2013(11)
8. Sun Zhanming, Yin Weizhong. Shipin tuxiang zhencha zhong fanzhencha xingwei d shibie he yingdui (Distinguishing anti-investigation tricks in video image investigation). Journal of Jiangshu Police Officer College, 2011(2).
9. Zhang Jichun, Li Tao. Dangqian shipin jiankong tuxiang zhencha zhong cunzai de wenti ji wanshan gouxiang (Problems in current video surveillance image investigation and suggestions for improvement). Journal of Chinese People's Public Security University (Science Edition), 2011(3).

UDC: 343.533::004
347.77/.78:004

CRIMINAL LEGAL PROTECTION OF COMPUTER DATA

Ivan Joksic, PhD[1]
University of Business Academy,
Faculty of Law for Commerce and Judiciary, Novi Sad

Abstract: The challenges posed by the rapid development of science and technology are making new demands in the field of personal and business data. It is almost impossible to successfully carry out any activity without the use of modern computer technology, especially made up of software solutions. In addition, the use of the Internet has enabled immediate sending of data and their storage on the available servers for it. However, overall progress in this area brings many dangers to the security of computer data users of the new software solutions. Recognizing the need to establish a framework of criminal law to protect computer data, Serbia enacted amendments to the Criminal Code of 2003, the existing system of offenses improved with new ones, thus directly protecting the security of computer data. After that, in the new Criminal Code of 2005, a special group of criminal offenses against the security of computer data were introduced for the first time (Chapter XXVII). Subsequently, there are eight offenses involving actions that harm the security of computer data which are being criminalized. Starting from the above, this paper will point out the specifics of these crimes in the light of the current situation in our criminal legislation. This means the examination of their essential elements and emphasizing the need to improve the existing system of criminal protection of computer data to new offenses or expanding existing offenses with the new (lighter or heavier) forms. We will also consider the existing penal policy, in order to point out the necessity of a more lenient or more stringent regime of sanctions against perpetrators of these crimes.

Keywords: computer data, computer, software, hardware, viruses.

INTRODUCTION

The development of science and technology has contributed to the overall development of human society. This is particularly evident in the sphere of communication through the use of computer technology. The backbone of the development of science and technology, which is often called the third industrial revolution, is the invention of the computer. It enables wider and more efficient distribution of data forming the basis of the modern way of doing business and communicating. The requirement is necessary to separate the two equally important components of usability of computers in the modern world. The first relates to the constantly increasing storage space for user data, mostly against charge. The second relates to the development of modern communications that is characterized by the speed of sending information and other supporting facilities. In a word, the development of information technology makes the pillar of modern business, including their application in science and technology.

1 E-mail: ijoksic@hotmail.rs.

The term cyberspace is used in the scientific and professional literature dealing with computers and the electronic apparatus. It is believed that this term was first used by William Gibson, the writer of science fiction. However, the term cyberspace can be found in the literature which is slightly older. Thus, the Italian scientist Antonio Meucci patented a device that was later called the phone, while the area where a phone conversation takes place is considered to be cyber space. This is the space between two phones involving the information content of the conversation between two men. As the conversation between two men technically does not exist, we can say that it is a virtual form of communication that is not materially tangible.

In recent decades, the cyber space has assumed wide dimensions and has become an essential form of communication between people at distances that do not have the space and time constraints. The Internet has become a timeless invention of modern man which has won the whole planet in a short time. In this way, the existing cyberspace is modernized by the use of computers in addition to audio visual communication as a form of communication of two or more users. Although cyberspace remained outside the material world (not materially evident and palpable) the fact is that it gets its physiognomy embodied in the benefits it provides and the necessities of its use in almost all spheres of social engagement of people.

At present, the expansion of cyberspace that is becoming a place where people spend a lot of time has become noticeable. In this way millions of people are active users of the Internet and related facilities - mostly of entertaining character. Hence, the cyber space is considered a network of international proportions that develops, grows, enriches and is increasingly present in politics, economics, law, police, sports, marketing and others.

The advantages of cyberspace and computers, as a means without which it is not possible to use them, brings a number of negative factors embodied in the performance of various criminal offenses. Here it is necessary to separate two groups of offenses. The first group consists of traditional crimes that are not strictly in relation to the use of the Internet (e.g. murder, theft, etc.). In this case we might say that computers and cyber space used for dealing with conventional crime existed long before their occurrence[2]. The second group includes crimes that cannot be executed without the use of cyber space (data theft, unauthorized intrusion into someone else's computer system, etc.). Ranges of performing both groups of offenses receive a new dimension in the field of cyber space because they do significantly more damage to an unlimited number of people in the world. This implies the absence of a physical connection between the perpetrator and the victim of crime. In 1982 the Interpol pointed out that the modern world is faced with prevailing property offenses in which the use of the computer is predominant. This practically means that the computers and cyber space are used as means by which criminals earn millions in funding.[3] In the literature we can find examples of the beginnings of the use of computers for committing criminal offenses, among them there is a case of theft in a Minnesota bank in the United States in 1966 when the computer was used as a means to commit the offense[4]

Establishing a legal framework for preventing crimes against the security of computer data took place at the international and national or intergovernmental level. The reasons for this kind of normative regulation of this area are related to the presence of legal specifics that are following these charges. They refer to the special nature of the act of execution, the occurrence of consequences, the profile of possible perpetrators, the occurrence of incalculable damage to property and crime victims, making it impossible that the cyber space is used for the execution of traditional crimes and others. Hence, it is extremely important to point out the international and national legal aspects of these crimes, especially due to the fact that our

2 Z. Cvetkovic (2001), *Kompjuterski kriminal*, Branič-časopis Advokatske komore Srbije, no. 2-3, p.5-6
3 N. Kitarovic (1998), *Kompjuterski kriminalitet*, Bilten sudske prakse Vrhovnog suda Srbije, no. 2-3, p. 52-53
4 D. Dragicevic (1999), *Kompjuterski kriminalitet i infomacijski sustavi*, Informator, Zagreb, p. 115

criminal legislation began to introduce new charges at this area of law, it is modeled on international legal instruments and comparative legal solutions.

INTERNATIONAL FRAMEWORK FOR PROTECTION OF COMPUTER DATA

After the democratic changes in Serbia followed by the re-establishment of the international political and police cooperation, our country has adopted a series of international agreements as essential for the fight against cyber crime[5]. The specialty of computer crime is evident in the presence of a large number of international and European legal instruments. They include provisions of substantive and procedural criminal law on the basis on which the procedure for establishing liability of natural and legal persons as their perpetrators is determined are adopted by the Council of Europe recommendations on crime related to computers in 1989 (Recommendations No.R (89)6), EU Directives for the protection of computer programs in 1991, Resolution on Cybercrime VIII United Nations Congress on the Prevention of Crime etc. In addition, Serbia, as a member of the State Union of Serbia and Montenegro has signed the Convention on Cybercrime and the Additional Protocol thereto in Helsinki in 2005. Thus, the legal scene in Serbia established the necessary legal framework for combating computer crime, regardless of the fact that at that time there were few computer and the Internet users.

After the October changes since 2000, Serbia in addition to normative work re-established the cooperation with relevant international and European police organizations, among them the Interpol and Europol as the two most important organizations for suppression of various forms of criminality, including computer and cyber crime. The International Criminal Police Organization *(French: Organisation internationale de police criminelle)* better known by its acronym telegraph the Interpol is an organization that deals with international police cooperation. In the area of criminal law protection of computer data, the Interpol has undertaken a number of activities. Thus, in 2014 the Government of Singapore donated a modern center for the fight against cyber crime to the Interpol, which was started in 2015. This center is a special organizational unit of the Interpol called IGCI (*INTERPOL Global Complex for Innovation*) within which there is a special department for the fight against cyber crime IDCC (*INTERPOL Digital Crime Centre*) and the Department for the Development of CIO (*Cyber Innovation and Outreach*). The center is involved in collecting, processing and distributing data to the national police services, detection of crimes and their perpetrators, strengthening of international police cooperation by providing expertise and assistance in investigations by national law enforcement agencies, providing assistance in the training of police officers, etc. The Department for the fight against cyber crime IDCC works round the clock in duty teams of experts who inform the National Police Service of any possible criminal threats. It is interesting to note that in 2015the Centre for the fight against cyber crime discovered several organized criminal groups that were involved in child pornography in the Philippines when over a hundred persons were arrested and over a thousand computers used with sexual content were seized.[6]

Europol (the European Police Office) is the criminal intelligence agency of the European Union. In the framework of Europol, liaison officers and Europol officers, analysts and other experts provide and deliver effective, multilingual constant (24 Hour) support of this

5 M. Milosevic (2007), *Aktuelni problemi suzbijanja kompjuterskog kriminaliteta*, Bezbednost, no. 1, p. 58
6 INTERPOL (2015), *Annual report 2014*, INTERPOL General Secretariat, Lion, p. 28

institution.[7] The Ministry of Internal Affairs of the Republic of Serbia has started cooperation with Europol since 2009. The legal framework of this cooperation is the Agreement on Strategic Cooperation between the Republic of Serbia and Europol.[8] In order to more successfully combat cyber crime, the Center for the fight against cyber crime (European Cybercrime Centre) was established. This Center was established in 2013 with a mission to assist in the protection of the state bodies, businesses and citizens from increasing cyber crime in the European Union. The main areas in which the Centre operates are: 1) the fight against organized criminal groups; 2) The fight against child pornography and sexual exploitation on the Internet; 3) protection of data against theft; 4) protection of vital information systems of the European Union. Based on these presented Europol's activities, including its specialized bodies and organs, it is clear that each Member State can successfully cooperate in combating computer crime.

A significant contribution to the field of criminal law protection of computer data is provided by the Convention on Cybercrime (hereinafter the Convention). This Convention was adopted in 2001 and Serbia ratified the document in its entirety in 2009.[9] In the beginning, the Convention provides the general meaning of the terminology used, which is of importance in the part relating to the application of provisions of substantive criminal law. It refers to the following terms (Article 1):

a) "computer system" means any device or group of interconnected or dependent devices, where one or more of them, perform automatic processing of data on the basis of a program;

b) "computer data" implies any representation of facts, information or concepts in a form suitable for processing in a computer system, including an appropriate program on the basis of which the computer system may perform its functions;

c) "provider" means: any public or private entity that provides users with its service, i.e. the ability to communicate through a computer system, any other entity that processes or stores computer data on behalf of such communication service or users of such service;

d) "information on traffic" means: any computer data referring to the communication through the computer system, generated by the computer system that is part of the chain of communication containing information on the origin, destination, trajectory, time, date, size, duration, or type of underlying service.

In the area of substantive criminal law, the Convention has provided four groups of offenses where criminal protection of computer data may be applied. These offenses cover a wider incrimination scope, which would complement the protection of business and private activities of legal and physical persons.

a) The first group consists of offenses against the confidentiality, integrity and availability of computer data and systems. They criminalize illegal access, interception, disruption and misuse of computers and other technical devices, including network data distribution. These are the following crimes: illegal access (Article 2), illegal interception (Article 3), disruption of data (Article 4), system interference (Article 5), and misuse of devices (Article 6).

b) The second group consists of offenses in connection with computers. These offenses are focused on different aspects of the misuse of computers that receive forms of fraudulent conduct. These are the following crimes: counterfeiting in connection with computers (Article 7), fraud in connection with computers (Article 8).

7 S. Ulyanov and Z. Ivanovic (2010), *Međunarodne policijske organizacije*, Strani pravni život, no. 2, p. 77
8 Zakon o potvrđivanju Sporazuma o strateškoj saradnji između Republike Srbije i Europola ("Službeni glasnik RS", br. 38/09)
9 Zakon o potvrđivanju Konvencije o visokotehnološkom kriminalu („Službeni glasnik RS", br. 19/09)

c) The third group consists of offenses with respect to the content. These are crimes relating to child pornography (Article 9) and other manifestations of the increasing number crimes, such as: production, distribution, offering, acquisition and possession of child pornography through the computer system.

d) The fourth group consists of offenses relating to copyright and related rights (Article 10). Given that it only criminalizes copyright infringement, the Convention suggests States Parties to adopt legislative and other measures as may be necessary to establish as criminal offenses under its domestic law violations.

In its provisions the Convention stipulates criminalizing attempts, aiding and abetting in the execution of those crimes. In this way it wants to complete the criminal protection of computer data because in practice we meet with different modalities of the commission of offenses. Special attention was paid to the liability of legal persons for criminal offenses against the security of computer data. This emphasizes the activity of legal persons by establishing their criminal, civil or administrative liability. In doing so, the liability of legal persons does not exclude criminal liability of the natural persons who have committed an offense. It coincides with the concept of criminal liability of legal persons in our legislation introduced just before the ratification of the Convention.[10]

NATIONAL FRAMEWORK FOR PROTECTION OF COMPUTER DATA

The development of information technologies and of the mass use of computers in the world has made the appropriate influence in Serbia. The transition to the new millennium was marked by the expansion of science and technology with computers and the Internet in its center as means of modern communication. Hence, there is a need for legal regulation of cyberspace within the framework of the existing criminal legislation of Serbia. Our legislators resorted to a threefold manner of regulating the security of computer data. The first group consists of provisions of substantive criminal law, the second group of the provisions of the criminal procedural law, while the third group includes the legal provisions governing the organization and competence of state bodies for combating high-tech crime. We are here to point out the specificities of this type of crime in the area of substantive criminal law in the light of the existing incriminations present in the Serbian Criminal Code.[11]

The introduction of criminal acts against the security of computer data is done by Amendments to the Criminal Code of Serbia from the year 2003.[12] It introduced a new group of criminal offenses against the security of computer data in Chapter 16 of the Criminal Code. In total, it has introduced seven offenses (Article 186a-186e) including a description of the different modalities of the security of computer data using computers and related electronic equipment. Their common denominator consists of an effort of the legislator to adjust our criminal legislation to the new challenges that make the emergence of cyberspace and the special profile of the perpetrators of these crimes that are atypical compared to traditional perpetrators of crimes.

The entry into force of the new Criminal Code of 2005 was marked by a series of legal newspapers, among which we can mention a completely independent legal regulation of crimes against the security of computer data. It is a group of criminal offenses from Chapter

10 See: Zakon o odgovornosti pravnih lica za krivična dela („Službeni glasnik RS", br. 97/08).
11 Krivični zakonik Republike Srbije („Službeni glasnik RS", br. 85/05-108/14)
12 Zakon o izmenama i dopunama Krivičnog zakona Republike Srbije („Službeni glasnik RS", br. 39/03)

XXVII of the Criminal Code comprising of a larger number of offenses. In addition, given the authentic meaning of the term in the field of cyber crime, the following terms are involved (Article 112):

a) Computer data refer to any representation of facts, information or concepts in a form suitable for processing in the computer system, including an appropriate program based on which the computer system performs its function.

b) Computer network is considered to be a collection of interconnected computers or computer systems that communicate by exchanging data.

c) Computer software is considered to be decorated set of commands that are used to manage the operations of your computer, as well as for solving a specific task using a computer.

d) A computer virus is a computer program or other set of commands entered into the computer or computer network that replicates by reproducing itself or infecting other programs or data in a computer or computer network by the addition of a program or a set of commands to one or more computer programs or data.

As far as the number and types of crimes that protect the security of computer data is concerned, the legislator resorted to the solutions present in comparative law. In this context, it introduced several criminal offenses involving a broad catalog of acts of commission.

- The offense of damaging computer data and programs (Article 298) performs "whoever deletes, edits, damages, conceals or otherwise renders useless computer data or program".

- The crime of computer sabotage (Article 299) is done "when someone enters, destroys, deletes, edits, damages, conceals or otherwise renders useless computer data or program or destroys or damages a computer or other device for electronic processing and transmission of data with the intention of disabling or considerably disturbing the process of electronic processing and transmission of data which are of importance for public authorities, public services, institutions, companies or other entities".

- The crime of creating and introducing computer viruses (Article 300) involves "device of introducing computer virus into someone else's computer or computer network" (paragraph 1) or "when the virus enters someone else's computer or computer network and thereby causes damage" (paragraph 2).

- The offense of computer fraud (Article 301) is committed "when entered incorrect information fails to enter correct data or otherwise conceals or fakes data and thereby influences the result of electronic processing and transmission of information in order to gain benefit and causes material damage".

- The offense of unauthorized access to a protected computer, computer network and electronic data processing (Article 302) is done "when the violation of the protection measures occurs involving unauthorized access to a computer or computer network, or unauthorized access to electronic data processing" (paragraph 1) or "when the use of information is obtained in the manner specified in paragraph 1 of this Article" (paragraph 2).

- The offense of preventing and restricting access to the public computer network (Article 303) performs "whoever prevents or hinders access to a public computer network".

- The offense of unauthorized use of a computer or computer network (Article 304) is committed "when computer services or computer network are used in an unauthorized way in order to gain material benefit".

- The offense of making, procuring or providing other means to commit offenses against the security of computer data (Article 304a.) performs "who possesses, purchases, sells or allows another person to use computers, computer systems, computer data or programs to commit a criminal offense of Art. 298 to 303 of this Code".

The analysis of all criminal acts against the security of computer data can indicate their common features. They relate to the different guidelines by which these offenses are diametrically different from other crimes in our criminal legislation. The following group features of these offenses are at issue:

1. They do not know interstate and regional boundaries as evidenced by their international character;

2. The diversity of forms of expression in practice;[13]

3. Although the principle does not limit the circle of potential subjects who carry out these crimes in practice we meet with persons who possess exceptional skills in information technology;[14]

4. It reduces the possibility of identifying and prosecuting perpetrators (spacing offenses), which affects the large dark number of these works;[15]

5. Few injured persons have general knowledge that they have been victims of any of these offenses. The reasons are related to the lack of performance of the real damage suffered and to the fact that legal entities want to avoid to be compromised in the business world because of the damage done due to the fact that their information systems were insufficiently protected. This is particularly the case with financial institutions (banks, insurance companies, private funds);

6. Some articles provide for the punishment for contemplated crime.[16]

Considering the growth of companies, we can observe the expansion of the catalog of possible acts of commission of criminal offenses against the security of computer data. This is particularly the case with the expansion of the Internet as an ideal ground for abuse in the field of invasion of privacy of its users. Organized crime, or terrorist groups, pornography and pedophile networks, illegal trafficking of weapons, drugs and people are well advanced due to the use of modern technologies. According to some estimates, the damage done by cyber crime in 2006 amounted to 200 billion Euros.[17] Most often it refers to the unauthorized publication and distribution of various audio and video contents in order to obtain unlawful material gain. In recent years, various types of abuse of information technologies are done through social networks.[18]

13 Gillespie, A., Cybercrime: Key Issues and Debates Florence, USA, Kentucky, 2015, p. 17

14 In practice we encounter various situations in which perpetrators possess exceptional knowledge of criminal acts against the security of computer data. In this regard, *The Office for the fight against cybercrime* conducted an investigation against a person who was suspected of having twice used his computer to enter into the systems of banks Austria and Switzerland in 2007-2008. The suspect in this case issued false orders for transferring money and in this way obtained material gain amounting to 51 990 Swiss francs. He also tried to make an unauthorized transfer of money amounting to19 000 US dollars. Source: L. Komlen Nikolic et al. (2010), *Suzbijanje visokotehnološkog kriminala*, Udruženje tužilaca i javnih tužilaca Republike Srbije, Beograd, p.102

15 Although we cannot determine with certainty what is the dark figure of cyber crime, according to some estimates it ranges from 90% to 99%. D. Dimovski (2010), *Kompjuterski kriminalitet*, Zbornik radova Pravnog fakulteta u Nišu, no. 55, p. 207

16 Thus, for example, the questions of criminal responsibility at work creating and introducing computer viruses (Article 300). If the same person makes a computer virus and enters it into someone else's computer or computer network, the question is on what basis could he be charged, taking into account that the perpetrator in this case corresponds to "the introduction of computer viruses", and that the actions of "making" are considered to be preparatory actions. Lj.,Lazarevic (2011), *Komentar Krivičnog zakonika Srbije*, Pravni fakultet Univerziteta Union, Beograd, p. 883rd.

17 D. Prlja et al. (2012), *Internet pravo*, Institut za uporedno pravo, Beograd, p. 123

18 In 2008, District / High Court in Belgrade conducted criminal proceedings against two persons who bought over 500 copies of copyright works via wireless internet from the company Excalibur net doo Kraljevo in the period 2005-2007. In this way, the users allowed unrestricted access and downloads of content for a monthly fee of 10 to 20 Euros. Source: L. Komlen Nikolić et al., op. cit., p. 119

In the end, it is important to point out the specific circumstances restricting the wireless in the implementation of the legal regulations in the criminal acts against the security of computer data. In that sense, we believe that it is necessary to ensure their efficient implementation through the introduction of additional restrictions in circulation of computers, computer components and laptops. It refers to the introduction of the ban in their sale without legal software. In this way the preventive effect on the suppression of cyber crime is introduced. Otherwise, we will have situations in which legally acquired computer and laptop equipments possess operating systems and the accompanying computer programs. This is particularly the case in the sale of computers, computer components and laptops via the internet.

CONCLUSION

The development of science and technology in the world has achieved positive effects in all spheres of social life. Today it is not possible to organize business activities without the use of computers, the Internet and other related electronic contents. Since our country has made significant strides in the direction of approaching the world and European trends, the IT sphere becomes an important part of social development. For these reasons, our legal system demands adopting adequate regulations that will regulate the use of modern means of communication and electronic data processing. This is particularly evident in the area of criminal legislation that ultimately protects society from crime. In this connection, the security of computer data is an important area where it is necessary to provide an efficient way of criminal protection. Thus begins the process of introducing new laws that should be adopted for the protection and security of computer data.

In contrast to the evident fact that our country has built appropriate criminal law framework in practice, we face large dark figure crimes that harm the security of computer data, and therefore the private sphere of every man. The analysis of the current situation in the judiciary, we can see a small number of prosecutions of criminal cases in this group of offenses. This implies that it is necessary to make further efforts to increase the level of efficiency of our law enforcement agencies. This includes reforming the existing organizational units in which professionally oriented persons equipped with modern technical aids would be engaged. This involves hiring IT professionals who are able to promptly respond to various forms of abuse of the system of collective and personal security. Otherwise, we will have a situation that we have done everything *de jure*, while the *de facto* cybercrime remains at the top of the dark figures of committed criminal offenses.

REFERENCES

1. Cvetkovic, Z.: *Kompjuterski kriminal*, Branič-časopis Advokatske komore Srbije, no. 2-3, 2001.
2. Dragicevic, D.: *Kompjuterski kriminalitet i infomacijski sustavi*, Informator, Zagreb, 1999.
3. Dimovski, D.: *Kompjuterski kriminalitet*, Zbornik radova Pravnog fakulteta u Nišu, no. 55, 2010.
4. Gillespie, A.: *Cybercrime: Key Issues and Debates Florence*, USA, Kentucky, 2015
5. INTERPOL: *Annual report 2014*, INTERPOL General Secretariat, Lion, France, 2015
6. Kitarovic, N.: *Kompjuterski kriminalitet*, Bilten sudske prakse Vrhovnog suda Srbije, no 2-3, 1998.
7. Komlen Nikolic, L. et al.: *Suzbijanje visokotehnološkog kriminala*, Udruženje tužilaca i javnih tužilaca Republike Srbije, Beograd, 2010.

8. Krivični zakonik Republike Srbije („Službeni glasnik RS", br. 85/05-108/14).
9. Zakon o potvrđivanju Sporazuma o strateškoj saradnji između Republike Srbije i Europola („Službeni glasnik RS", br. 38/09).
10. Zakon o izmenama i dopunama Krivičnog zakona Republike Srbije („Službeni glasnik RS", br. 39/03).
11. Zakon o potvrđivanju Konvencije o visokotehnološkom kriminalu („Službeni glasnik RS", br. 19/09).
12. Zakon o odgovornosti pravnih lica za krivična dela („Službeni glasnik RS", br. 97/08).
13. Lazarevic, Lj.: *Komentar Krivičnog zakonika Srbije*, Pravni fakultet Univerziteta Union, Beograd, 2011.
14. Milosevic, M.: *Aktuelni problemi suzbijanja kompjuterskog kriminaliteta*, Bezbednost, no. 1, 2007.
15. Prlja D. et al.: *Internet pravo*, Institut za uporedno pravo, Beograd, 2012.
16. Ulyanov, S., Ivanovic, Z.: *Međunarodne policijske organizacije*, Strani pravni život, no. 2, 2010.

UDC: 343.131.5
342.722

THE RIGHT TO COUNSEL AND EUROPEAN LEGAL STANDARDS

Zoran Pavlović, PhD[1]
University of Business Academy,
Faculty of Law for Commerce and Judiciary, Novi Sad

Abstract: A constitutionalized right to counsel in criminal proceedings expended the legal right of the defendant as the subject of criminal proceedings to have a counsel in the earliest phase of the proceedings, and at the same time, efficient mechanisms of procedure control in realizing that right and procedural sanctions in case that violation have been provided. The defendant has the right to decide whether he/she will use this right, as well as in which moment and volume, but through the institute of appointed counsel and defense of the poor, this right has been significantly supplemented. European legal standards that the criminal procedural law of Serbia is attempting to harmonize with, emphasizes the counsel by choice as primary, so this solution should not be violated to disadvantage of the defender by imposing appointed counsel through proceedings of the court in an attempt to reach decision in the merit of the case.

The right to counsel, as a conventional and a constitutional right, demands wholesome legislative regulation as do the solutions to such situations that are more than procedural disciplines, the implementation of which is in the authority of the court, but not to the expense of the defendant. The constitutional and legislative implementation of standards found in the verdict ECHR *Salduz v. Turkey*, expands the rights of the defendant to criminal proceedings from the earliest phase, including also the right to the choice of defense counsel.

Key words: right of the defendant to counsel, role of the judiciary, choice of counsel, criminal proceedings.

INTRODUCTION

The Constitution of Serbia and international treaties on human rights contain several provisions important for criminal proceedings[2]. Amongst the most important ones are those from Art.32 of the Constitution and Art.6 of the Conventions on the protection of human rights and basic liberties of the Council of Europe (ECHR) that guarantee the right to a fair trial. Concretization of the general principle of fair treatment in relation to individual rights of the defendant in criminal proceedings is contained in Art 33.of the Constitutions and Art. 6, item 3 of ECHR. This means that the defendant is expeditiously and in accordance with the law, in detail and language they understand, ensured minimal rights to be informed of the nature and

1 E-mail: zoran.pav@hotmail.com.
2 For example, the right to freedom and security (Art.27, of the RS Constitution and Art.5 of ECHR), the right to legal remedy (Art. 36 of the RS Constitution and Art.2 of Additional protocol no.7 of ECHR), and other. More in Pavlović, Z., Constitutionalization of the Criminal Procedure Law, Belgrade (2014), Thematic Conference Proceedings of International Significance Archibald Reiss Days, Vol.III, p. 199-209.

the reasons of the actions they are accused of, the evidence gathered against them, they must be enabled a hearing and a defense, as well as presenting defense and evidence in their favor, question the witnesses of the prosecution, suggest and examine the witnesses of the defense, all in reasonable deadline and being exempt of self-incrimination.

The minimal right of the defended, i.e. of the defense, as one of the most important rights is the one found in Art 33, item 2 of the Constitution, which is that the defendant has the right to counsel and the right of the choice of counsel[3], to undisturbed communication with the counsel as well as suitable conditions to prepare defense. The legislator included the convention solution from Art 6, item 3 of ECHR by providing the right to free counsel if the interests of justice demand so.

The content of these Constitutional provisions specified by the Criminal Code, i.e. the minimal rights of the counsel that the defendant is entitled to are also specified by the practice of the European Court of Human Rights that interprets these provisions in determining possible violations of Art 6, item 3 of the ECHR and all decisions of the Constitutional Court of Serbia in the matter of subjects related to determining violations of constitutional rights and basic liberties in criminal proceedings of Serbian judiciaries. These rights are signified as *minimum rights*, as they represent the lowest limit in the guarantees given to protect the defendant in litigation with the state, i.e. the state police, state prosecutor and judiciary. Constitutionalism demands establishing limits to the state authority, compliance with the rule of law and protection of basic rights.[4] This limit must not be lowered as it would lead to the complete imbalance between the rights of the defendant and state repression within the criminal procedure. Minimum rights of protection of the defendant during criminal proceedings are parallel to the principle of legitimacy in material law.[5]

The right of the defendant to a defense and counsel has three elements: the right of the defendant to represent oneself, the right to counsel assistance of choice and the right to free assistance of counsel.[6] The matter of entitlement to this right is resolved in the Constitution by prescribing that any person has the right to judicial protection and the right to fair procedure. Procedural guarantees specific to criminal procedure are conventionally related to the defendant for a criminal act, namely everyone charged with a criminal offense (Art. 6, item 3 of ECHR). The constitutional solution, regarding the special right of the defendant, must be interpreted exclusively in the sense of the provisions of the Criminal Code that defines the defendant in a material sense, namely the accused, charged and convicted.

The issue of whether the right to counsel by choice can be limited, and in which scope the court can refer to the measures of procedural discipline, the principle of economy, efficiency and others, has been particularly debated in one of the currently most complex trials under special division of organized crime of the Higher Court in Belgrade, on indictment against M.Đ. and M.M. and others for inflicting damages to road construction companies and an oil company in Kruševac. In the case that has 15 defendants, all selected counsels were absent from several hearings with a written explanation that the court has violated law by a sudden scheduling of new dates. The selected counsels were of opinion that the legal subject that had over 60 hearings during the year 2015, is not in accordance with the Law on the Bar to conduct the so-called successive scheduling of hearings as it violates the right of the defendants to coun-

3 Art.29 of RS Constitution the right to counsel by choice and the right to appointed counsel is enabled to a person deprived of liberty without a court decision.

4 Rosenfield, M., CONSTITUTIONALISM, IDENTITIY, DIFFERENCE AND LEGITIMACY, October 25, 1994, p.4; Duke University Press| ISBN-10: 0822315165

5 Zupančić, B.M., Commentary of Art. 19, 20,23, 27, 31, 29, 36 and 27 of the Constitution of the R. of Slovenia, in New constitutional regulations of Slovenia, The Faculty of Law in Ljubljana and other, Ljubljana (1992), p. 66

6 Refers to the right to free expert defense or the right to free legal assistance

sel by choice, nor is advocacy respected as a profession. The Law on the Bar guarantees to the citizens (Art 2, item 2) the right to a free choice of lawyer. However, the trial was not postponed as the trial chamber assigned appointed counsels to all defendants, regardless the objection of the defendants as well as the complexness of the criminal procedure lasting for several years, and therefore the possibility of such appointed counsels to do their duty constituted by a decision of the President of the court to defend the defendants in accordance with the Constitution, the law and the Code of Advocacy.

Such treatment of the court opened numerous questions about the procedure related to the minimum (constitutionalized) rights of the defendants in criminal proceedings, firstly – whether counsels can be imposed in this manner, whether fairness of proceedings is infringed, the role of the appointed counsel if they are not dismissed by the court and appointed counsels are re-included into active defense, the validity of the evidence suggested by the prosecutor with the counsels that accept appointed counsel duty despite the complexness of the subject and the chosen counsel. Secondly, the question is whether the request of the defense for postponing the scheduled hearing can be an abuse of such right with the aim to drag out the procedure. But, let us attempt to address these issues in order.

THE RIGHT TO COUNSEL OF CHOICE

Criminal procedure is a field where the legislator expressed the stance on legal assistance as a strictly defined vocation of lawyers, which is an important element of legislative safety of a legal and democratic state. The counsel is the so-called *regulator* of the procedure. The right to a counsel is guaranteed by the Constitution of the RS in the Criminal Procedure Code, ECHR and an entire line of other international documents on human rights, such as the International Covenant on Civil and Political Rights (Art. 14, item 3 (b) and (d)), Basic Principles on the Role of Lawyers, adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, August 27 – Sept. 7, 1990, Charter on Fundamental Rights of the EU (Art. 47) and others.

The defense counsel (Art. 71 et al CPC) is a procedural assistant to the defendant, who helps the defendant in their defense, i.e. in determining the facts beneficial for the defendant as well as their use of procedural rights. The counsel is hired by the defendant by granting authorization and it can be hired by close individuals, unless expressly protested by the defendant. Under precisely established conditions, a counsel can be appointed to the defendant. In a recent decision of ECHR, the Grand Chamber from the year 2015 refers to the right of the defendant to the counsel of his choice. Namely, in the proceedings *Dvorski vs Croatia*, the Grand Chamber of ECHR[7] established an infringement of Art 6.item 1 and 3 point c) of the European Convention. Even though the mother of the defendant was authorized to hire a counsel, the defendant gave deposition only in the presence of an appointed counsel, based on which the verdict of guilty was made, so the European Court found it to be a violation of the rights of the defense, namely, the right to counsel of choice, which infringed the legality of the entire procedure.[8] The favoring of national legislature and ECHR counsel of choice is obvious in relation to the appointed counsel, so in the following text we will predominantly deal with the counsel of defendant by choice.

7 ECHR GC, Dvorski v. Croatia, 20 October 2015, 25703/11.

8 EU Directive 2013/13 of the European Parliament and Council from October 22nd, 2013 on the right to access to a counsel in a criminal proceedings and in proceedings based on the European warrant of arrest, and the right to third party informing in case of deprivation of liberty, and the third party and consular bodies communication, The Official Gazette of the EU, L 249/1-12, Nov.6, 2013.

Theoretically speaking, several subjects of the criminal proceedings contribute to the defense, namely the court and the state authorities (public prosecutor activity), with the task of providing comprehensive discussion about the legal subject (Art 15 CPC). However, such action is not a suitable substitute for activities of the defendant's counsel. Participation of the counsel in the defense liberates all other subjects of that role – state authorities, psychologically incompatible functions of the prosecution, defense and impartial trial. In reality, state prosecutors believe their main obligation to be avoiding unfounded acquittals of criminal act executors, while the court depends precisely on the evidence provided by the parties during the trial. [9]

The principle of equity therefore dictates that the defendant is aided by an expert person – a lawyer. The defendants aided by a counsel are able to exercise their rights efficiently as they are aided by a counselor. The defendants can always waive the right to counsel by their choice however they cannot be forced to do so, especially not by decision of the court in charge of the proceedings, even with the explanation of the principle of trial within a reasonable time (Art. 14 of CPC).

Similarly, the ECHR in the subject *Hanzekovacki vs Croatia* determined that there has been a violation of the right to fair trial from Art. 6, item 1, in relation to the right of the defendant to be defended by the counsel of choice as guaranteed by Art.6, item 3, cl. c) of the ECHR. Namely, despite of justified absence of the counsel although the defendant categorically did not want to be defended by himself, the final hearing took place.[10] The defendant cannot be *forced* to waive the right to a chosen counsel as such treatment by authorities where the defendant signs a statement renouncing their chosen counsel, regardless of the obligatory or non-obligatory defense for the specific act being trialed, is also a violation of Art. 6, item 3, point c) of the European Convention[11].

The right to a counsel must be *practical* and *efficient*. The European Court did not formulate general regulations on what is valued as efficiency of the right to a counsel, but it is governed by *all specificities of the case* standard. According to Krapac,[12] who refers to three decisions of ECHR in the legal subjects *Goddi*, *Alimena* and *Tripodi vs Italy*, it is stated that the summon to the main hearing must be delivered to the defendant and the defendant counsel of choice and the counsel must be notified of the changes in scheduled hearings, but also to *postpone the main hearing if the counsel is prevented to attend.* However, by following the tradition of Serbia's criminal procedural law, regardless of the adversarial criminal proceedings according to CPC from the year 2011, a violation of any right to defense and a counsel is (relatively) significant violation of provisions of criminal proceedings if such has influenced or could influence sentencing. This applies to all phases of the procedure.

LIMITATIONS OF THE RIGHT OF THE DEFENDANT TO COUNSEL OF CHOICE

The constitutional right of the defendant to a counsel is a property of all modern, democratically modeled legal system; however, certain limitations do appear in national legislatures. One of the limitations is the moment that the defendant can use this right. According to

9 Treschel,S., Human Rights in Criminal Proceedings, Oxford University Press, 2005, p.270.
10 Hanžekovački versus Croatia, verdict from April 16th, 2009, final verdict July 16th, 2009, number of request 17182/07
11 ECHR Yaremenko v. Ukrajina, June 12th 2008, 32092/02, para.78-81
12 Krapac, D., The right of the defense counsel in criminal proceedings as the standard of some international treaties on human rights and freedoms, Odvjetnik, no. 5-6, Zagreb (2010), p. 25

the constitutional and the legislative solution in the Republic of Serbia, citizens can exercise this right as soon as they are apprehended without a court decision. They are protected from self-incrimination, have the right to a hearing in the presence of a counsel of their choice or an appointed counsel if they are unable to pay for legal counsel. Criminal procedural law of Serbia has established a standard in this segment, which is to provide a lesson on their rights along with the invitation for the first questioning, including a lesson on the right to a counsel.

The right to a counsel in previous proceedings was expanded according to the so- called *Salduz versus Turkey*[13]doctrine, where the ECHR expressly decided that the Art.6, item 3 c) is applied in initial police questioning, from the moment of apprehension. The role of the counsel is not exclusively to provide legal assistance before or during the questioning, as much as it is a guarantee of legal treatment towards the defendant. The European Court of Human Rights applied this stance in the case of *Salduz* proceedings where those arrested were questioned by the police, while other situations where the defendant was not arrested were valued differently.[14]

In this manner, The European Court set the standard of sanctioning violations of conventional right to a counsel as the incriminating statements of the defendants that did not have access to legal counsel and could not be used as evidence in the procedure. In the proceedings *Panovits vs Cyprus*[15]ECHR found a violation of Art. 6 of ECHR as the statements of the defendant without presence of a chosen counsel were used for conviction, even though they were not the only evidence. The lack of legal assistance is limiting the rights of the defense, even if there is no evidence to indicate that the legality of the entire proceedings is brought into question. With such positions of ECHR it seems that the so- called *gray zone* of the right for defense is reduced to the smallest possible measure.

Limitations of the right of the defendant to a counsel of choice can be quantitative and qualitative. The aim of quantitative limitations of the so-called formal defense is to ensure the quality of defense. Hence, even through the provisions of CPC and the Law on the Bar determined that the counsel can exclusively be a lawyer, this is confirmed by ECHR practice that it is the person who has expert legal qualifications and is allowed to conduct public (and not state) duty in certain area.

The counsel can only be a lawyer, however CPC itself has foreseen the possibility of replacement by a legal prentice, only in the case of a defense for a criminal act with a possible conviction of up to 5 years of prison.

The quantitative limitations of formal defense are related to determining the maximum number of counsels in a proceeding. A too high number of counsels can lead not only to technical issues during the trial, but also to abuse of the right to defense. Therefore, the limitation of 5 counsels in CPC RS is completely in accordance with the position of the European Commission from the year 1978, in the case file *Ensslin, Baader and Raspe v. Germany*, where the number of counsels was limited to three at the most, is in complete accordance with the law from Art.6, item.3c) of the Convention.[16]According to CPC and Art.78, item3, the right to defense is realized when one of the counsels participates in the proceedings. If the defendant has over five counsels, the elimination of the excess counsels is primarily left to the defendant, and if such is not done within three days, it is considered that the counsels are the first five ones who delivered authorizations to the court.

13 ECHR GC, *Salduz v. Turkey*, 27 Nov 2008 36391/02 par 50. Morgan, C., The EU procedural Rights Roadmap, Background, importance, overview and state of affairs, in Vermeulen, Gert (ed.), Defence Rights, International and European Developments, Maklu, 2012, p.79
14 ECHR; Schmid_Laffer c. Suisse, 16 June 2015, 41296/08 par.39-40
15 ECHR; Panovits v Cyprus, 11 Dec 2008 4268/04 par. 73-76, See Morgan, op.cit.
16 Ensslin, Baader and Raspe v. Germany, Decision of the European Commission as of July 8th, 1978, no.7572 and 7587/76 para. 19

Apart from the demands regarding formal qualifications of counsels that enable only a certain category of persons to be counsels of the defendant during criminal procedure in general, CPC proposes other kinds of limitations that prevent a specific counsel, who in principle meets the formal requirements, to conduct the defense of the defendant in a certain case. Most frequently, it is a matter of a degree of suspicion regarding the involvement of a counsel in criminal acts, but also for other reasons that brings into question their ability to be counsels in certain proceedings.[17]

The matter of limiting the right to a defense counsel of choice can be put into two different situations, but with the same consequences. Namely, when the defense is obligatory, it is proposed in Art. 47, item 2 of CPC, conditioned that the proceeding is due to a criminal act that can lead up to eight years of imprisonment or more when it is conducted from the first hearing to the legal verdict. Secondly, it refers to defense of poor people from Art.77, item 1 of CPC, referring to the situation when the defendant has a chosen counsel but not the means to pay for the defense.

In the case of *Pakeli*, ECHR concluded that the person being prosecuted for a criminal act and demands a legal counsel of choice is authorized to be provided free legal assistance when it is in the interest of justice, and the defendant himself does not have the funds to pay for it.[18] Certain authors, such as Pajčić[19], stated that while appointing these counsels it is necessary to take into consideration the wishes of the defendant. In the case of *Lagerblom v. Sweeden,* the European Court stated that while appointing counsels, the courts must take into consideration the wishes of the defendant but they are under no obligation to implement them if there are reasons strong and significant enough that such is not in the interest of justice.[20]

The Criminal Proceedings Code of RS does not provide a specific answer to the question imposed here, which is whether the court is actually obliged to accept the defendant's opinion in regards to the selection of a counsel paid from the budget of the court in charge of the proceedings, but court practice implemented a rule that in the case of insufficient funds for authorized defense counsel, the same is appointed as the counsel by the court in accordance with general principles of the procedure with the aim to respect the wishes of the defendant for a chosen counsel and their minimum rights in the proceedings (as in the case of Ovčara appearing before the Higher Court in Belgrade).

FEE OF THE DEFENSE COUNSEL AS A LIMITATION OF THE RIGHT TO DEFENSE

In the Republic of Serbia, criminal law or criminal procedural law is, at this moment, in its most dynamic phase of development in relation to the last hundred years. The changes in progress, from judicial to prosecutor investigation and so on, have changed the position of defendants and their counsels in the procedure. Of course, special knowledge and experience for other provisions of the procedure is necessary, from unlawful evidence and the manner of executing evidence to regulations on examination during the main hearing. At this moment, it is highly debatable whether the attorneys appointed as counsels are in fact prepared to be engaged in criminal cases in terms of experience and expertise.

17 In the Criminal Procedure Code, Art.80, 73, para.3 cl.3 et al, itemizes the reasons for defense counsel dismissal, from the criminal act of preventing and disturbing of evidence and so on.
18 Trechsel, S.,op.cit.par. 31 Decision of case Pakelli.
19 Pajčić,M. The right of the defender to counsel and free legal assistance, HLJKPP (Zagreb), Vol.17, 1/2010, p. 53-107 We agree with this opinion completely. The court is obliged to request the opinion of the defendant, and reach a decision based on the realistic condition.
20 Lagerblom v Švedska, para.54

A good defense in the criminal proceedings and respect of the minimum rights of the defendant often means employing significant monetary funds. Limitation of the fund or the reimbursement to the counsels whose fees are paid by RS budget by any means cannot contribute to the equality of weaponry and set accusatory proceedings. Without empirical evidence it is difficult to determine whether in Anglo-American legal system the shift from the model of paid fees as a reward for time spent and conducted actions – *time and line billing* to the so- called *fixed payment system* is fair. The right of the defendant to a suitable, effective and efficient assistance by a procedural assistant - attorney requires the court to take into consideration the approximate equity of weaponry between the parties. Neither the counsel, nor the appointed counsel can be an Ionic pillar holding the roof of the goddess of justice, nor a trouble or expense in criminal proceedings. They must be active participants who do not only prove themselves in their final statement or appeal, but during the entire procedure by taking into consideration only and exclusively the defense of their clients.

Here, we will list the rights of the defendant to represent oneself pro se, to be reimbursed for certain expenses during the proceedings, with the aim to realize the right to defense and the principle of fairness. As a textbook example of this case, we will list the case from the International Criminal Tribunal for the former Yugoslavia (ICTY), in the case of Vojislav Šešelj. Namely, the defendant Šešelj represented himself before ICTY refusing an appointed counsel. In that context he requested funds to prepare his defense. Up to the year 2007 his requests were denied, when the judge Antonetti made the decision that the defendant has the right to finance his defense by ICTY fund intended for legal assistance. According to the decision of judge Antonetti, the defendant has the right to this finance if he can prove that he does not have enough funds and if he hires a person through whom those funds would be directed to an informal defense team. The defendant did not receive these funds as he refused to participate in determining his own property assets.[21]

This issue was not resolved even in the national legislature in the adversarial criminal proceedings as it is now in Serbia. Our CPC was not engaged in this problem at all, in the sense what should be done in the situation when the defendant represents himself and does not have enough funds to finance, for example, gathering evidence in his favor. However, the defense is not obligatory where the proposed prison sentence for criminal acts that carry a prison sentence is up to 8 years.

RIGHT OF THE DEFENDANT TO A DEFENSE IN EU LEGISLATION

There are noticeable attempts within the EU to secure minimum procedural standards in criminal proceedings. Without those standards, regional and international cooperation is virtually impossible in criminal as well as in civil matters. Recognizing court decisions according to the treaty from Tampere European Council from 1999, it is possible only with trust in criminal legislative system of another country. This trust is achieved only if the other country also respects minimum procedural standards, amongst which we point out the minimum right of the defendant (to a defense) in criminal proceedings. This means that the expediting of police, judicial and prosecution cooperation is still not enough if that cooperation is not accompanied by a proper protection of individual rights of the defendant in criminal proceedings.

Minimum rights of the defendant to a defense (procedural right) in EU law are established in the Charter of Fundamental Rights of the European Union on the EU summit in Nice in the year 2000, and have been altered in 2007 in Strasbourg, thereby being of same force as a

21 Decision on the Financing the Defence of the Accused, Pre Trial Judge, 30 July 2007

Treaty, just before signing the Treaty of Lisbon. According to the Charter, everyone has the option to achieve the right to legal counsel and representation with the guaranteed right to defense to anyone accused. The supervision is conducted not only by the EU Court but also by national courts that are the only authority to be addressed by the citizen in case of a violation of this right, the issue that the courts then may direct to the EU Court as the previous issue.[22]

Consequently, in 2003, the European Commission put into force the Green Paper – Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the EU, where in particular this right to legal assistance and representation is listed as the main rights. Taking into consideration the unwillingness of the member states to accept all the rights of the defendant in criminal proceedings at once, they are introduced gradually into national legislations with the idea from the Treaty on European Union, where it is stated that the basic rights are guaranteed by the European Convention on the Protection of Human Rights and Fundamental Freedoms resulting from constitutional traditions of the member states form the general principles of EU legislation. This is all encircled by the Directive 2013/48 of EU on the right to access to a counsel in criminal proceedings. [23] The very process of accessing the European Convention, determined by the Treaty of Lisbon[24]does not influence the authority of the Union determined by valid contracts, but only accepts mutual validity values for the countries of the same or similar legal culture and tradition, thereby facilitating international cooperation in criminal affairs in general.

INSTEAD OF CONCLUSION

The right of the defendant to self-defense and/or with the help of a counsel is today considered to be one of the basic minimum rights of defense and the most important segment of the right in criminal proceedings. The right to a counsel, where we particularly point out the right to a counsel by choice, based on constitutionalized rights of the defendant but also on the ECHR judicature is shifted from the earliest phase of the procedure and arrest without a court decision to the legal ending of judicial procedure. This is a complex and multidimensional human right that needs to include not only a well-regulated legislative coordinated with the European legal principles and values (Art.1 of the RS Constitution) but also the readiness of national judicature to respect entirely that right. The newly founded legal standards in the field of minimum rights to a defense are the part of *ius cogens* of the internal legislative order and they must be respected. This standard would include the right of the defendant as a subject of legal proceedings to decide whether and to what degree they will realize their right to a (chosen) counsel.

It is indisputable that certain limitations to the right to a defense (for example abuse through postponing hearings due to absence of counsels)[25] are necessary, but in spite of this fact it must be taken into consideration that by those limitations the right to a freely chosen counsel is not violated. This is the protection *de iure and de facto*.[26]

22 Pajčić,M. The right of the defender to counsel and free legal assistance, HLJKPP (Zagreb), Vol.17, 1/2010, p. 53-107

23 One of the more important ones, the Directive 2013/48/EU of the European Parliament and Council as of October 22nd, 2013, on the right of access to a defense counsel and the procedure based on the European warrant of arrest, and on the right to informing third party in case of deprivation of liberty, and communication with third persons or consular bodies, the O. Gazette of EU L 249/1-12,6, Nov., 2013

24 The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Art.6, para.2 and 3 of the Treaty

25 The ECHR was of the opinion even in 1975, that preventing efficient use of the right can turn into a violation of that right, even if it is a temporary obstruction. Golder v UK (verdict from February 21st, 1975, para. 26)

26 Gomien, D., A Short Guide through ECHR, Belgrade, 1996, Belgrade center for human rights, p. 33-44

Today, the development of criminal procedural law in the RS is heading in the direction of creating propositions for a more efficient criminal prosecution. Protection of the society from crime is necessary, but not only through efficient judicature, but also by respecting minimum procedural guarantees of defense of a defendant in criminal proceedings. In that context, not only the solutions of national legislature are present, but also those of the EU. The changes present in the structure during the criminal proceedings, that are not always the best solution in regards to some previous solutions, have completely altered the procedural position of the subject during the proceedings, as well as their rights and obligations. Certain issues surfaced that have not been completely resolved by the Criminal Proceedings Code and other positive legal propositions. Judicial practice could provide coherent answers by applying not only the internal regulations, but also international documents. This could lead to the necessary balance between the desire for efficient procedure and the need to protect basic rights of the defendant.

Finally, but not the least important, due to the decision in the proceedings of MĐ, MM et al, discussed at the beginning of this paper, not to be accepted the request for postponement of hearing due to earlier obligations of the chosen counsels and the decision of the court that the appointed counsels remain in the courtroom, the defense asked the Chairman of the judicial council to be exempted from the case file MI, as well as the Chairman of the Higher and other courts authorized to decide on this demand. The Supreme Court of Cassation and the Court of Appeal in Belgrade refused this request of the defense.[27] The question is whether by refusing this request and by enforcing appointed counsels they violated the minimal constitutional and legally specified right of the defendant to present defense via chosen counsels and it is of **rhetorical** nature.

Dating back in the year of 2008 in the case of *Bogumil*, the European Court of Human Rights was of the opinion that appointing counsels by the court only few hours before the main hearing violated the right to adequate time necessary to prepare defense.[28]Respectively, in this specific case there was a violation of rights, the right to a counsel by choice and the right to prepare defense.

The right of the defendant to a defense via a counsel of choice cannot be limited by a court decision unless a violation of this right was established previously. This is not only based on the Constitution, positive legal regulations, but also on European legal standards the values of whom we aspire.

REFERENCES

1. Gomien, D., A short guide through ECHR, Belgrade, 1996. Belgrade center for human rights
2. Krapac, D., The right of the defense counsel in criminal proceedings as the standard of some international treaties on human rights and freedoms, Odvjetnik, no. 5-6, Zagreb (2010).
3. Morgan, C., The EU procedural Rights Roadmap, Background, importance, overview and state of affairs, in Vermeulen, Gert (ed.), Defence Rights, International and European Developments, Maklu, 2012
4. Pajčić, M., The right of the defender to counsel and free legal assistance, HLJKPP (Zagreb), Vol.17, 1/2010, p. 53-107

27 Politika daily paper, Belgrade Dec. 31st, 2015, Jan. 1st and 2nd, 2016, p. 03: "Rejected requests for exemption." Provisions of ZKP propose the solution that by hiring a counsel by choice, the appointed counsel is relieved of duty, so that this situation and further postponing would not occur.
28 ECtHR Bogumil v. Portugal. October 7th, 2008, no. 35228/03, para. 48

5. Pavlović, Z. Constitutionalization of the Criminal Procedure Law, Belgrade (2014), Thematic Conference Proceedings of International Significance Archibald Reiss Days, Vol. III, p. 199-209

6. Rosenfeld, M., CONSTITUTIONALISM, IDENTITY, DIFFERENCE AND LEGITIMACY, October 25, 1994. p. 4; Duke University Press| ISBN-10: 0822315165

7. Treschel,S., Human Rights in Criminal Proceedings, Oxford University Press, 2005

8. Zupančić, B. M., Commentary of Art. 19, 20,23, 27, 31, 29, 36 and 27 of the Constitution of the R. of Slovenia, in New constitutional regulations of Slovenia, The Faculty of Law in Ljubljana and other, Ljubljana (1992), p. 66

9. EU Directive 2013/13 of the European Parliament and Council from October 22nd, 2013 on the right to access to a counsel in a criminal proceedings and in proceedings based on the European warrant of arrest, and the right to the third party informing in case of deprivation of liberty, and the third party and consular bodies communication, The Official Gazette of the EU, L 249/1-12, Nov.6, 2013

10. EU Directive 2013/48/EU of the European Parliament and Council as of October 22nd, 2013, on the right of access to a defense counsel and the procedure based on the European warrant of arrest, and on the right to informing third party in case of deprivation of liberty, and communication with third persons or consular bodies, the O. Gazette of EU L 249/1-12, 6, Nov., 2013

11. Politika daily paper, Belgrade Dec. 31st, 2015, Jan. 1st and 2nd, 2016, p. 03

UDC: 343.983:177.3
343.14
159.925.8

PERSONALITY CORRELATES OF LIE DETECTION

Valentina Baić, PhD[1]
Academy of Criminalistic and Police Studies, Belgrade
Igor Areh, PhD
University of Maribor, Faculty of Criminal Justice and Security, Ljubljana
Dag Kolarević, PhD
Academy of Criminalistic and Police Studies, Belgrade

Abstract: The evaluation of truth of a testimony is a central topic of many research papers from the field of psychology. Although psychological research gives some insight about behaviours that characterize false statements, it can be concluded that there is no perfect way to detect lying. There is a general consensus that the detection of lying is rare talent. Studies have shown that most professional groups who work closely with people such as the police, psychologists, lawyers, prosecutors, judges, etc., in standard conditions can detect lies only at the level of coincidence. Detection of lying is not a simple task, and there are individuals who are better at it than others. Bearing in mind the fact that some individuals are more successful in the detection of lying then others, the question of their psychological repertoire can be raised. In this paper, a research objective has been to examine connection between the accuracy of the truth assessment and the personality dimensions included in the model Big Five plus two. The study included 60 subjects (49 men and 11 women) aged 23 to 25 years, students of the Basic Police Training Centre in Sremska Kamenica, who had been assessing statements of 30 persons (15 true and 15 false statements) that were shown on video footage before and after training in detecting lies. The Big five plus two model was used for personality assessment questionnaire, which consists of 184 items on a five-point Likert scale. The questionnaire contains seven subscales for the detection of the big factors: *neuroticism*, *conscientiousness*, *agreeableness*, *extraversion*, *openness to experience*, *positive* and *negative valence*. The research results have shown that personality traits conscientiousness and positive valence were the most important and most stable predictors of accuracy of truth assessment, so it was concluded that the success in assessing the testimony is largely determined by conative factors.

Keywords: detection of lying, personality dimensions, truth assessment.

INTRODUCTION

Assessment of the truth is the central topic of many research papers from the field of psychology. The general opinion is that successful detection of lying requires an examination of the overall context, and that the assessment of one's misleading statement is made on the basis of a wide range of evidence[2]. There is a general consensus that the lie detection is rare skill based on special talent. Studies have shown that most professional groups who work

1 E-mail: sonovanja@gmail.com.
2 Baić, V., Areh, I. (2015). Detekcija laganja. Beograd: Sinapsa edicije.

closely with people such as the police, psychologists, lawyers, prosecutors, judges, etc., in standard conditions can detect lies only at the level of coincidence[3]. Although most people are not skilled in recognizing lies, there is still a small percentage of those who possess this ability[4]. Bond and Uysal[5] believe that convincing evidence of the existence of extraordinary ability in detecting lies have never been presented. It can be said that there is no diagnostic procedure for the detection of these abilities[6]. Advanced beliefs, especially about non-verbal signs of lying, showed the prisoners in the survey conducted by Vrij and Semin[7]. This study have found that prisoners had the most appropriate feedback on what non-verbal behaviour indicates lying, unlike other research participants, namely students, police officers and detectives who did not differ in the accuracy of their assessments. The success of the prisoners had been explained by the consequence of living in "the specific culture of liars", as well as by the assumption that they are manipulative in interpersonal relationships themselves. In Serbian literature, there is a research on the relationship between the accuracy of truth statements and cognitive abilities[8], while neither in Serbian nor in Anglo-Saxon literature no research about the relationship between the accuracy of truth assessment with dimensions of personality has been found. In fact, in foreign, mostly Anglo-Saxon literature, there are certain researches dealing with individual differences in the skill of discovering lying.

Basically, the influence of gender, age, work experience and profession is examined, while the influence of certain personality traits and abilities such as extroversion, Machiavellian intelligence, etc., is examined in the context of determining the individual differences in the ability to lie, not to detect lie[9]. In this paper, the connection between accuracy of truth assessment of the testimony and personality dimensions will be explored, covered by the Big

3 Baić, V. (2009). Prepoznavanje laganja na osnovu neverbalnog ponašanja kod studenata Kriminalističko-policijske akademije. Savremeni trendovi u psihologiji, Novi Sad, oktobar, 2009; Baić, V. (2010). Tačnost procene laganja i neverbalnih ponašanja koja indikuju laž i obmanjivanje. Primenjena psihologija 1, pp. 77–89; Baić, V. (2011). Detektovanje laganja na osnovu posmatranja neverbalnog ponašanja. Bezbednost, 1, pp. 28–42; Ekman, P. (1992). Telling lie: clues to deceit in the marketplace, politics and marriage. New York W.W. Norton; Garrido, E., Masip. J., & Herrero, C. (2004). Police officers' credibility judgements: Accuracy and estimated ability. International Journal of Psychology, 39, pp. 254–275; Hartwing, M., Granhag, P.A., Strömwall, L., & Vrij, A. (2004). Police officers' detection accuracy: Interrogating freely versus observing video. Police Quarterly, 7, pp. 429–456.

4 Baić, V., Areh, I. (2015). *Detekcija laganja*. Beograd: Sinapsa edicije; Ekman, P., & O'Sullivan, M. (1991). Who can catch a liar? *American Psychologist, 46,* pp. 913–920.

5 Bond, C. F., Jr., & Uysal, A. (2007). On lie detection 'wizards'. *Law and Human Behavior, 31,* pp. 109–115.

6 Baić, V., Kolarević, D., Ivanović, Z. (2015). Kognitivne sposobnosti kao potencijalni činilac tačnosti procene iskaza. *Kriminalistička teorija i praksa 3,* pp. 127–140.

7 Vrij, A., Semin, G.R. (1996). Lie experts' beliefs about nonverbal indicators of deception. *Journal of Nonverbal Behavior, 20,* pp. 65–80.

8 Baić, V., Kolarević, D., Ivanović, Z. (2015). Kognitivne sposobnosti kao potencijalni činilac tačnosti procene iskaza. *Kriminalistička teorija i praksa 3,* pp. 127-140.

9 Bond, C. F., & DePaulo, B. M. (2007*). Individual differences in detecting deception.* Manuscript submitted for publication Exline, R.E., Thibaut, J., Hickey, C. B., & Gumpert, P. (1970). *Visual interaction in relation to Machiavellianism and an unethical act*. In R. Christie and F.L. Geis (Eds.), Studies in Machiavellianism (pp. 53–75). New York: academic Press; Hunter, J.E., Gebing, D.W., & Boster, F.J. (1982). Machiavellian beliefs and personality: Construct invalidity of the Machiavellianism dimension. *Journal of Personality and Social Psychology, 43,* pp. 1293–1305; Lennox, R.D., & Wolfe, R.N. (1984). Revision of the self-monitoring scale. *Journal of Personality and Social Psychology, 46,* pp. 1349–1364); Miller, G.R, de Turck, M.A., & Kalbfleich, P.J. (1983). Self-monitoring, rehearsal, and deceptive communication. *Human Communication Research, 10,* pp. 97–117; Riggio, R.E. & Friedman, H.S. (1983). Individual differences and cues to deception. *Journal of Personality and Social Psychology, 45,* pp. 899–915; Siegman, A. W., & Reynolds, M., A. (1983). Self-monitoring and speech in feigned and unfeigned lying. *Journal of Personality and Social Psychology, 45,* pp. 1325–1333; Snyder, M. (1974). Self-monitoring of expressive behavior. *Journal of Personality and Social Psychology, 30,* pp. 526–537; Vrij, A. (2008). *Detecting Lies and Deceit. Chichester*: John Wiley & Sons Ltd.

Five Plus Two model: neuroticism, extraversion, agreeableness, conscientiousness, openness, positive and negative valence[10]. Neuroticism (emotional stability) reflects the individual reactions in susceptibility to experience negative emotions such as worry, sadness, fear or anxiety. Extroversion dimension reflects individual differences in the degree of responsiveness to the external environment, and refers to the need for intensive social contacts and also determines the facet sociability, activity, the need for excitement, positive emotions, as opposed to less need for social contacts, lesser need for companionship, a lesser degree of activity as well as restraint in the expression of emotions. Agreeableness includes attributes such as trust, altruism, kindness, affection and other pro-social behaviours. People who are high in agreeableness tend to be more cooperative while those low in this trait tend to be more competitive and even manipulative. Opposite pole of this dimension can be understood as aggressiveness. Conscientiousness is a dimension that reflects individual differences in relation to the attitude towards duties and refers to the ability of self-control, organization, discipline, persistence, motivation and principle and goal-oriented behaviour. Openness is a characteristic which includes tendency toward progress and is largely determined by culture. It includes intellectual curiosity, openness to change, a wide range of interests, and tolerance for diversity. The positive valence is dimension of self-evaluation concerning the assessment of themselves as superior and exceptional people. If a person realistically assesses his/her qualities, elevated score on trait positive valence may be a prerequisite of his/her proper adaptation to the requirements of society and the environment. And finally, negative valence is also a dimension of self-evaluation and is composed of two subscales: manipulation and negative self-image. In personality assessment and its relation with truth assessment, it is important to determine the way in which personality dimensions increase or decrease. In the case of manipulation, for instance, it can be expected that a person will use all means to achieve his/her goal, and if it is a negative image of themselves, a person can be prone to self-blame, self-criticism and preoccupation with personal behaviours[11]. Since these issues did not attract the attention of the authors, and bearing in mind the importance of this area for police officers, as well as most professional groups who work closely with people, there is a necessity to examine whether the individual personality factors influence potential accuracy of truth assessment of statements. Basic assumption in this research is that personality dimensions characterized with interpersonal character, such as extraversion, agreeableness, and openness to experience, will have significant influence on truth assessment. Thus, the overall objective of the research was to examine relations of truth assessment and dimensions of cognitive abilities and personality dimensions, covered by the Big Five plus two model.

METHOD

The research presented in this paper is part of a larger study that was conducted with the primary objective of determining the effects of training in detecting lies, and getting answers to the question: Does the training can bring about higher accuracy in detecting lies?[12]. 60 subjects participated in the study (49 men and 11 women aged 23 to 25 years), police training participants, who acted as assessors of truth and false statements. In the first phase of the study, video material necessary for the implementation of research was prepared. In that video material 30 convicts from the Penitentiary Institution in Sremska Mitrovica and the Novi Sad District Prison have given statements about real and fictional events. Convicted persons

10 Smederevac, S., Mitrović, D. i Čolović, P. (2010). *Velikih pet plus dva. Primena i interpretacija.* Beograd: Centar za primenjenu psihologiju.
11 *Ibid*.
12 Baić, V. (2012). Efekti treninga u detekciji laganja. *Bezbednost, 2,* pp. 38–57.

in these institutions served many years of imprisonment, for offences of property crime and economic crime. One of the reasons why sentenced persons have been chosen was the assumption that they are manipulative in interpersonal relationships, so that made them more appropriate for this research.

INSTRUMENTS

For the purpose of this study, a questionnaire for rapid assessment of verbal and nonverbal behaviour was prepared. It consisted of list of nonverbal and verbal behaviour and a scale for assessment of frequency of behaviours. Nonverbal and verbal behaviours used in the assessment were selected on the basis of the findings of four studies[13]. The list included the following signs of nonverbal behaviour: smiling, illustrations, self-touching, movement of hand and fingers, legs and feet movements, head movements, body movements and change in body position and the following characteristics of verbal behaviour: hesitations in speech, errors in speech, the period of delay, logical structure of the statements, unstructured presentation, quantity, quality and prolixity of conversation, unusual or unique details, unnecessary details, spontaneous updates, a recognition that something is not remembered, questioning parts of his/her own testimony. Big five plus two personality assessment questionnaire was used. It consists of 184 items on a five-point Likert scale. The questionnaire contains seven subscales for the detection of the factors: neuroticism, conscientiousness, agreeableness, extraversion, openness to experience, positive and negative valence. Cronbach alpha reliability coefficient for those scales ranged from .80 to .91.

PROCEDURE

In the first phase subjects filled out the personality questionnaire, and then in the second phase they watched specially designed short movies which were displayed via video projector in random order. In those short movies, real time convicts were questioned about their criminal biography. The task of each interviewee was to give the truthful and the false testimony about their criminal biography that included the reasons for detention, the type, style and manner of the crime. In the case of false testimony, demonstrators had the task to design their own new identity and criminal activity, which is expected to be significantly different from their real criminal past. One of the requirements was that the false testimony should not have been about the same or similar crimes that are committed, because the same elements would be used in truthful testimony. Key parts of the statements were the motive and the crime scene. All persons in movies were questioned by the same researcher and they were asked identical questions. During the movies, subjects were instructed to make truth assessments on the basis of perceived verbal and nonverbal cues of the testimony of 30 convicts (15 false statements and 15 true statements). They could score from 0 to 30 correct answers.

After that stage of study, during short training, subjects were educated about truth assessment techniques. The training program was based on three methods: focus on the cognitive process, techniques of lie detection and feedback. The process of focusing implied that subjects before deciding on one's deceptive behaviour, pay attention to those behaviours that

13 *Ibid*.; Steller, M. & Kohnken, G. (1989). Criteria based statement analysis. U D. C. Raskin (ur.), *Psychological Methods in Criminal Investigation and Evidence* (pp. 217–245), New York: Springer; Vrij, A. (2008). *Detecting Lies and Deceit. Chichester*: John Wiley & Sons Ltd.; Vrij, A., Edward, K., Roberts, K. P. & Bull, R. (2000). Detecting deceit via analysis of verbal and nonverbal behaviour. *Journal of Nonverbal Behaviour, 24*, pp. 239–263.

are related to harder cognitive processing. Subjects were informed about the most important techniques for the detection of lies, based on facial, physical and verbal behaviours. And finally, in the process of feedback, educational movies were analysed in detail in order to obtain correct feedback, or feedback on the accuracy of the interpreted behaviour.

Then, subjects made truth assessments of convicts video testimonies again (15 false statements and 15 true statements).

RESULTS

The first step was to examine how well the personality traits predict accuracy of the truth assessment before training in detecting lies. By applying the regression analysis where the criterion variable was the accuracy of truth assessment, the contribution of set of predictors that comprised neuroticism, extraversion, conscientiousness, aggression, openness, positive and negative valence was examined.

Table 1: *The significance of the regression model in a situation assessment before training (predictors: personality assessor)*

	Sum of squares	**Df**	**Average square**	**F**	**p**
Regression	27,581	14	1,970	2,759	,005
Residual	31,419	44	,714		
Overall	59,000	58			

$R = 0{,}68$; $R^2 = 0{,}46$; Corrected $R^2 = 0{,}29$

The regression model was statistically significant at $p < 0.05$. Multiple correlation coefficient is 0.68, which indicates a strong association between the criterion variable and a set of predictors. The value of the coefficient of determination indicates approximately 29% of the variability of criterion variable that can be explained on the basis of the predictor set.

Table 2: *Partial contributions of personality traits prediction accuracy assessment of the situation before exercises*

	Beta	Standard error	Df	F	p
Neuroticism	,474	,125	1	14,454	,000
Extraversion	,422	,173	3	5,927	,002
Conscientiousness	,474	,168	2	7,923	,001
Agreeableness	,146	,116	3	1,584	,207
Openness	-,359	,156	1	5,318	,026
Positive valence	,257	,125	2	4,246	,021
Negative valence	,458	,174	2	6,885	,003

In the stage before training it was found that only agreeableness was not significantly correlated with the accuracy of truth assessment. The remaining dimensions of personality, neuroticism, extraversion, conscientiousness, positive and negative valence, had positive correlation with the criterion, besides openness which was negatively correlated. It was found that all the predictors except agreeableness have a significant contribution to the prediction criteria, and that the only pre-exercise aggression was not significantly associated with the accuracy of estimates. Higher scores on neuroticism, extraversion, conscientiousness, positive and negative valence and lower scores on openness were associated with higher accuracy of truth assessment.

Next step was to examine the contribution of a set of predictors that comprised neuroticism, extraversion, conscientiousness, agreeableness, openness, positive and negative valence after subjects had training in techniques of truth assessment.

Table 3: *Significance of the regression model in a situation assessment after training (predictors: personality assessor)*

	Sum of squares	**Df**	**Average square**	**F**	**p**
Regression	27,198	14	1,943	2,688	,006
Residual	31,802	44	,723		
Overall	59,000	58			

The regression model was statistically significant at $p < 0.05$. Multiple correlation coefficient is 0.67, which indicates a strong association between the criterion variable and a set of predictors. The value of the coefficient of determination indicates that approximately 28% of the variability of criterion variable can be explained on the basis of the predictor set.

Table 4: *Partial contributions of personality traits prediction accuracy assessment of the situation after training*

	Beta	Standard error	Df	F	p
Neuroticism	,087	,146	1	,359	,552
Extraversion	-,461	,168	2	7,518	,002
Conscientiousness	,356	,160	2	4,971	,011
Agreeableness	-,363	,139	3	6,837	,001
Openness	,390	,130	2	9,021	,001
Positive valence	,421	,123	3	11,730	,000
Negative valence	-,428	,169	1	6,394	,015

In the stage after training it was found that only neuroticism was not significantly correlated with truth assessment. Conscientiousness, openness and positive valence had positive correlation with the criterion, while agreeableness, extraversion and negative valence were negatively correlated with the truth assessment. Higher scores on conscientiousness, openness, positive valences and lower scores on extraversion, agreeableness and negative valences are associated with higher accuracy of truth assessment.

The research results show that significance of certain personality traits in the prediction accuracy of truth assessment changes before and after training. The neuroticism was only significant predictor of truth assessment before training. Extraversion, negative valence and openness were significant predictors before and after training, but the direction of their relationship with criterion was changed. Conscientiousness and positive valence were significant predictors before and after training. Agreeableness was not significant before training, but its opposite pole proved to be a significant predictor of truth assessment after the training.

DISCUSSION AND CONCLUSION

The research sought to answer the question of whether and how personality characteristics are associated with truth assessment testimony. In a stage before training in truth assessment techniques it was found that neuroticism, extraversion, conscientiousness, openness,

positive and negative valence proved to be significant when testing the model, except for the dimensions of agreeableness, which was not significantly associated with the truth assessment. Subjects with different scores on agreeableness gave equally accurate answers, which in no way could predict how someone will give accurate estimates. When subjects were instructed how to estimate truth by using behavioural clues, it was found that extraversion, conscientiousness, agreeableness (its opposite pole), openness, positive and negative valence proved to be significant predictors, except for the dimensions of neuroticism, which was not found significant.

The results show that conscientiousness and positive valence can be considered the most important and most stable predictors of accuracy assessment. In fact, their significance was the same before and after training. Conscientiousness is a dimension that involves self-discipline, sense of duty and setting clear standards when it comes to achievement. People who are self-disciplined, having developed sense of responsibilities and a strong orientation towards the attainment were more accurate in the truth assessment. When it comes to positive valence, it is possible that a positive self-image represents a motivating factor in a variety of situations related to achievement, even in a situation of truth assessment in which a person may be more or less successful. A higher level of self-esteem leads to more accurate assessment because confident people are using their capacities for assessment to a much greater extent than insecure people. That is why people, who have a high opinion of themselves and their abilities, were more successful in assessing. So, it might be concluded that the performance in assessing the testimony is largely determined by conative factors.

In the situation before the training it was found that only agreeableness was not significantly associated with the accuracy of estimates. The remaining dimensions of personality, neuroticism, extraversion, conscientiousness, positive and negative valence, had positive correlation with the criterion, except openness which was negatively correlated. It could be said that the prediction accuracy of the assessment before the training depends on the characteristics of neuroticism such as anxiety and concern. People with high neuroticism are characterized by chronic negative affect and dissatisfaction. It is possible that such persons, due to reduced capacity to overcome the stress and expectations to help others develop more pronounced sensitivity to different verbal and nonverbal behaviour of other people, because they feel that they depend on these behaviours to a greater extent. Perhaps that makes them more successful in assessing truth and lies, because this could have a potentially greater significance for them than for people who are emotionally stable and independent. Thus, such ability for them may have adaptive function. Extraversion's dimensions, such as the activity, the need for excitement and satisfaction, which are referred to as temperamental aspects of extraversion, can also contribute to success in truth assessment. For extroverted people, other people represent an important source of stimulation, which is why they spend much time in the company of others and develop interpersonal skills. Increased exposure to social interaction makes them more "experienced" when it comes to evaluation of the behaviour of others. Dimension that also appears important to improve truth assessment accuracy is negative valence. Given that this dimension includes manipulative and amoral self-concept, it is possible that this is a major component in the lie detection. Manipulative people may be more willing to notice signs of manipulation in other people, since their relationships are generally not based on closeness and mutual trust. This observation is confirmed by the survey[14], in which the prisoners were more accurate than other groups (students, detectives and police officers) in the assessment of lying. The findings of this study suggest that the prisoners in relation to the prison staff and students have different beliefs about the signs that point to lies and deception. Also, unlike the other two groups, prisoners had fewer stereotypes about the signs that indicate lying.

14 Vrij, A., Semin, G.R. (1996). Lie experts' beliefs about nonverbal indicators of deception. *Journal of Nonverbal Behavior, 20,* pp. 65-80.

As far as openness is concerned, a negative correlation with the success in truth assessment at first glance may seem unusual. However, it is possible that such tasks are more difficult for people with higher scores on openness. These people may have the experience where they lack the necessary information for their decisions about lie detection. This is supported by the result which indicates that after the training, which includes a variety of information about the signs of lying, openness shows a positive correlation with the accuracy of truth assessment.

We can conclude that in the situation before the training persons who are social, active, inclined to search for excitement, self-disciplined, with a developed sense of obligation and duty are more successful in truth assessment. These are people who have a positive image of themselves, people who slightly tend to be manipulative in interpersonal relationships, as well as persons who feel themselves dependent on other people and have less need for intellectual stimulation.

So, although it was assumed that this is particularly important for the accuracy of estimates, the traits that have clearer interpersonal character turned out to be just some other features that have a great importance in the assessment of the accuracy of the statement.

In the situation after the training it was found that only neuroticism was not significantly correlated with an accuracy of truth assessment. It seems that persons who tend to be emotionally stable under the influence of training have equalized with persons with neuroticism. This supports the fact that people with high neuroticism have benefited less from the training. Dimensions conscientiousness, openness and positive valence achieved a positive correlation with the criterion, while extraversion, agreeableness and negative valence were negatively correlated with the accuracy of truth assessment. While the status of dimensions of conscientiousness and positive valence as a predictors of accuracy of truth assessment remained unchanged, agreeableness which before training showed no significant association with an accuracy of truth assessment, after training have become significant predictor. Characteristics of opposite pole of agreeableness, like adaptability and competitiveness, are important for truth assessment. Aggressiveness in this context is not expressed in its original form as instinct or impulse, but above all is the ability of adaptation, as well as the competitiveness that represents successful execution of assigned tasks. These features get more importance in the situation after training where the success in truth assessment represents form of achievement of subjects. Openness is also a dimension whose predictive power changed after training. While before training it was negatively correlated with the accuracy of truth assessment, after the training it has shown a positive correlation with the criterion. Openness for a novelties and a wide range of interests are likely characteristics that have led to the fact that people with higher scores have significant profit from the training. When they perform new tasks it triggers the need for curiosity. When it comes to openness, the results also confirm the importance of motivational factors in assessing the accuracy truth assessment. Since extraversion and negative valence have changed the direction of the correlation with the criterion from positive, as it was before training, to negative after training, it could be concluded that the introvert and less manipulative individuals progressed as a result of training more than extraverted and slightly manipulative subjects. Extrovert people may lose motivation because of the repetitive task experience, while introvert persons may be more receptive to new knowledge in the field in which they feel less competent. Therefore, the knowledge gained during the training made them more successful than extraverts. People with higher negative valence after the training showed lower performance in the assessment of those with lower scores, as opposed to the situation before exercises. This probably indicates that less manipulative, even naive persons had acquired new skills during training, while slightly manipulative people, possibly due to decreased confidence in the training and less willingness to comply with some requirements of the situation, have been less successful.

If we start from the fact that personality traits are just predisposed to a particular response[15], the benefits of training in detecting lies have those subjects who are manipulative, introvert, more adaptable, more militant and open to new experiences. In other words, more benefits of education in truth assessment had those subjects who:

- are less social, or independent and intellectually curious,
- have the ability to adapt to new situations,
- have a trait of grit and perseverance, which is in a function of the successful performance of the tasks set,
- are curious and ready for new experiences and knowledge,
- are less manipulative in interpersonal relationships.

REFERENCES

1. Baić, V. (2009). *Prepoznavanje laganja na osnovu neverbalnog ponašanja kod studenata Kriminalističko policijske akademije.* Rad je prezentovan na naučnom skupu sa međunarodnim učešćem Savremeni trendovi u psihologiji, Novi Sad, oktobar, 2009.
2. Baić, V. (2010). Tačnost procene laganja i neverbalnih ponašanja koja indikuju laž i obmanjivanje. *Primenjena psihologija 1,* pp. 77–89.
3. Baić, V. (2011). Detektovanje laganja na osnovu posmatranja neverbalnog ponašanja. *Bezbednost, 1,* pp. 28–42.
4. Baić, V. (2012). Efekti treninga u detekciji laganja. *Bezbednost, 2,* pp. 38–57.
5. Baić, V., Areh, I. (2015). *Detekcija laganja*. Beograd: Sinapsa edicije.
6. Baić, V., Kolarević, D., Ivanović, Z. (2015). Kognitivne sposobnosti kao potencijalni činilac tačnosti procene iskaza. *Kriminalistička teorija i praksa 3,* pp. 127–140.
7. Bond, C. F., & DePaulo, B. M. (2007*). Individual differences in detecting deception.* Manuscript submitted for publication.
8. Bond, C. F., Jr., & Uysal, A. (2007). On lie detection 'wizards'. *Law and Human Behavior, 31,* pp. 109–115.
9. Christie, R., & Geis, F.L. (1970). *Studies in Machiavellianism.* New York: academic Press.
10. Ekman, P. (1992). *Telling lie: clues to deceit in the marketplace, politics and marriage.* New York W.W. Norton.
11. Ekman, P., & O'Sullivan, M. (1991). Who can catch a liar? *American Psychologist, 46,* pp. 913–920.
12. Exline, R.E., Thibaut, J., Hickey, C. B., & Gumpert, P. (1970). *Visual interaction in relation to Machiavellianism and an unethical act.* In R. Christie and F.L. Geis (Eds.), Studies in Machiavellianism (pp. 53–75). New York: academic Press.
13. Garrido, E., Masip. J., & Herrero, C. (2004). Police officers' credibility judgements: Accuracy and estimated ability. *International Journal of Psychology, 39,* pp. 254–275.
14. Hartwing, M., Granhag, P.A., Strömwall,L., & Vrij, A. (2004). Police officers' detection accuracy: Interrogating freely versus observing video. *Police Quarterly, 7,* pp. 429–456.
15. Hunter, J.E., Gebing, D.W., & Boster, F.J. (1982). Machiavellian beliefs and personality: Construct invalidity of the Machiavellianism dimension. *Journal of Personality and Social Psychology, 43,* pp. 1293–1305.

15 Rot, N., (2010). *Psihologija ličnosti.* Beograd: Zavod za udžbenike.

16. Kapardis, A. (2001). *Psychology and Law.* Cambridge: Cambridge University Press.
17. Lennox, R.D., & Wolfe, R.N. (1984). Revision of the self-monitoring scale. *Journal of Personality and Social Psychology, 46,* pp. 1349–1364).
18. Miller, G.R, de Turck, M.A., & Kalbfleich, P.J. (1983). Self-monitoring, rehearsal, and deceptive communication. *Human Communication Research, 10,* pp. 97–117.
19. Riggio, R.E. & Friedman, H.S. (1983). Individual differences and cues to deception. *Journal of Personality and Social Psychology, 45,* pp. 899–915.
20. Rot, N., (2010). *Psihologija ličnosti.* Beograd: Zavod za udžbenike.
21. Siegman, A. W., & Reynolds, M., A. (1983). Self-monitoring and speech in feigned and unfeigned lying. *Journal of Personality and Social Psychology, 45,* pp. 1325–1333.
22. Smederevac, S., Mitrović, D. i Čolović, P. (2010). *Velikih pet plus dva. Primena i interpretacija.* Beograd: Centar za primenjenu psihologiju.
23. Snyder, M. (1974). Self-monitoring of expressive behavior. *Journal of Personality and Social Psychology, 30,* pp. 526–537.
24. Steller, M. & Kohnken, G. (1989). Criteria based statement analysis. U D. C. Raskin (ur.), *Psychological Methods in Criminal Investigation and Evidence* (pp. 217–245), New York: Springer.
25. Stiff, J., Corman, S., Krizek, B. & Snider, E. (1994). Individual Differences and Changes in Nonverbal Behavior: Unmasking the Changing Faces of Deception. *Communication Research, 21,* pp. 555–581.
26. Vrij, A. (2008). *Detecting Lies and Deceit. Chichester*: John Wiley & Sons Ltd.
27. Vrij, A., Edward, K., Roberts, K. P. & Bull, R. (2000). Detecting deceit via analysis of verbal and nonverbal behaviour. *Journal of Nonverbal Behaviour, 24*, pp. 239–263.
28. Vrij, A., Semin, G.R. (1996). Lie experts' beliefs about nonverbal indicators of deception. *Journal of Nonverbal Behavior, 20,* pp. 65–80.

UDC: 343.982.327:662.2

AFTEREFFECTS OF HIGH EXPLOSIVE EXPLOSION AND THEIR EVIDENCE POTENTIAL[1]

Ivana Bjelovuk, PhD[2]
Tanja Kesić, PhD
Academy of Criminalistic and Police Studies, Belgrade

Abstract: When the perpetrators of terrorist acts and other crimes use explosives for those criminal acts, aftereffects of explosions may be significant for cracking the cases. Aftereffects of explosions occur in very different forms and may contribute to the identification of explosives, explosive devices and perpetrators. Evidence potential of these aftereffects is very large if they are perceived, correctly processed and presented in the court. The classification of aftereffects that can be found at the explosion site is given, as well as the model forensic processing and an analysis in the forensic labs. Also, the authors pointed to their potential as evidence in the court.

Keywords: high explosive, explosion, aftereffects of explosion, forensic identification, evidence

INTRODUCTION

In recent decades a large number of illegal activities have been performed with the use of explosion both in the Republic of Serbia and all around the world. The perpetrators of various criminal offences use explosion effects to achieve their goals. With the use of formational and improvised explosive devices awareness and willingness of the offender may be directed towards causing danger to a particular person or object, the occurrence of the death of a certain person, injuring, intimidating people, destruction or damage of other people's things and others. Terrorists often use the explosion to create fear and panic among the population with human victims, causing of light and severe bodily injuries to people, material damage and the like. The perpetrators of other crimes (murder, serious and light bodily injuries, causing general danger, illegal hunting and fishing, aggravated theft, etc.) use the explosion to cause injury or death, to cause the intimidation of individuals, to overcome obstacles when breaking into houses, flats and other premises, opening safe deposit boxes and others.[3] There is a volume of scientific and technical literature about the effects of an explosion to the environment.[4] The main reason for investigating the cause of the explosion lies in establishing respon-

1 This article is the result of scientific research project *Forensic methods in criminalistics* funded by the Academy of Criminalistic and Police Studies Belgrade (2015-2019) and approved by the Ministry of Internal Affairs of the Republic of Serbia and scientific research project *Crime in Serbia and instruments of state response*, which is financed and carried out by the Academy of Criminalistic and Police Studies, Belgrade (2015-2019).

2 Corresponding author: e-mail: ivana.bjelovuk@kpa.edu.rs

3 Bjelovuk, I., Kesić, T., Žarković, M. (2013). Consequences of explosive devices' activation on victims and their criminal justice importance. *In: Eds. G. Meško, A. Sotlar, J. Greene, The ninth biennial international conference criminal justice practice and research.* Slovenia, Ljubljana: Faculty of Criminal Justice and Security.

4 Bulson, P. S. (1997). *Explosive Loading of Engineering Structures*. London: E&FN SPON.; Carper, K. (2001). *Forensic Engineering*. Boca Raton: CRC Press LLC. Baker, W.E., Cox, P.A., Westine, P.W., Kulesz, J.J., Strehlow, R.A. (1983). *Explosive hazards and evaluation*, In: Fundamental studies in engineering 5, Amsterdam: Elsevier Scientific Publishing Company.; Beveridge, A. (1998). *Forensic Investigation of Explosion*. Boca Raton: CRC Press. ; Cooper, P. (1996). *Explosive`s Engineering*. New York: Willey

sibility for the explosion, the summary estimation of financial loss due to material damage, determining the degree of injury of people and the number of killed persons that may occur as a consequence of the explosion. Responsibility for the explosion lies in the circumstances, activities, error, intent, or ignorance, which is related to the human factor.

THE EFFECTS OF AN EXPLOSION TO THE ENVIRONMENT

Various types of explosive devices used for criminal offenses that occur on the territory of the Republic of Serbia can be regarded either as a subject or as a means of perpetration. Activation of explosive devices with or without the intent can cause harmful effects, and every contribution to determination of the cause of explosion is significant. In order to confirm this attitude, the paper presents a number of criminal offences committed with explosives with consequences on the territory of the Republic of Serbia within a period of sixteen years. From the presented diagrams one can conclude that explosions are not uncommon in Serbia and that therefore they deserve special attention. The number of crimes in the territory of the Republic of Serbia with the use of various types of explosives in the period from 2000 to 2015 is shown in Figure 1 while the consequences that occurred during the commission of these crimes are shown in Figure 2[5].

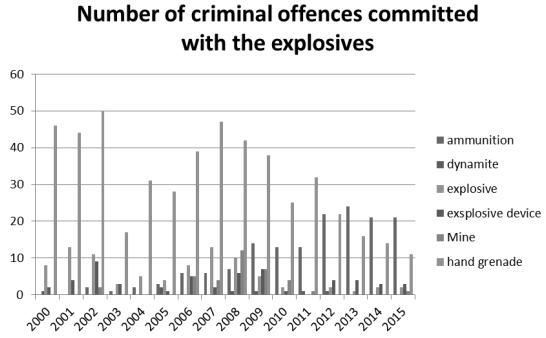


Figure 1: *The number of criminal offences committed with explosives in the Republic of Serbia during the period from 2000 to 2015*

The data analysis showed that in the reporting period of sixteen years M75 grenade as formation explosive device was the most widely used (in 50 cases) in the territory of the Republic of Serbia. Also, mines and improvised explosive devices containing high explosive charge were used, but dynamite was used in a small number of cases. There were cases involving an explosion of ammunition. Regarding the trend of activating explosive devices, the decrease in the number of explosions immediately after the bombing of Yugoslavia was observed, but this number began to rise again since 2004. During the perpetration of the offences occurring in the reporting period there were different consequences (killing, serious and light injuries) as shown in Figure 2. The largest number of killed people was in 2009 (3), the most cases of

– VCH. ; Korajlić, N. (2009) Criminalistic methodology of discovering and proofing of explosions. Centre for security studies, Sarajevo; Luccioni, B., Ambrosini, D., Nurick, G., Snyman, I. (2009). Craters produced by underground explosions, *Computers & Structures, 87*, 21 – 22, 1366-1373. ; Žarković, M., Bjelovuk, I., Kesić, T., *Effects of an Explosion to the Environment and Qualification of Criminal Offences Committed with the Explosives.* Thematic Proceedings of International Significance, International Scientific Conference "Archibald Reiss Days", Vol. I (editor in chief Prof. G. Milošević, PhD), Academy of Criminalistic and Police Studies, Belgrade, 1-2 March 2013, p. 315-325.

5 Source: the Ministry of the Interior of the Republic of Serbia.

inflicting serious bodily injuries (4) occurred in 2004, while the most light bodily injuries were inflicted in 2001 (7).

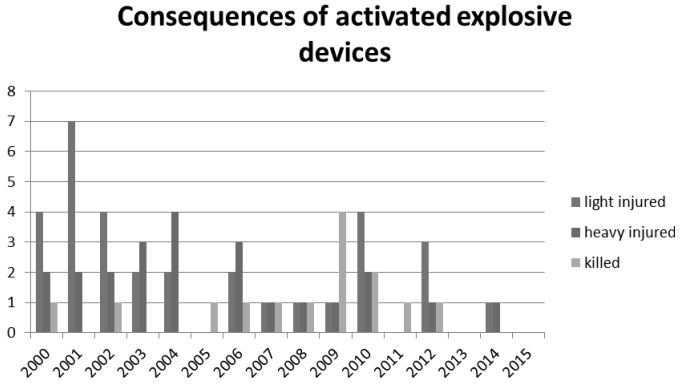


Figure 2: *Number of consequences of activated explosive devices in Serbia from 2000 to 2015*

CLASSIFICATION OF AFTEREFFECTS OF HIGH EXPLOSIVE EXPLOSION

As the explosion is a process of very rapid chemical transformation of a system which is followed by transformation of potential energy into mechanical work to the environment and various forms of energy release. The action of explosion to the environment can result in the appearance of the air blasts, creating a crater in the ground and the ejection of parts of the soil, creating seismic vibrations, the demolition of buildings in the surrounding area, the thermal effect of the explosion, etc. The diffusion of molecules of explosives into the ground can occur when explosive an explosive charge is placed on the soil, so the traces of explosive substances can be found after the explosion. These traces can be used for identification of explosives on the basis of chemical analysis of soil from the crater and soil that remained uncontaminated with explosive substance and their comparison. Namely, due to the fact that explosive is usually evaporative substance there is diffusion of the explosive molecules in the material which is in direct contact with explosive. Chemical identification of explosives is conducted by forensic chemistry, applying the method of thin layer chromatography, mass spectrometry and the like. The type of explosive can be determined with the spot test analysis. Such information cannot be used as evidence in court. Valid data about the type of explosive used can be obtained by performing procedures in accredited chemical laboratories which apply the ISO17025 standard. This information is a prerequisite for assessing the mass of used explosive based on explosion effects on the environment by forensic engineers.

Considering the fact that the explosion is a chemical reaction with the heat, aftereffects of thermal effects of explosion can also be found – melting or burning materials in the immediate environment of explosive charge or in a wider circle and fires can occur. The fire at the explosion site can destroy most of the evidence. These traces can be used for determination of the type of explosive substances by chemical engineers.

As a result of the explosion one can find evidence of the fragmentation effect at the explosion site (the parts of an explosive device already detonated). These parts, in some cases, may

indicate the type of explosive device that has been used. When these fragments hit into the surrounding object the secondary craters can be created. The secondary craters can indicate the degree of damage and the resulting damage. These aftereffects are atypical and they are analyzed by the forensic engineering expert. A forensic engineer needs to know the type of formation of improvised explosive devices and their appearance before and after the explosion.

As an explosion results in the formation of gaseous products under very high pressure which builds at the scene of explosion one can find destroyed material in the immediate environment of the explosive charge and craters in the ground. The dimensions of such damage can indicate a mass of explosive used. The parts of an explosive device can be found in the crater and the type of high energy explosive that was used can be determined from the analysis of soil from the crater. The dimensions and volume of the crater can be used for the calculation of the mass of explosive charge on the basis of empirical formula or by using software for numerical simulation of explosion such as Abaqus, Autodyn, etc.

The gaseous products of the explosion form a shock wave that spreads into the surrounding space. As a consequence of the explosive shock wave, broken windows at certain distances from the center of the explosion and discarded objects around the blast site can appear. This evidence can also be used by forensic engineers for calculating the mass of explosives used.

If a large amount of high explosive is used for explosion an intense shock wave can be created with the accompanying seismic effect that can lead to cracking and demolition of surrounding structures such as earthquakes. Such evidence is formed as a result of tremors that can cause damage to the surrounding buildings, which could be used to assess the damage.

When handling ordnance, an offender can leave contact traces of biological nature on the parts of the explosive devices which were left thrown and have not been exposed to the shock wave or thermal effects. These items of evidence may indicate the identity of the perpetrator (traces of papillary lines and traces suitable for DNA analysis, such as traces of blood, sweat, secretions, etc.).

Shoeprints that can be found at the explosion site can indicate the identity of the perpetrator`s shoe. Besides this evidence, the tire prints could be found at the scene if the perpetrator came to the scene by a vehicle (they may indicate the type of car used); cigarette butts may be present if the perpetrator consumed cigarettes in the vicinity of the crime scene (these may indicate the identity of the offender by DNA analysis of saliva, finger marks, etc.); evidence in the form of objects that belonged to the perpetrator can also be found at the explosion site (cigarette case, lighter, hat, parts of wardrobe, etc.).

Evidence which can be found on victims includes death, heavy injuries and light injuries. This type of injury is known as blast injury (injuries resulting from the action of air pressure - damage to internal organs, eardrums etc., internal bleedings, injuries resulting from penetration of parts of the explosive device, burns of various degrees, etc.) Indirectly, the value of overpressure of gases released during an explosion can be used to estimate the mass of explosive charge.

Evidence of the explosion impact on the surroundings is manifested in the form of physical and chemical effects of the explosion. The process of explosive decomposition is accompanied by the release of a variety of products (CO_2, H_2O, CO, C, NO, NO_2, S et al.). Some of them are harmful to the environment. Physical effects can be harmful to flora and fauna.

FORENSIC PROCESSING AND ANALYSIS OF RESIDUES OF HIGH EXPLOSIVE EXPLOSION

Bearing in mind the function of the police in detecting and proving the perpetrator of the crime, there is a need for unifying the conduct of the police and all other entities involved in the investigation of explosions starting from the receipt of the notification that a blast occurred, securing the crime scene and forensic processing of the explosion site (freezing the scene - preparation of a crime scene report, record of the investigation, photo-documentation and videos, doing the crime scene sketch and excluding items of evidence from the scene), packaging, transport and storage of exempted evidence items for analyses in forensic laboratories. To this end, the model of treatment at the site of explosion (Figure 3) lists all entities involved in the provision of evidence to shed light on the events that led to the explosion, the identification and prosecution of perpetrators of specific criminal offenses. So, the model of forensic processing, analysis and presentation of explosion residues as evidence is given at the Figure 3.

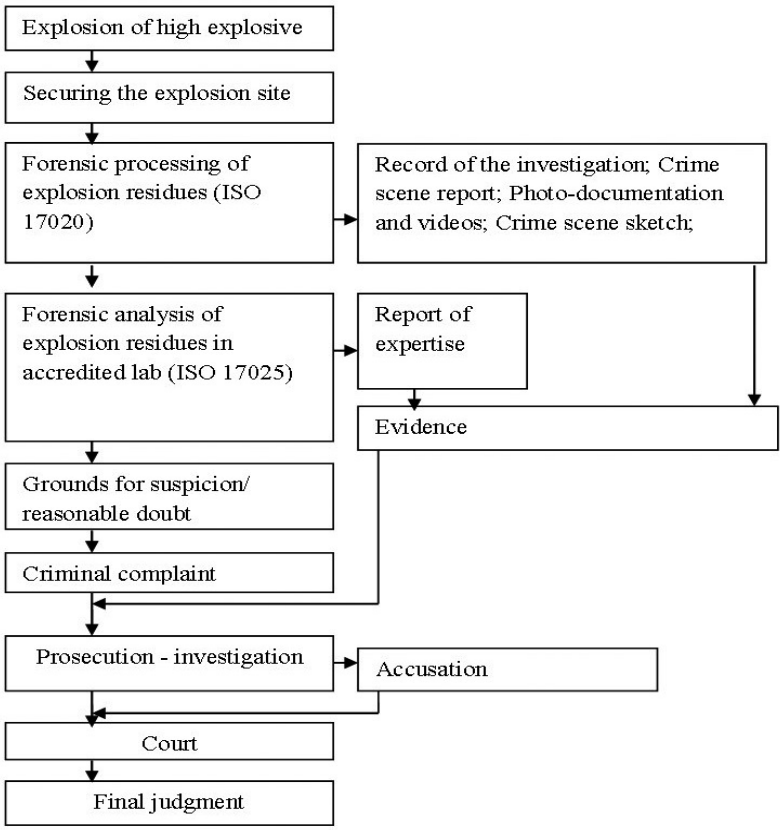


Figure 3: *Model of forensic processing, analysis and presentation of explosion residues*

In conducting a forensic examination and analysis of the explosion aftereffects, standards ISO17020 and ISO17025 should be applied. The Quality Management System should be applied also. The forensic chain that will confirm the credibility of the evidence should also be

provided. Such conduct is necessary to recognize the secured evidence at the international level and possible exchange of evidence.

DISCUSSION

Considering the fact that there was the war in the region involving the Balkan countries in recent decades, formational explosive devices were accessible to the almost anyone and the use of explosive ordnance (formational and improvised) is evident at the beginning of the 21st century. Given the fact that a hand grenade is of a relatively small size and can remain unnoticed, it is quite logical that it was the most frequently used explosive device in the reporting period on the territory of the Republic of Serbia. The hand grenade M75 has the characteristic pieces that fly apart after the explosion (lever, bucket, fuse, beads, housing parts, lead balls, etc.) and they can be recognized during the crime scene investigation. In such cases the cause of the explosion is usually not difficult to determine on the basis of fragmentation effect. It is often with the use of hand grenades apparent survival of finger marks and traces suitable for DNA analysis on the lever, which can be used for identification of perpetrator. The lever usually does not suffer changes in the form of plastic deformation and melting. Only rejected blast usually happens. The situation is similar with other military ordnance since the merger of deformed and rejected parts can determine the type of explosive device. The problem arises when the explosive device is improvised in which case the determination of the cause of the explosion is difficult because the parts of the device and its function depend on the available resources, knowledge, imagination and intention of the perpetrator.

The crater has very large evidence potential considering the fact that its dimensions can be used to estimate the mass of used explosive which may be of use to the court in the qualification of the crime taking into account other circumstances. The crater may be the place where the explosive device components such as detonators, lighter parts, parts of time mechanism, parts of electric circuits, parts of the housing and the like are found. The crater can contain information about the type of explosives used.

Based on the effect of the shock wave, such as the dimensions of the elements destroyed, overturned and discarded vehicles and other items, the estimation of the explosive charge mass can also be done. The effect of the explosion in the form of shock waves that break glass and windowpanes at certain distances can also be used to estimate the mass of explosives used. The effects of the shock waves that are manifested on the victims of explosion in the form of blast injuries can also be used for the preliminary assessment of the mass of explosive used.

Traces of the explosive device such as fingerprints and traces suitable for DNA analysis can lead to the offender i.e. the person who planted an explosive device. Tire marks can also be used for identification of the perpetrator`s vehicle. In addition to this, there are other things that can also be used for identification of the perpetrator and they may include wardrobe parts, cigarettes, etc.

In situations of suicide terrorist acts, the effects of the explosion can be used to identify the explosive device, determining the type and mass of explosive used and the resulting damage. In such cases, the perpetrator is also a victim of the crime and the operating method for the detection of the organizers and accomplices in the crime should be used. As a preparation for forensic processing and analysis of the explosion traces the proposed model of dealing with the explosion aftereffects may help in shedding light on events, investigation, identifying of the perpetrators and establishing all the necessary facts with regard to the necessary scope of activities of all stakeholders involved in the process of forensic examination of evidence at the explosion site and forensic analysis of the explosion evidence in the laboratory.

CONCLUSION

Residues of the explosive device explosion are very different and they are determined by the type of released explosion energy. Each of the explosion residues individually can be used in a specific way to shed light on the event, to secure identification of the perpetrator or identification of explosive device, to determine the type of explosive used or the manner of its initiation, to estimate the explosive charge mass, etc. In this sense, each of them has different evidence potential. Evidence potential of the crater as a characteristic consequence of explosion in the case of using a high energy explosive could be set aside in relation to other aftereffects due to the fact that the crater may give information about the type of explosives used, that its dimensions can be used to estimate the mass of explosive used, and that it may contain parts of an explosive device such as detonators, fuse parts, parts of electric circuits, parts of the housing and the like. Evidence potential of each aftereffect of explosion individually was confirmed by applying the quality management system defined by international standards ISO17020, ISO17025 and the forensic chain.

REFERENCES

1. Baker, W.E., Cox, P.A., Westine, P.W., Kulesz, J.J., Strehlow, R.A. (1983). *Explosive hazards and evaluation*, In: Fundamental studies in engineering 5, Amsterdam: Elsevier Scientific Publishing Company.
2. Beveridge, A. (1998). *Forensic Investigation of Explosion*. Boca Raton: CRC Press.
3. Bjelovuk, I., Jaramaz, S., Elek, P., Micković, D., Kričak, L. (2015) Modeling of the characteristics of crater emerged from the surface explosion on the soil. Combustion, Explosion & Shock Waves, (3) 395-400.
4. Bjelovuk, I. Jaramaz, S., Elek, P., Micković, D., Kričak, L. (2015) Estimation of the Explosive Mass Based on the Surface Explosion Crater on Asphalt. Technical Gazette, 22 (1) 227-232.
5. Bjelovuk, I., Kesić, T., Žarković, M. (2013). Consequences of explosive devices' activation on victims and their criminal justice importance. *In: Eds. G. Meško, A. Sotlar, J. Greene, The ninth biennial international conference criminal justice practice and research.* Slovenia, Ljubljana: Faculty of Criminal Justice and Security.
6. Bulson, P. S. (1997). *Explosive Loading of Engineering Structures*. London: E&FN SPON.
7. Carper, K. (2001). *Forensic Engineering*. Boca Raton: CRC Press LLC.
8. Cooper, P. (1996). *Explosive`s Engineering*. New York: Willey – VCH.
9. Korajlić, N. (2009) Criminalistic methodology of discovering and proofing of explosions. Sarajevo: Centre for security studies.
10. Luccioni, B., Ambrosini, D., Nurick, G., Snyman, I. (2009). Craters produced by underground explosions, *Computers & Structures, 87*, 21 – 22, 1366-1373.
11. Žarković, M., Bjelovuk, I., Kesić, T., *Effects of an Explosion to the Environment and Qualification of Criminal Offences Committed with the Explosives.* Thematic Proceedings of International Significance, International Scientific Conference "Archibald Reiss Days", Vol. I (editor in chief Prof. Dr G. Milošević), Academy of Criminalistic and Police Studies, Belgrade, 1-2 March 2013, p. 315-325.

UDC: 316.647:316.77(497.6)
343.971:316.647.8(497.6)

HATE CRIME OR HATE SPEECH: JUDICIARY PRACTICE IN BOSNIA AND HERZEGOVINA

Marija Lučić-Ćatić, PhD[1]
Dina Bajraktarević Pajević, PhD
Muamer Kavazović, PhD
Nebojša Bojanić, PhD
University of Sarajevo, Faculty of Criminal Justice and Security

Abstract: Hate crime and hate speech are a significant problem in B&H. Despite the fact that these criminal offences are integrated in the criminal legislation in force in all four jurisdictions of B&H, the lack of understanding of those contemporary legal concepts and lack of significance of their adequate prosecution are still evident. In transitional, ethnically and religiously heterogeneous society, intensification of work on the issue of combating hate crime and hate speech as well as enhancement of the understanding of the key issues related to their legal regulation and prosecution in the B&H's specific context are necessary steps in the process of finding better and more effective solutions in this area. Even though existing legal solutions enable distinction and prosecution of both, hate crime and hate speech, those terms are often used as synonyms. The equalization of those essentially different concepts has resulted in inadequate response of the justice system to those extremely harmful phenomena. Through the analysis of existing case law in all four jurisdictions in B&H that were conducted using the six elements test - the Article 19 in order to establish threshold of criminal liability, the authors will try to determine the extent of inadequate application of the existing legal framework by prosecutors and judges.

Keywords: hate crime, hate speech

INTRODUCTION: WHY IS ADEQUATE RESPONSE TO HATE SPEECH IN B&H'S CONTEXT VITAL?

Hate speech (hereinafter: HS) is extremely harmful because of its damaging effect on the very foundation of society and trust between communities. In B&H those offences are particularly dangerous because of their substantial potential to increase the existing tensions and negatively affect the trust building process and a genuine recovery of the whole society.[2] On

1 E-mail: marijalc@gmail.com.

2 The sensitivity of ethnic relations in B&H is something that should not be neglected. In post-conflict, ethnically and religiously heterogeneous society even smaller national or religious incidents can have serious consequences. They may be psychological (feelings of fear among the communities whose goods was attacked or threatened), social (deepening of the existing group divisions that lead to distortion of inter-ethnic relations, and to the continuous demographic changes in terms of the gradual emigration of minority nations, which finally leads to territorial concentration of groups and national homogenization) and even security (HS in a problematic environment almost always presents a risk for the outbreak of violence). See more in: Lalić, V. (2014) Sociološki aspekti zločina iz mržnje u Bosni i Hercegovini in *Krivična djela počinjena iz mržnje: Izazovi reguliranja i procesuiranja u BiH*, ed. Hodžić. E., Mehmedić, A. Sarajevo: Analitika – Centar za društvena istraživanja, pp. 17-35

the other hand, the legacy of the war in the nineties of the last century, the existing fragmentation of the society, the dominance of collective identities, the media propagating intolerance (and hatred) on daily basis… all contribute to the perception that in the B&H's society incidents are motivated by hatred thus resulting in general acceptance of HS as "normal".[3] The manifestation of national hatred and violence is evident in all areas of B&H's reality. Sports events, especially football matches represent a kind of the arena for the expression of national animosity.[4] Hate messages may be found on the web, in the cultural landscape as a kind of media space for messages of intolerance and discrimination, [5] in urban and rural, ethnically homogeneous and heterogeneous environments.[6]

Unfortunately, this "normality" is not only a question of public opinion. Current legislation and judiciary practice show similar approach that leads to misunderstanding of concepts of hate crime (hereinafter: HC) and HS and consequently to inadequate judicial response to those harmful behaviors.

Namely, B&H is a post-war, ethnically and religiously heterogeneous society where HS deepens existing and creates new antagonisms and presents a threat to peace and stability.[7] Considering the role that HS played in the conflict in the former Yugoslavia, the significance that ethnocentric rhetoric and aggressive nationalism now poses to the security and peaceful coexistence in B&H should not be underestimated.[8] Existing historical antagonisms of multinational and multi-confessional society and associated social disorganization as well as the legacy of the war, which in addition to the consequences of an objective nature (such as war crimes, destroyed religious buildings and cemeteries, poverty, crime and other socio-pathological phenomena) are also reflected on those of subjective nature (such as hatred that remains present even after the war is over), makes B&H's society particularly sensitive to HS and incitement to hatred.[9] Even though 20 years passed since the conflict, its influence on the symbolic level does not subside.[10] Furthermore, the paradigm of diversity in B&H is present in the mass media, which are a direct reflection of the socio-political situation. Media in B&H are ethnically polarized, and they generally address a national group that makes the majority

3 Lučić-Ćatić, M., Bajrić, A. (2013). *Procesuiranje kaznenih djela počinjenih iz mržnje u Bosni I Hercegovini: Perspektiva tužitelja*. Sarajevo: Analitika

4 Palmiotto, M. J., Vejnović, D, Lalić, V. (2012). Rad policije na sprječavanju etnički motivisanog nasilja na fudbalskim utakmicama u Bosni i Hercegovini, *Defendologija 15*, br. 32, str. 19-32.

5 Messages in the cultural landscape can have a very significant impact due to the fact that a large number of them we encounter on a daily basis (flags, street signs, road signs, etc.). As Blagojevic (2010) emphasizes, the purpose of these messages can be a domination of one collectivity in an area, the expression of intolerance and insult toward the members of other often minority nations and threats in the form of various graffiti. Blagojević, B. (2010). Kulturno-geografski aspekt istraživanja govora mržnje na javnim površinama, in *Govor mržnje*, ur. Duško Vejnović. Banja Luka: Defendologija, centar za bezbjednosna, sociološka i kriminološka istraživanja. pp. 377-387

6 *Ibidem*.

7 See more in: Hagan, J., Merkens, H., Boehnke, K. (2009) Delinquency and Disdain: Social Capital and the Control of the Right-Wing Extremism Among East and West Berlin Youth, *American Journal of Sociology* 100, no.4, pp. 1028-1052 and Watts, M. (1996) Political Xenophobia in the Transition from Socialism: Threat, Racism and Ideology Among East German Youth, *Political Psihology 17*, no. 1, pp. 97-126

8 De Sanctis, F. (2014) Značaj procesuiranja govora mržnje u postkonfliktnim državama: lekcije iz Bosne i Hercegovine i lekcije za Bosnu i Hercegovinu, in: *Krivična djela počinjena iz mržnje: Izazovi reguliranja i procesuiranja u BiH,* ed. Hodžić. E., Mehmedić, A. Sarajevo: Analitika – Centar za društvena istraživanja, pp. 107-128

9 Milosavljević, B. (2004) *Socijalna patologija i društvo.* Banja Luka: Filozofski fakultet Univerziteta u Banjoj Luci str. 388–391.

10 Lalić, V. (2014) Sociološki aspekti zločina iz mržnje u Bosni i Hercegovini in Krivična djela počinjena iz mržnje: Izazovi reguliranja i procesuiranja u BiH, ed. Hodžić. E., Mehmedić, A. Sarajevo: Analitika – Centar za društvena istraživanja, pp. 17-35

in the territory they are covering.[11] According to the results of the research on security of B&H (2009), political actors and mass media increasingly use speech that inflames ethnic dissension, which has resulted in the radicalization of public discourse and in deepening of a sense of uncertain future.[12] Furthermore, the results of a research Dynamics *of Conflict in the Multi-ethnic State of B&H* (2012) indicate the possibility that tense political climate in B&H escalates into ethnically motivated violence provoked by HS.[13] Considering the fact that the current, as well as the past nationalistic rhetoric often uses the same patterns and structures, the danger of today's rhetoric can be fully viewed only in comparison with that of the past, just as today's anti-Semitic speech can be fully understood only in connection with the Holocaust.[14] Namely, different views of the political elite which represent three constitutive nations on important social matters, including the nationalist rhetoric, further intensifies the climate of intolerance and hostility creating a very suitable social environment for "incitement to hatred". The greater political contradictions are, the higher prospect for large-scale conflicts is, including the sporadic and systematic violence.[15]

All the aforementioned indicates exceptional danger that ignoring, wrong perception and inadequate judicial response to HS and HC present in B&H's context. Although some theoreticians and practitioners emphasize the fact that HS is not prescribed in the Criminal Codes (hereinafter CCs) in B&H De Sanctis (2014) accurately points out that for prosecution of HS in B&H legal provisions on "incitement to hatred" can be used without violation of the principles of legal security and the right of freedom of expression. In this respect, it is very important for the practitioners to use these provisions in the light of the criteria that have been established by international organizations, such as Article 19.[16]

DIFFERENCE BETWEEN "HATE SPEECH" AND "HATE CRIME"

Terms HS and HC are frequently used as synonyms although they represent different legal concepts of harmful behaviour and they do not raise the same concerns for the right to freedom of expression.[17]

Despite its frequent usage, there is no universally accepted definition of the term HS in international law. Even though most states have passed provisions and laws prohibiting the

11 Cvjetičanin,T., Sali-Terzić, S., Dekić,S., (2010). *Strategije isključivanja: govor mržnje u BH javnosti*. Sarajevo: Mediacentar, pp. 16.
12 Azinović,V., Bassuener, K., Weber, B. (2011). *Assessing the potential for renewed ethnic violence in Bosnia and Herzegovina: A security risk analysis*. Sarajevo: Atlantic Initiative, Democratization Policy Council.
13 Kivimaki,T., Kramer, M., Pasch,P. (2012) *The Dynamics of Conflict in the Multi-ethnic State of Bosnia and Herzegovina: Country Conflict-Analysis Study*. Sarajevo: Friedrich- Ebert-Stiftung
14 See Sladeček, M., Džihana, A. (2009). Spinning Out of Control: Media Coverage in the Bosnian Conflict, in: *Media discourse and the Yugoslav Conflicts representations of self and other*, ed. Kolsto, P. Farnham: Ashgate Publishing, pp. 153-172
15 Lalić, V. (2014) Sociološki aspekti zločina iz mržnje u Bosni i Hercegovini in *Krivična djela počinjena iz mržnje: Izazovi reguliranja i procesuiranja u BiH*, ed. Hodžić. E., Mehmedić, A. Sarajevo: Analitika – Centar za društvena istraživanja, pp. 17-35
16 De Sanctis, F. (2014) Značaj procesuiranja govora mržnje u postkonfliktnim državama: lekcije iz Bosne i Hercegovine i lekcije za Bosnu i Hercegovinu, in: *Krivična djela počinjena iz mržnje: Izazovi reguliranja i procesuiranja u BiH,* ed. Hodžić. E., Mehmedić, A. Sarajevo: Analitika – Centar za društvena istraživanja, pp. 107-128
17 Responding to Hate Speech against LGBT People (2013): London: Article 19, web site: https://www.article19.org/data/files/medialibrary/37343/LGBT-Incitement-Paper-30-Sept-AS-FINAL.pdf (visited: 12.01.2016)

expression of the amount of HS, definitions slightly differ when determining what is being prohibited.[18] The term is commonly used to refer to written or oral expression that is insulting, threatening or harassing and which incites to hatred, violence or discrimination against a group of people based on their race, ethnicity, national origin, religion, sexual orientation, disability or other protected characteristics.

Usable definition is offered by the Council of Europe's Committee of Ministers in Recommendation 97(20)[19] where HS is defined as follows:" the term HS shall be understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti- Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin". In this sense, HS covers comments which are necessarily directed against a person or a particular group of persons.[20]

The term is also used by European Court of Human Rights in its practice but the Court has never given a definition of it. In some of its judgments the Court states that "all forms of expression which spread, incite, promote or justify hatred based on intolerance (including religious intolerance) are HS."[21]

This defiance of definition at international level reflects on all national legislations. Therefore, there are impermissibly broad definitions, too narrow definitions, definitions that are not differentiated from provisions for hate crime, etc.[22]

The similar situation in defining the notion of HC is present on international and all national levels.[23] Neither all legislators nor all theorists[24] agree on what constitutes HC, and hence its legal definition varies around the world.[25] Essentially and simply said, HC is a criminal offence where the perpetrator targets the victim in whole or in part out of a bias motive.[26]

Office for Democratic Institutions and Human Rights of the Organization for Security and Cooperation in Europe (hereinafter: ODIHR) has developed a useful working definition of criminal offenses motivated by hatred, which reads:

"A) Any criminal offence, including offences against persons or property, where the victim, premises, or target of the offence are selected because of their real or perceived connection, attachment, affiliation, support, or membership with a group as defined in Part B.

B) A group may be based upon a characteristic common to its members, such as real or perceived race, national or ethnic origin, language, color, religion, sex, age, mental or physical disability, sexual orientation, or other similar factor."[27]

18 Weber. A. (2009). "Manual on hate speech". France: Council of Europe Publishing, web site: http://www.coe.int/t/dghl/standardsetting/hrpolicy/Publications/Hate_Speech_EN.pdf (visited: 15.12.2015)
19 Committee of Ministers Recommendation 97(20), 30 October 1997, Council of Europe
20 This definition is broader than the forms of speech that legislation of B&H currently criminalizes.
21 Gündüz v. Turkey, op. cit, para. 40; Erbakan v. Turkey, op. cit., para. 56
22 This situation is present in B&H legal system as will be discussed further on.
23 The reason is partly the fact that cultural differences, social norms and political interests play a major role in defining illegal behaviour in general, and thus in defining hate crimes as well. See more in: Boeckmann, R. J., Turpin-Petrosino, C. (2002) "Understanding the Harm of Hate Crime", *Journal of Social Issues 58*, No. 2, pp. 207–225
24 Levine and McDevitt point that the offenses motivated by hatred are all the offenses motivated, either in whole or in part, by the assumption, or the fact, that the aggrieved party is in some way different from the perpetrator of the crime in question. See more in: Levin. J., McDevitt, J. (2008) ""Hate crimes" in *The Encyclopedia of peace, violence and conflict*, 2nd ed.: Academic Press
25 Lučić-Ćatić, M., Bajrić, A. (2013). Procesuiranje kaznenih djela počinjenih iz mržnje u Bosni I Hercegovini: Perspektiva tužitelja. Sarajevo: Analitika
26 Responding to Hate Speech against LGBT People (2013): London: Article 19, web site: https://www.article19.org/data/files/medialibrary/37343/LGBT-Incitement-Paper-30-Sept-AS-FINAL.pdf (visited: 12.01.2016)
27 OSCE/ODIHR, (2006) "Challenges and Responses to Hate-Motivated Incidents in the OSCE Region (for the period January – June 2006)" Warsaw: OSCE/ODIHR, pp. 9

As it is visible from previous definition and as the Organization or Security and Cooperation in Europe (hereinafter: OSCE) has indicated, HC have two key elements: an action that criminal code defines as a criminal offence, and a bias motivation.[28] The motivation by bias means that the perpetrator has chosen the victim on the basis of certain protected characteristics. Protected characteristics are the basic or main characteristics shared by members of a group, such as race, religion, nationality, language, gender, sexual orientation, etc. The victim may be one person, several people or property associated with an individual or a group that share protected characteristics.[29]

Bearing in mind those definitions, it is important to stress out that hate crime does not always involve HS and HS is not always a HC.

"HATE SPEECH" AND "HATE CRIME" LEGISLATION IN BOSNIA AND HERZEGOVINA

Prior to adoption of the amendments[30] in the CCs of Republika Srpska (RS), Brčko District of B&H (BDB&H) and B&H, the criminal legislative framework applicable to hate crime and hate speech was composed of:

- Provisions on "incitement to hatred" in the Federation of B&H (FB&H), BDB&H and RS CCs;

- Certain provisions that prescribe aggravated forms of some criminal offences (murder, grievous bodily harm, rape and malicious mischief) in the FB&H and the BDB&H CCs.

Therefore, until 2010 the CCs did not provide specific provisions that could be used as a legal basis for consideration of the bias motive in committing any criminal offence, and provisions on "incitement to hatred" were used for processing hate speech as well as HC, which in their essence refer solely to hate speech.

After CCs reforms this type of criminal offense is regulated and prescribed in three different ways:

- as a separate criminal offence of incitement to hatred, discord and intolerance,

- hatred (bias as a motive)[31] as a qualifying circumstance for a wide range of qualified crimes,

- hatred as an aggravating circumstance in any criminal offence that does not qualify for enhanced punishment under the provisions of existing laws.

At this point all CCs in B&H have provision prohibiting incitement to national, racial or religious hatred.[32] While amendments included this provision in the CC of the B&H, CCs of the FB&H, RS and the BDB&H inherited this provision from the CC of the former Socialist Federal Republic of Yugoslavia.

---

28 OSCE/ODIHR (2009). "Hate Crime Laws: A Practical Guide". Warsaw: OSCE/ODIHR

29 Perry, B. (200). *In the Name of Hate – Understanding hate crimes*, New York – London: Routledge

30 The amendments entered into force on 07 August 2010 in the RS (Official Gazette 73/10) and on 30 June 2010 in BDB&H (Official Gazette BDB&H 21/10).

31 Even though term HC is widespread, it can cause certain confusion. Beside unnecessary psychologization, this term may lead people to believe that any manifestation of hatred is a criminal offence which is not the case. The term "bias motivated crime" more accurately reflect the core essence of those offences (criminal liability depends on proving of a criminal offence and not on proving hatred). Responding to Hate Speech against LGBT people (2013): London: Article 19, web site: https://www.article19.org/data/files/medialibrary/37343/LGBT-Incitement-Paper-30-Sept-AS-FINAL.pdf (visited: 12.01.2016)

32 For the commentary on "incitement to hatred" see more in Babić, M., *et all.* (2005) *Commentaries on the CCs in Be&H,* Book II, Sarajevo: CeO/European Commision, pp 961-962 and 1815-1815

In its basic form, the criminal offence of "incitement to hatred"[33] is regulated similarly in all four B&H's jurisdictions.[34] The crucial differences in the provisions are reflected in: defining its public expression as a substantial element of the criminal offence, and in defining of the protected groups, acts of commission, territorial jurisdiction, and the type and length of the prescribed sentence.[35] CCB&H and CCFB&H limit the application of legal repression solely on public incitement to hatred while this is not the case in provisions of CCBDB&H and CCRS. Given the fact that "incitement to hatred" is HS, lack of the element of publicity in CCBDB&H and CCRS is not reasonable.[36]

Those provisions prohibit incitement or inflaming national, racial or religious hatred, discord or hostility among constituent peoples and others by certain forms of written or spoken hate speech and through other actions such as derision of national, ethnic or religious symbols, damaging other people's belongings and desecrating monuments and graves.

It is very important to note that formulation and the precise meaning of those regulations were brought to question by the ODIHR and Commissioner for Human Rights of the CoE (CHRCoE). ODIHR stated that terms such as "inflames", "discord" and "hostility", currently proscribed in the existing provision, can be unclear. Furthermore they violate the principle of legal certainty because of their essentially broad nature. Therefore, consistent judicial interpretation of these terms is essential.[37] In the paragraph 64 of the Report of CHRCoE Commissioner stated that none of the existing CCs in B&H includes all forms of hate speech provided for by the CoE Committee of Ministers' Recommendation No.R (97)20 on "hate speech".[38]

33 CC regulation of incitement to hatred and intolerance among different communities is harmonized with the relevant recommendations issued by Council of Europe and Council of the European Union according to which the member states had to incorporate specific provision for public incitement to hatred into their national laws before 28 November 2010. See more: The European legal framework on hate speech, blasphemy and its interaction with freedom of expression (2015) Brussels: Directorate General for Internal Policies of the Union Policy Department C: Citizens' Rights and Constitutional Affairs

34 CCRS Article 294 a) – Incitement to national, racial and religious hatred and bigotry (*Official Gazette of RS* 49/03, 108/04, 37/06, 70/06, 73/10, 67/13);
CCFB&H Article 163 – Incitement to national, racial and religious hatred, discord or intolerance (*Official Gazette of FB&H* 36/03, 37/03, 21/04, 69/04, 18/05, 42/10 i 42/11);
CCBDB&H Article 160 – Incitement to national, racial and religious hatred, discord or intolerance (*Official Gazette* of *BDB&H* 10/03, 45/04, 6/05 / 21/10);
CCB&H Article 145.a) – Incitement to national, racial and religious hatred, discord or intolerance (*Official Gazette B&H* 3/03, 32/03, 37/03, 54/04, 61/04, 30/05, 53/06, 55/06, 32/07 i 8/10).

35 E.g. CCB&H provides that the offense is punishable no matter where in B&H it was committed, CCBDB&H and CCFB&H only if it was committed in their jurisdiction, while the CCRS states no such territorial restrictions.

36 Similarly, the ODIHR has identified the challenges in interpreting the term "public". See more: OSCE/ODIHR (2009*) Opinion on Draft Amendments to the Federation of Bosnia and Herzegovina Criminal Code,* web site: http://www.legislationline.org/documents/id/15597 (visited: 18.10.2015)

37 *"Legal certainty requires that it must be possible to reasonably anticipate what kind of behavior will be prohibited under criminal law, and the likely consequences for breaching the law. In other words, it must be possible to reasonably anticipate what kind of behavior will be prohibited under criminal law."* See more: OSCE/ODIHR (2009*) Opinion on Draft Amendments to the FB&H CC,* web site: http://www.legislationline.org/documents/id/15597 (visited: 18.10.2015.)

38 *"Furthermore, hate speech used on the Internet is not a criminal offence, although in 2006 B&H ratified the Additional Protocol to the Council of Europe Convention on cybercrime, which concerned the criminalization of acts of a racist and xenophobic nature committed through computer systems. The Additional Protocol provides that criminal codes should include as offences 'threats and intimidations motivated by racism and xenophobia' committed thought a computer system."* See more: Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, Following his visit to Bosnia and Herzegovina on 27-30 November 2010, eb site: https://wcd.coe.int/ViewDoc.jsp?id=1766837 (visited: 18.10.2015.)

CCs of Entities and BDB&H recognize hatred (bias) as aggravating factors for a wide range of qualified criminal offences.[39] Offences of this type differ from one jurisdiction to another mainly by different legislative techniques, possible sanctions, but also in some aggravating circumstances.[40]

"Hatred" as an aggravating circumstance is explicitly defined in CC BDB&H[41] in sentencing all crimes, while CC RS defines "committing acts of hatred" as an aggravating factor.[42] The CC BDB&H in basic terms[43] defines the meaning of "hatred" as a motive for committing a crime, while the CCRS defines the meaning of "hate crime."[44] These legal solutions imperatively require that courts consider hatred (bias) as an aggravating circumstance in all criminal cases. The exception of these legislative solutions is visible in CCFB&H where such measures are not provided. However, it should be pointed out that CCFB&H, in its Article 49, establishes that a motive of a convicted defendant must be considered at sentencing.[45] Even though "hatred" is not defined and highlighted in the CCFB&H, given the aforementioned, it cannot justify not prosecuting bias motivated crimes in FB&H.

"HS" VS. "HC" IN JUDICIAL PRACTICE IN B&H

Methodology

Given the fact that equivalence of terms of HS and HC leads to inadequate responses to both phenomena, we conducted a research of approaches of B&H's judiciary in solving those crimes through critical analyzes of existing case law in all four jurisdictions in B&H from 2012 to 2014 with absolute sample of HC and HS court cases. [46] The analysis was conducted by using the six elements test - the Article 19 in order to establish threshold of criminal liability on a case-by-case basis. Finally, the authors tried to determine the extent of inadequate application of the existing legal framework by prosecutors and judges. The questioned sample consisted of 2 cases (1 hate crime and 1 incitement to hatred) in 2012; 7 cases (2 hate crime and 5 incitements to hatred) in 2013 and 7 cases (all 7 incitements to hatred) in 2014.

39 Due to the jurisdiction of the Court of B&H (it has no jurisdiction over murder, grievous bodily harm, rape, serious theft, robbery, aggravated robbery, and causing general danger) it is logical that this provision as well as the absence of a definition of "hatred" are not included in CCB&H. See more in: Lučić-Ćatić, M., Bajrić, A. (2013). Procesuiranje kaznenih djela počinjenih iz mržnje u Bosni I Hercegovini: Perspektiva tužitelja. Sarajevo: Analitika

40 For example, the CCB&H, CCBDB&H and CCFB&H prescribe abuse of position or authority as an aggravating factor for sentencing any "basic" or severe offence, while the CCRS does not. See more in: Lučić-Ćatić, M., Bajrić, A. (2013). Procesuiranje kaznenih djela počinjenih iz mržnje u Bosni I Hercegovini: Perspektiva tužitelja. Sarajevo: Analitika

41 See: CCBDB&H, Article 49, paragraph 2 (*Official Gazette* of *BDB&H* 10/03, 45/04, 6/05 i 21/10)

42 See: CCRS, Article 37, paragraph 3 (*Official Gazette of RS* 49/03, 108/04, 37/06, 70/06, 73/10, 67/13)

43 See: CCBD B&H, Article 2, paragraph 37 (*Official Gazette* of *BDB&H* 10/03, 45/04, 6/05 i 21/10)

44 See: CC RS, Article 147, paragraph 25 (*Official Gazette of RS* 49/03, 108/04, 37/06, 70/06, 73/10, 67/13)

45 In March 2013 the Federal Ministry of Justice submitted the Draft Law on Amendments to the CCFB&H which in the general section provides a definition of hatred. At the time of finalizing this paper, in January 2016, the Proposal is still in the legislative procedure.

46 The sample created according to evidence of the OSCE Mission in B&H is presented on *Hate monitors* and in accordance with their records, an absolute sample is achieved. Namely, OSCE is the only organization in B&H that collect data on HC and HS incidents, responses and court cases even though National Point of Contact on HC in the Ministry of Security of B&H is appointed Its responsibility is to collect and keep records of information on HC and to provide this information to the ODIHR but until now Ministry has issued no available data of this kind. Based on the records from *Hate monitors*, we sent a request to the respective prosecutor's offices and courts for access to cases. See more: http://hatemonitor.oscebih.org/Default.aspx?pageid=10&lang=EN (visited: 26.11.2015)

Rabat Plan of Action and Article 19[47]

Having in mind problems in interpreting and implementing international obligations which prohibit all advocacy that constitutes incitement to discrimination, hostility or violence ("incitement to hatred"), as mandated by Article 20(2) of the International Covenant on Civil and Political Rights (ICCPR), the Office of the United Nations High Commissioner for Human Rights (OHCHR) organized a series of expert workshops in the various regions of the world on incitement to national, racial or religious hatred. Those workshops resulted in a document "Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence" (Plan).[48] Paragraph 22 of a Plan formulates a comprehensive test that can be used to review cases and determine whether certain speech reaches the threshold of incitement to hatred. Similar six-part incitement test is also proposed in a Policy paper by the Article 19.[49]

According to those directions all incitement cases should be strictly assessed under six-part test. Reviewing the cases with incitement test would ensure that incitement to hatred is a narrowly restricted offence to which states do not resort on a frequent a basis.

These elements (and sub-elements) are:[50]

Context of the expression;

- Existence of conflicts within society;
- Existence and history of institutionalized discrimination;
- History of clashes and conflicts;

▪ Speaker/proponent of the expression;

- The official position of the speaker;
- The level of the speaker's authority or influence over the audience;
- Politicians/prominent members of political parties;
- Public officials or persons of similar status;

▪ Intent of the speaker/proponent of the expression to incite to discrimination, hostility or violence;[51]

- Language used by the speaker;
- Objectives pursued by the speaker;
- The scale and repetition of the communication;

▪ Content of the expression;

- What was said;

47 Article 19 is one of the most important organizations dealing with issues of freedom of expression around the world. See more on a web site: https://www.article19.org/ (visited: 19.11.2015)
48 "Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence" - Conclusions and recommendations emanating from the four regional expert workshops organized by OHCHR, in 2011, and adopted by experts in Rabat, Morocco on 5 October 2012
49 Prohibiting incitement to discrimination, hostility or violence – Policy brief (2012) Article 19
50 All elements and sub-elements are retreived from the analysis of Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence and Prohibiting incitement to discrimination, hostility or violence – Policy brief (2012) Article 19
51 Article 19 strongly suggests that incitement under Article 20(2) of the ICCPR or Article 4(a) of the ICERD requires intention on the part of the speaker, as opposed to recklessness or negligence. *Ibidem.*

- Who was targeted (the audience);
- Who was targeted (the potential victims of discrimination, violence or hostility);
- How it was said (tone);
- What form the expression took;

▪ Extent and magnitude of the expression;

- The public nature of the expression;
- The means of dissemination of the expression;
- The magnitude of the expression.
- Likelihood of the advocated action occurring, including its imminence;
- Was the speech understood by its audience to be a call to acts of discrimination, violence or hostility?
- Was the speaker able to influence the audience?
- Did the audience have the means to resort to the advocated action, and commit acts of discrimination, violence or hostility?
- Had the targeted victim group suffered or recently been the target of discrimination, violence or hostility?

Case 1 – example of analysis

Description of a case: Three persons (victims) of the same nationality were driving in a van from work through the part of municipality where most of residents were of a different nationality. At one moment a car with a driver and two passengers that were driving behind them took over and while turning back to the right lane hit a van in a bumper. After that the car stopped in the middle of the street so that the van could not pass by and it was forced to stop. All three persons from the car got out and two of them (person A and person B) approached the van while using slurs based on nationality of victims. One of them (person A) hit the windshield of the van with open palm and broke it. After that all three of them went back to the car and drove off while the victims called the police.

Indictment: Person A committed damaging of property in concurrence with incitement to hatred and a person B committed incitement to hatred.

Separation of criminal procedure: After person A concluded plea bargain, the criminal procedure was separated because person B pleaded to be not guilty.

Person A: concluded plea bargain and was convicted to pay a pecuniary fine.

Person B: was convicted and sentenced to a pecuniary fine. After the appeal, the first instance verdict was overturned into not guilty.

Six-part test:

- Context of the expression;

B&H has well known history of conflicts between people of different nationalities and the municipality where this case happened is returnee community and victims are returnees. Incident (offence) happened on a lonely road without any witnesses.

- *Speaker/proponent of the expression;*

Speakers did not have an official position or audience that they could influence. They were no prominent members of political parties or public officials. Both speakers have prior convictions for forest theft but it is important to highlight that there were no prior convictions

for HC or HS. Furthermore, criminal investigation did not show prior actions related to HC or HS.

- Intent of the speaker/proponent of the expression to incite to discrimination, hostility or violence;

Both speaker used threatening language and slur without further repetition of the communication. They both spoke directly to the victims.

- Content of the expression;

The expression was oral form and it was threatening and insulting based on the nationality of the victims. Only targeted audience was those three victims.

- Extent and magnitude of the expression;

This expression happened in a public place but without any audience (beside victims) and it was one time incident without further dissemination.

- Likelihood of the advocated action occurring, including its imminence;

Given the identified extent and magnitude of the expression, likelihood of the advocated action occurring was non existing one.

After a thorough analysis of elements and sub-elements of the incident, it is evident that acts (expressions) of both perpetrators (speakers) were not "incitement to hatred" but they were typical acts of HC (damaging of property with bias motives).

DISCUSSION

After an in-depth analysis of 16 court cases in the period 2012-2014 by using the six elements test on a case-by-case basis (as presented in the previous analyses of Case 1), we came to the conclusion that more than 50% of all cases of indictments to hatred were wrongly classified as incitement (HS). Namely, in a sample of 16 verdicts 3 were classified as HC (severe body injures 2X and rape + robbery) and 13 as incitements to hatred. Out of those 13 verdicts according to the results of six elements test 5 verdicts are incitements to hatred while the rest of them - 8 are different forms of HC (criminal act + bias motive).

This very high percent of wrongly qualified offences leads us to the conclusion that most of the practitioners (prosecutors, lawyers and judges) do not understand the very concept of HC and HS. Namely, existing legal framework offer possibilities for prosecution of the acts of HC as well as the acts of the aggravated forms of HS (incitement to hatred) in different ways and with different legal consequences and therefore, limitations and deficiencies in the CCs regarding those issues cannot be used as the excuse for those misconceptions. Adequate legal and social response to HS and HC has wide repercussions on the entire B&H's society and therefore, state must respond to those harmful behaviors in a different manner.

As previously pointed out, B&H is ethnically and religiously heterogeneous, as well as a post-war society where HS creates new antagonisms and can lead to another conflict. The role HS played in the conflict in the former Yugoslavia, the significance of ethnocentric rhetoric and aggressive nationalism should not be forgotten and inadequate prosecution of incitement to hatred should not be taken lightly. Usage of the provision for incitement to hatred for prosecuting HC by practitioners, beside the issue of legal security, raise the question of their ability to recognize, identify and react the cases of the incitement to hatred.

REFERENCES

1. Article 19, web site: https://www.article19.org/ (visited: 19.11.2015.)
2. Azinović,V., Bassuener, K., Weber, B. (2011). Assessing the potential for renewed ethnic violence in Bosnia and Herzegovina: A security risk analysis. Sarajevo: Atlantic Initiative, Democratization Policy Council.
3. Babić, M., Filipović, LJ., Marković, I., Rajić, Z. (2005) *Commentaries on the CCs in B&H,* Book II, Sarajevo: CeO/European Commission
4. Blagojević, B. (2010). Kulturno-geografski aspekt istraživanja govora mržnje na javnim površinama, in *Govor mržnje*, ur. Duško Vejnović. Banja Luka: Defendologija, centar za bezbjednosna, sociološka i kriminološka istraživanja. pp. 377-387
5. Boeckmann, R. J., Turpin-Petrosino, C. (2002) "Understanding the Harm of Hate Crime", Journal of Social Issues 58, No. 2, pp. 207–225
6. Committee of Ministers Recommendation 97(20), 30 October 1997, Council of Europe
7. Cvjetičanin,T., Sali-Terzić, S., Dekić,S., (2010). Strategije isključivanja: govor mržnje u BH javnosti. Sarajevo: Mediacentar, pp. 16.
8. De Sanctis, F. (2014) Značaj procesuiranja govora mržnje u postkonfliktnim državama: lekcije iz Bosne i Hercegovine i lekcije za Bosnu i Hercegovinu, in: Krivična djela počinjena iz mržnje: Izazovi reguliranja i procesuiranja u BiH, ed. Hodžić. E., Mehmedić, A. Sarajevo: Analitika – Centar za društvena istraživanja, pp. 107-128
9. Gündüz v. Turkey, op. cit, para. 40; Erbakan v. Turkey, op. cit., para. 56
10. Hagan, J., Merkens, H., Boehnke, K. (2009) Delinquency and Disdain: Social Capital and the Control of the Right-Wing Extremism Among East and West Berlin Youth, American Journal of Sociology 100, no.4, pp. 1028-1052 and Watts, M. (1996) Political Xenophobia in the Transition from Socialism: Threat, Racism and Ideology Among East German Youth, Political Psihology 17, no. 1, pp. 97-126
11. Hate monitor, web site: http://hatemonitor.oscebih.org/Default.aspx?pageid=10&lang=EN (visited: 26.11.2015)
12. Kivimaki,T., Kramer, M., Pasch,P. (2012) The Dynamics of Conflict in the Multi-ethnic State of Bosnia and Herzegovina: Country Conflict-Analysis Study. Sarajevo: Friedrich-Ebert-Stiftung
13. Lalić, V. (2014) Sociološki aspekti zločina iz mržnje u Bosni i Hercegovini in Krivična djela počinjena iz mržnje: Izazovi reguliranja i procesuiranja u BiH, ed. Hodžić. E., Mehmedić, A. Sarajevo: Analitika – Centar za društvena istraživanja, pp. 17-35
14. Levin. J., McDevitt, J. (2008) "Hate crimes" in *The Encyclopaedia of peace, violence and conflict*, 2nd ed.: Academic Press
15. Lučić-Ćatić, M., Bajrić, A. (2013). Procesuiranje kaznenih djela počinjenih iz mržnje u Bosni I Hercegovini: Perspektiva tužitelja. Sarajevo: Analitika
16. Milosavljević, B. (2004) Socijalna patologija i društvo. Banja Luka: Filozofski fakultet Univerziteta u Banjoj Luci p. 388–391
17. OSCE/ODIHR (2009). "Hate Crime Laws: A Practical Guide". Warsaw: OSCE/ODIHR
18. OSCE/ODIHR (2009) Opinion on Draft Amendments to the Federation of Bosnia and Herzegovina Criminal Code, web site: http://www.legislationline.org/documents/id/15597 (visited: 18.10.2015.)

19. Palmiotto, M. J., Vejnović, D, Lalić, V. (2012). Rad policije na sprječavanju etnički motivisanog nasilja na fudbalskim utakmicama u Bosni i Hercegovini, Defendologija 15, no. 32, p. 19-32
20. Perry, B. (200). *In the Name of Hate – Understanding hate crimes*. New York – London: Routledge
21. Prohibiting incitement to discrimination, hostility or violence – Policy brief (2012) Article 19
22. "Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence" - Conclusions and recommendations emanating from the four regional expert workshops organized by OHCHR, in 2011, and adopted by experts in Rabat, Morocco on 5 October 2012
23. Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, Following his visit to Bosnia and Herzegovina on 27-30 November 2010, eb site: https://wcd.coe.int/ViewDoc.jsp?id=1766837 (visited: 18.10.2015)
24. Responding to Hate Speech against LGBT People (2013): London: Article 19, web site: https://www.article19.org/data/files/medialibrary/37343/LGBT-Incitement-Paper-30-Sept-AS-FINAL.pdf (visited: 12.01.2016)
25. Sladeček, M., Džihana, A. (2009). Spinning Out of Control: Media Coverage in the Bosnian Conflict, in: Media discourse and the Yugoslav conflicts representations of self and other, ed. Kolsto, P. Farnham: Ashgate Publishing, pp. 153-172
26. The European legal framework on hate speech, blasphemy and its interaction with freedom of expression (2015) Brussels: Directorate General for Internal Policies of the Union Policy Department C: Citizens' Rights and Constitutional Affairs
27. Weber. A. (2009). "Manual on hate speech". France: Council of Europe Publishing, web site: http://www.coe.int/t/dghl/standardsetting/hrpolicy/Publications/Hate_Speech_EN.pdf (visited: 15.12.2015)

UDC: 343.533(497.7)

CRIMINAL ACTS AGAINST INTELLECTUAL PROPERTY ENCOMPASSED BY THE MACEDONIAN CRIMINAL CODE

Katerina Krstevska, PhD[1]
University "St. Kliment Ohridski", Faculty of Security, Skopje

Abstract: The Criminal Code of the Republic Macedonia within its Chapter XV "Criminal acts against the rights and freedoms of human and citizen" encompasses four criminal acts which object of protection is the intellectual property, i.e. Violation of author's right and related rights (Article 157), Violation of the rights of distributor of technically and specially protected satellite signal (Article 157-a), Piracy of audio-visual works (Article 157-b) and Piracy of phonograms (Article 157-c).

Therefore, by analysing the legal framework of these criminal acts, from the aspect of the criminal policy, their trend of movement shall be determined. On the other hand, with the help of scientific analysis and description of the statistical data disposable to the State Statistical Office, the detecting and proving activities of the Macedonian law enforcement organs shall be noted through the submitted criminal reports, initiated accusations and delivered judgments for sanctioning of the perpetrators of the criminal acts defined in Articles 157, 157-a, 157-b and 157-c. Also, a special attention shall be given to the type of the criminal sentences delivered to the convicted adult persons. And finally, having in mind the aspiration of the Republic of Macedonia to become an EU member, the European Commission's progress reports shall be analysed from the aspect of the intellectual property, i.e. the efforts that Republic of Macedonia takes in order to comply with the Copenhagen criteria and the conditionality of the Stabilisation and Association Process.

Keywords: intellectual property; criminal acts, Criminal Code, Republic of Macedonia.

INTRODUCTION

Intellectual property, as defined by the World Intellectual Property Organization (WIPO), refers to creations of the mind, such as inventions, literary and artistic works, designs, and symbols, names and images used in commerce.[2] Similar definition is given by the Word Trade Organization (WTO), i.e. rights given to persons over the creations of their minds. They usually give the creator an exclusive right over the use of his/her creation for a certain period of time. Further, the intellectual property rights are customarily divided into two main areas – Copyright and rights related to copyright and Industrial property.[3]

Having in mind the above, especially the fact that the Republic of Macedonia joined WIPO in 1991 and WTO in 2003, as well as the country's aspiration to become an EU mem-

1 E-mail: katerina.krstevska@gmail.com.
2 For more, see: http://www.wipo.int/about-ip/en/.
3 For more, especially what is meant under "Copyright and rights related to copyright" and "Industrial property", see: https://www.wto.org/english/tratop_e/trips_e/intel1_e.htm.

ber,[4] it is necessary to provide a protection of the intellectual property rights. This should be done not only by ratifying numerous international acts and by adopting domestic legislation (such as the Macedonian Constitution,[5] Criminal Code – CC,[6] Law on Author's Right and Related Rights – LAR,[7] Law on Electronic Communications,[8] Law on Broadcasting,[9] Law on Film Production,[10] Law on Culture,[11] Law on Industrial Property,[12] Law on Custom's Measures for Protection of the Intellectual Property Rights,[13] and etc.), but also by their implementation into the practice. Therefore, the last Report prepared by the European Commission concerning the country's progress towards EU should be mentioned, especially the Chapter 7 dedicated to the "Intellectual property law". No comment is needed to the given assessments and recommendations – "The country is moderately prepared in this area. Some progress was made on customs enforcement. The commitment and capacities of the institutions responsible for enforcing and protecting intellectual property rights and the *acquis* vary, but remain insufficient. A satisfactory track record on investigation, prosecution and judicial handling of piracy and counterfeiting is lacking. Public awareness campaigns are not yet well developed. In the coming year, the country should in particular step up efforts to investigate and prosecute infringements of intellectual property."[14]

Similar strategic goal was set by the "Strategy on Intellectual Property of Republic of Macedonia, 2009–2012" (Strategy), i.e. the level of efficiency and effectiveness of the protection and implementation of the intellectual property in the Republic Macedonia shall be

4 About the necessity to harmonize the Macedonian legislation to the EU law, see: Ј. Дабовиќ-Атанасовска/Н. Гавриловиќ: Аспекти на хармонизацијата на домашното право на интелектуална сопственост со правото на ЕУ, во *Зборник од научната расправа „Методи за хармонизација на националното законодавство со правото на Европската унија",* Книга 2, Скопје, 2008 (Македонска академија на науките и уметностите, Скопје, 02.04.2008), pp. 297–320.

5 For example, the Constitution within the basic freedoms and rights of the individual and citizen encompasses the economic, social and cultural rights, among which it guarantees the right to ownership of the property (Article 30). Also, it notes no person may be deprived of his/her property rights or of the rights deriving from it, except in cases concerning the public interest determined by law. Additionally, the Article 47 guarantees the freedom of scientific, artistic and other forms of creative work, as well the rights deriving from scientific, artistic or other intellectual creative work. See: Constitution of the Republic of Macedonia ("Official Gazette of the Republic of Macedonia" No. 52/1991), and its Amendments ("Official Gazette of the Republic of Macedonia" No. 01/1992, 31/1998, 91/2001, 84/2003, 107/2005, 03/2009, 13/2009, 49/2011).

6 Criminal Code – CC ("Official Gazette of the Republic of Macedonia" No. 37/1996, 80/1999, 04/2002, 43/2003, 19/2004, 81/2005, 60/2006, 73/2006, 07/2008, 139/2008, 114/2009, 51/2011 – two changes and amendments, 135/2011, 185/2011, 142/2012, 166/2012, 55/2013, 82/2013, 14/2014, 27/2014, 28/2014, 41/2014, 115/2014, 132/2014, 160/2014, 199/2014, 196/2015, 226/2015).

7 Law on Author's Right and Related Rights – LAR ("Official Gazette of the Republic of Macedonia" No. 15/2010, 140/2010, 51/2011, 147/2013, 154/2015).

8 Law on Electronic Communications ("Official Gazette of the Republic of Macedonia" No. 39/2014, 188/2014, 44/2015, 193/2015).

9 Law on Broadcasting ("Official Gazette of the Republic of Macedonia" No. 100/2005, 19/2007, 103/2008, 152/2008, 06/2010, 145/2010, 97/2011, 13/2012, 72/2013).

10 Law on Film Production ("Official Gazette of the Republic of Macedonia" No. 82/2013, 18/2014, 44/2014, 129/2015, 152/2015).

11 Law on Culture ("Official Gazette of the Republic of Macedonia" No. 31/1998, 49/2003, 82/2005, 24/2007, 116/2010, 47/2011, 51/2011, 136/2012, 23/2013, 187/2013, 44/2014, 61/2015, 154/2015).

12 Law on Industrial Property ("Official Gazette of the Republic of Macedonia" No. 21/2009, 24/2011, 12/2014).

13 Law on Custom's Measures for Protection of the Intellectual Property Rights ("Official Gazette of the Republic of Macedonia" No. 38/2005, 107/2007, 135/2011).

14 European Commission: *The Former Yugoslav Republic of Macedonia Report 2015,* Brussels, 2015, p. 38 (available at: http://ec.europa.eu/enlargement/pdf/key_documents/2015/20151110_report_the_former_yugoslav_republic_of_macedonia.pdf). Compare to the Progress Reports for the previous years: http://ec.europa.eu/enlargement/countries/package/index_en.htm.

raised, according to the EU standards and rules in this area of interest.[15] The Strategy goes even further by defining the four strategic tasks, such as:

1. strengthening the legal framework in the field of intellectual property rights;
2. strengthening the implementation of the protection of intellectual property rights;
3. enhancing the capacities of individual holders and business community for the protection and enforcement of intellectual property rights;
4. enhancing the public awareness and benefits of intellectual property.

It must be pointed out that the Strategy, which refers to the period 2009–2012, also sets the obligation "in the last two quarters of the implementation of the Strategy, Macedonian Government shall take measures to prepare and adopt a long-term strategy on intellectual property rights".[16] However, such obligation is not fulfilled since the long-term strategy has not been adopted yet.

ANALYSIS OF THE CRIMINAL LEGAL FRAMEWORK

Macedonian CC makes an effort to protect the intellectual property and the rights deriving from it, by prescribing four criminal acts within the Chapter 15 "Criminal acts against the rights and freedoms of human and citizen". The crucial years in the criminal legislation concerning the intellectual property are:

- 1996 when CC, adopted by the Assembly, defined the criminal act violation of author's right and related rights (Article 157),
- 2004 when CC's Article 157 was amended,
- 2008 when, not only CC's Article 157 was amended for the second time, but also three new criminal acts were prescribed, i.e. violation of the rights of distributor of technically and specially protected satellite signal (Article 157-a), piracy of audio-visual works (Article 157-b) and piracy of phonograms (Article 157-c).[17]

As mentioned in the Explanation of the 2008 Draft Law on changing and amending CC (Draft CC), the aim of the proposed novelties is to ensure its compliance with international standards on human trafficking, terrorism and author's rights and to tighten the penal policy for certain criminal acts. In relation to the author's rights, the CC has been harmonized with the Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on

15 See: Government of the Republic of Macedonia: *Strategy on Intellectual Property of Republic of Macedonia, 2009-2012*, Skopje, 2009, pp. 41–43.

16 See: *op. cit*., p. 71.

17 It should be noted that the list of criminal acts is not being exhausted by the four acts mentioned above. Thus, the list also includes violation of industrial property rights and unauthorized usage of someone else's company (Article 285) and violation of right arising from reported or protected innovation and topography of integrated circuits (Article 286). However, they shall be subject of another paper since they are part of the CC's Chapter 25 "Criminal acts against public finances, payment operations and economy".

More about the industrial property, see: М. Поленак-Акимовска/Ј. Дабовиќ-Атанасовска/В. Бучковски/В. Пепељугоски/Л. Варга/Г. Наумовски: *Индустриска сопственост – домашна и меѓународна пракса*, Скопје, 2004. On the other hand, Serbian CC dedicates a separate chapter for the criminal acts against intellectual property. Namely, its Chapter XX includes the criminal acts violation of moral right of author and performer (Article 198), unauthorised usage of author's work and items of related rights (Article 199), unauthorised removal or altering of electronic information on author's or related rights (Article 200), violation of patent rights (Article 201) and unauthorised use of another's design (Article 202). Analysis of these criminal acts can be found in: Ђ. Ђорђевић: *Кривично право – посебни део,* Београд, 2009, pp. 103–106. Compare to: В. Камбовски: *Казнено право – посебен дел (четврто, дополнето издание),* Скопје, 2003, p. 136.

the enforcement of intellectual property rights,[18] and with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).[19] The Draft CC's Explanation also refers to the Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Macedonia, of the other part (Agreement), i.e. especially to the Article 71 Paragraph 2 under which the country is obliged to take the necessary measures in order to guarantee no later than five years after Agreement's entry into force a level of protection of intellectual, industrial and commercial property rights similar to that existing in the Community, including effective means of enforcing such rights.[20] Further, Draft CC's Explanation gives critical assessment that the county has acute ineffective protection of the author's right and related rights, which many times has been pointed out both by the domestic experts and by EU institutions. The situation of enforcement of the author's right and related rights, as it is, undoubtedly suggests that the country fails to fulfil its obligations under the Agreement. Problems in this area are clearly systemic and due to the inability of the authorities to apply the legal norms, but also in the inappropriate regulation in this area.[21]

The ***violation of author's right and related rights*** is the first criminal act in the Macedonian CC (Article 157), that has the intellectual property as its object of protection. The act is performed by a person who in his/her own name or in the name of another unauthorizedly publishes, shows, reproduces, distributes, performs, transmits or in some other way unauthorizedly encroaches upon the author's right or some related right of another, respectively author's work, performance or object of related right.[22] It can be noted that CC prescribes

18 See: Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (available at: http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32004L0048R(01)&from=EN).

19 See: Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) (available at: https://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm). More about the state member obligations regarding the protection of the author's rights and providing criminal procedures and penalties, see: TRIPS's Section 5 "Criminal procedures".

20 See: Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Macedonia, of the other part (available at: http://ec.europa.eu/enlargement/pdf/the_former_yugoslav_republic_of_macedonia/saa03_01_en.pdf).

21 Government of the Republic of Macedonia: *Draft-Law on Changing and Amending Criminal Code* (submitted to the Assembly in May 2007), pp. 14–16 (available at: http://www.sobranie.mk).

22 The Anglo-Saxon legal system uses the term "copy-right". This term, the right to copy, refers to the main action (copying) which under certain author's work could only be performed by the author or a person authorized by him/her. On the other hand, the term author's right refers to the author of a certain work, which highlights the fact that rights have been given to the author over his/her work. See: М. Поленак-Аќимовска/В. Бучковски/Ј. Дабовиќ-Атанасовска: Интелектуална сопственост – предизвик на модерното општество, во М. Поленак-Аќимовска (главен и одговорен уредник): *Право на индустриска сопственост – избор на текстови*, Скопје, 2003, p. 21.

As notable from the CC's text, the dispositions are using terms that are not defined by CC itself. Therefore, in order to understand what is meant under the used terms, it is necessary to address LAR, i.e. LAR defines the terms used by the CC:

Author's right is an autonomous right and it is independent from the ownership right or other rights over the objects/items in which the author's work is incorporated, unless otherwise provided by law (Article 6); Author's work is an intellectual and individual creation in the field of literature, science and art, expressed in any manner and form (Article 12 Paragraph 1). Author's right shall be, in particular: written work (book, paper, article, handbook, brochure, treatise and other works of the same nature); computer program, as a written work; spoken work (lecture, speech, address, and other works of the same nature); musical work, with or without words; dramatic work, dramatic-musical work, choreographic work and a work of pantomime; photographic work and a work created in a process analogous to photography; audio-visual work (cinematographic work and other work expressed in moving images); works of fine art (painting, drawing, print, sculpture, etc.); works of architecture; works of applied art and design; and cartographic work, plan, sketch, technical drawing, project, table, plastic work and other work of identical or similar character in the domain of geography, topography, architecture and science (Article 12 Paragraph 2);

variety of ways how the criminal act can be performed, and for all of them one thing is common – they must be unauthorized by the author. This condition is crucial in order the act to be treated as criminal and later to be sentenced. Till 2008, the basic form of the criminal act (Paragraph 1), was punishable with a fine or imprisonment up to one year when the sentence was increased, i.e. imprisonment of six months to three years.

Besides the basic form of the criminal act, CC also stipulates three severe forms of it, which are sentenced with:

- imprisonment of six months to three years (Paragraph 2) – if the act is committed by using a computer system,[23]

- imprisonment of six months to five years (Paragraph 3) – if the perpetrator obtained a larger property gain by performing the act,[24] and

- imprisonment of one to five years (Paragraph 4) – if the perpetrator obtained a significant property gain by performing the act.[25]

Although the sentence for the act's basic form is below five years of imprisonment, the CC in a separate Paragraph prescribes that the attempt is punishable.[26] Concerning the prosecution, the Paragraph 8 contains an exemption. Thus, if a moral right has been violated, then the prosecution shall be undertaken upon a proposal,[27] with a note that till 2004 the prosecution of this violation was undertaken upon a private suit.

As mentioned above, the ***violation of the rights of distributors of technically and specially protected satellite signals*** is a criminal act that was encompassed in the Macedonian CC in 2008 (Article 157-a). The Draft CC's Explanation noted that in the given period there were more frequent disregards and violations of author's right and related rights (film, music, sports competitions) by cable televisions who unauthorizedly decode the encrypted satellite channels (channels for whose transmission, distribution and rent is necessary to pay an appropriate compensation, and the payment gives the right to use it (license), i.e. the authorized

Items of related rights are the performances of artists – performers; phonograms of phonogram producers; video-grams of film producers; programs of radio-television organizations; publications of publishers and databases of database makers (Article 99).

23 This Paragraph was introduced by the CC's amendments in 2008. According to the CC's Article 122 Paragraph 26, a computer system is any type of device or a group of interconnected devices, out of which, one or several of them, performs automatic processing of data, according to a certain program.

24 In 2008 the imprisonment prescribed for this type of criminal act was increased from "three months to three years" to "six months to five years", which is a second tightening of the sentence. In fact, until 2004 the criminal act was punishable with a fine or imprisonment up to three years.

CC's Article 122 Paragraph 34 notes that a larger property gain shall mean a gain that corresponds to the amount of 5 average monthly salaries in the Republic of Macedonia, at the time when the criminal act was committed.

25 Same as above, the sentence for this type of criminal act was increased two times. Firstly, in 2004 when the imprisonment was increased from "three months to five years" to "six months to five years", and secondly, in 2008 when the imprisonment was increased from "six months to five years" to "one to five years".

A significant property gain, as stipulated in CC's Article 122 Paragraph 35, means a gain that corresponds to the amount of 50 average monthly salaries in the Republic of Macedonia, at the time when the criminal act was committed.

26 Namely, according to the CC's Article 19, a person that intentionally starts the perpetration of a criminal act, but does not complete it, shall be punished for an attempted criminal act for which according to the law, a sentence could be pronounced of five years of imprisonment or a more severe punishment, and for the attempt of some other criminal act only when the law explicitly prescribes the punishment of an attempt.

27 LAR in the Article 21 defines that the moral rights shall protect the author with regard to his/her personal and spiritual (intellectual) ties to the work. This means that the author shall have the several exclusive moral rights, such as: right to claim authorship; right of first disclosure; right to protection of the integrity of the work; and right to withdrawal.

user gets its own code and password). Therefore, Draft CC's Explanation stated that by prescribing the criminal act such practice shall be sanctioned. Namely, the act can be performed by any person who, without an approval by the authorized distributor of technically and specially protected satellite signal, produces, imports, distributes, rents or in any other manner provides such signal at disposal to the public, i.e. provides services of installation of a material or non-material device or system in order to brake such signal (Paragraph 1).[28]

The Paragraph 3 stipulates another way of committing the criminal act – by receiving technically and specially protected satellite signal, whose protection has been broken without an approval of its authorized distributor or by performing further distribution of such signal. If this is done, then the prescribed sentence is the same as in Paragraph 1 (imprisonment of six months to three years).

Same as the previous criminal act, the ***piracy of audio-visual works*** was firstly introduced in the Macedonian CC in 2008 (Article 157-b).[29] Frequent violations of the author's right and related rights regarding the film works and audio-visual works, as stated in the Draft CC's Explanation, required special protection of these goods, regardless of the medium in which they are reproduced (video-gram).[30] Therefore, the unauthorized importation, reproduction, storage, rental, distribution of the audio-visual work shall be sanctioned, regardless whether it is 35mm (cinema rights), video and DVD rights or Video-CD rights.

According to the disposition, the criminal act is done by any person who, without an approval by the film producer or the authorized distributor to whom the film producer transferred his/her right to the audio-visual work, produces, imports, reproduces, distributes, stores, rents, trades in or in any other manner provides such products at disposal to the public, or undertakes other activities for the purpose of distribution, renting, public screening, trading, placing at disposal to the public or in any other manner unlawfully uses the audio-visual work, i.e. the video material or its unauthorized copies (Paragraph 1).

The ***piracy of phonograms*** is the last criminal act in the CC's Chapter 15, and also the last one of the group of three criminal acts by which CC was supplemented in 2008.[31] The necessity to stipulate this type of criminal act is the same as for the Article 157-b (Draft CC's Explanation – frequent violations of the author's right and related rights regarding the music works, required special protection of these goods, regardless of the medium in which they are reproduced (phonograms)). In order to fulfil such goal, CC shall sanction the unauthorized

28 What is meant under terms "broadcasting", "satellite", "broadcasting by satellite", "encrypted program-carrying signals", see: LAR's Article 35. More about the broadcasting and electronic communications, see: Law on Electronic Communications, Law on Broadcasting, etc.

29 As stated in the LAR's Article 88, audio-visual work is a cinematographic or other work expressed in a form of sequence of moving images, whether or not accompanied by sound, regardless of the type of the carrier which contains it. Further, authors of an audio-visual work shall be: author of the screenplay, principal director and principal cameraman. In case when the animation of any kind is an essential element of the work, the principal animator shall also be considered as an author. Where the music is an essential element of the work, the author of the music specially created for use in the audio-visual work shall also be considered as an author. More about the authors of contributions to the audio-visual work, contract for film production, completion of the audio-visual work, etc., see: LAR's Articles 90–94; and more about the film production, see: Law on Film Production.

30 A video-gram, within the meaning LAR's Article 112 Paragraph 2, is the image carrier containing the fixation of moving images, with or without accompanying sound, from which they can be perceived, reproduced or communicated with assistance of a technical device.

31 LAR also defines several terms in this area of interest, such as: phonogram producer (physical person or legal entity who undertakes the initiative, organization, financing and responsibility for the first fixation of sounds of a performance, of other sounds or sound effects, i.e. phonogram), phonogram (fixation of sounds of a performance, or of other sounds or sound effects, except fixation contained in an audio-visual work), fixation (embodiment of sounds or sound effects into a sound carrier from which they can be perceived, reproduced or communicated with assistance of a technical devices). For more, see: LAR's Articles 109–111.

importation, reproduction, storage, rental, distribution of the music work, regardless whether it is reproduced on a cassette, CD, DVD or Video-CD.

This criminal act also protects the intellectual property, i.e. it sanctions the perpetrator who, without an approval by the phonogram producer or the association for collective protection of rights of phonogram producers, produces, reproduces (copies), distributes, stores, rents, trades in or in any other manner provides such products at disposal to the public, or undertakes other activities for the purpose of distribution, renting, trading, placing at disposal to the public or in any other manner unlawfully uses the phonogram or its unauthorized copies (Paragraph 1).

If a comparative analysis of the content of the four criminal acts is performed, then the following common characteristics can be found:

- an imprisonment of six months to three years is prescribed for the perpetrator who has committed the basic form of the criminal act as defined in the Paragraph 1 of all Articles,

- an imprisonment of one to five years is prescribed for the perpetrator who by performing the criminal act has obtained a significant property gain (Article 157 Paragraph 4), i.e. has obtained a significant property gain or a significant damage has resulted (Article 157-a, Paragraphs 2 and 4, Article 157-b Paragraph 2, Article 157-c Paragraph 2),

- a fine is stipulated as a sanction for the legal entity's criminal liability[32] – Article 157 Paragraph 7,[33] Article 157-a Paragraph 5,[34] Article 157-b Paragraph 3 and Article 157-c Paragraph 3;

- items shall be seized – Article 157 Paragraph 6 (copies of author's work and items of the related right, as well as instruments for their reproduction), Article 157-a Paragraph 6, Article 157-b Paragraph 4 and Article 157-c Paragraph 4 (items that were intended or used to commit the criminal act, or were created by committing it).

ANALYSIS OF THE STATISTICAL DATA

Based on the annual reports for the perpetrators of criminal acts prepared by the State Statistical Office of the Republic of Macedonia,[35] the following situation can be established (Table 1), which refers to the reported, accused and convicted adult persons for the period 2009–2014:

32 Legal entity, as defined in CC's Article 122 Paragraph 6, is the Republic of Macedonia, units of local self-government, political parties, public enterprises, companies, institutions, associations, foundations, alliances and organizational forms of foreign organizations, sport's associations and other legal entities in sport's area, financial organizations and other organizations specified by law, which are registered as legal entities, and other communities and organizations who have been recognized as having the status of a legal entity.

33 It should be noted that for the first time the criminal liability of the legal entities was provided by CC in 2004, which caused original paragraph to be changed (if the violation is committed by a legal entity, then its responsible person shall be punished).

34 A legal entity can commit the criminal acts as defined in Article 157-a Paragraphs 1 and 3.

35 See: State Statistical Office of the Republic Macedonia: *Perpetrators of criminal offences in 2009–2014* (available at: http://www.stat.gov.mk).

The paper shall analyse the data for period 2009– 014, since the Report for 2015 has not been published yet, and concerning the period before 2009 – there is no published data about the Article 157 (the other articles were encompassed in the CC in 2008).

Table 1: *Reported, accused and convicted adult persons – four criminal acts*

Year	CC's Article (Criminal act)	Reported	Accused	Convicted
2009	Article 157 (Violation of author's right and related rights)	/	/	/
	Article 157-a (Violation of the rights of distributors of technically…)	2	/	/
	Article 157-b (Piracy of audio-visual works)	26	/	9
	Article 157-c (Piracy of phonograms)	1	/	/
2010	Article 157 (Violation of author's right and related rights)	/	/	/
	Article 157-a (Violation of the rights of distributors of technically…)	16	3	3
	Article 157-b (Piracy of audio-visual works)	24	8	8
	Article 157-c (Piracy of phonograms)	/	1	1
2011	Article 157 (Violation of author's right and related rights)	/	/	/
	Article 157-a (Violation of the rights of distributors of technically…)	2	4	4
	Article 157-b (Piracy of audio-visual works)	12	15	15
	Article 157-c (Piracy of phonograms)	/	1	1
2012	Article 157 (Violation of author's right and related rights)	/	/	/
	Article 157-a (Violation of the rights of distributors of technically…)	5	4	1
	Article 157-b (Piracy of audio-visual works)	1	14	13
	Article 157-c (Piracy of phonograms)	/	2	2
2013	Article 157 (Violation of author's right and related rights)	/	1	1
	Article 157-a (Violation of the rights of distributors of technically…)	12	4	4
	Article 157-b (Piracy of audio-visual works)	1	3	3
	Article 157-c (Piracy of phonograms)	/	/	/
2014	Article 157 (Violation of author's right and related rights)	8	6	6
	Article 157-a (Violation of the rights of distributors of technically…)	/	8	7
	Article 157-b (Piracy of audio-visual works)	/	1	1
	Article 157-c (Piracy of phonograms)	/	/	/
	Total	110	75	79

As notable from the data given in the Table 1, the number of reported, accused and convicted adult persons for the four criminal acts was very low. The relevant authorities were most active in 2010 when 40 persons were reported and in 2009 when 29 persons were reported, and for the other years the average number of reported persons was low (10,25 persons per year). The total number of reported persons was 110 for the period of six years, or 18,33 persons per year.

The total number of convicted persons was 75 (or 12,5 persons per year), which is a decrease of 31,82% concerning the reported persons. In 2011 and 2012 same number of persons were accused (20 per year), and for the other years the number was lower, e.g. 15 in 2014, 12 in 2010, 8 in 2013, and no one was accused in 2009.

With regard to the convicted persons, their number did not follow this downward trend, i.e. the total number of convicted persons was 79 spread to 13,17 persons per year (5,06% higher compared to the accused persons). Therefore, it must be noted that the State Statistical Office' data should be rechecked, since 75 persons were accused and 79 persons were convicted. Further, the lowest activity can be seen in 2013 when only 8 persons were convicted, followed by 9 in 2009, 12 in 2010, 14 in 2014, 16 in 2012 and 20 persons in 2011. It is interesting to point out that in some years (e.g. 2010, 2011 and 2013), the number of accused and convicted persons was same, which implies that all of the accused persons afterwards were convicted. This remark can also be applied to the remaining years (2012 and 2014), with a very low deviation. However, 2009 was an exception since no one was accused, but 9 persons were convicted (with a note that 26 persons were reported for the Article 157-b).

Table 2: *Reported, accused and convicted adult persons – total*

Year	CC's Article (Criminal act)	Reported	Accused	Convicted
2009–2014	Article 157 (Violation of author's right and related rights)	8	7	7
	Article 157-a (Violation of the rights of distributors of technically…)	37	23	19
	Article 157-b (Piracy of audio-visual works)	64	41	49
	Article 157-c (Piracy of phonograms)	1	4	4
	Total	110	75	79

If a listing is done concerning the total number of reported adult persons (110), then it can be seen that most persons were reported for Article 157-b (58,18%), than for Article 157-a (33,64%), followed by Article 157 (7,27%), and Article 157-c (0,91%). Same can be established for the accused and convicted persons, i.e. Article 157-b has dominated in this two categories (54,67% accused; 62,03% convicted). On the second place was Article 157-a (30,67% accused; 24,05% convicted), Article 157 was on the third place (9,33% accused; 8,86% convicted) and with the lowest participation was Article 175-c (5,33% accused; 5,06% convicted).

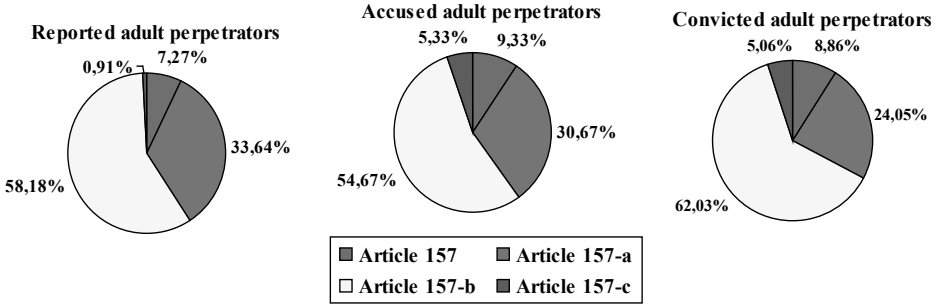


Chart 1: Reported, accused and convicted adult persons – percentage

Finally, the Table 3 and Chart 2 represent the types of criminal sentences that were imposed on the 79 convicted persons. According to the total number of imposed sanctions, it can be observed that the Macedonian courts mostly were imposing probation-imprisonment (41 sanctions; 51,90%), afterwards fine (26 sanctions; 32,92%), and imprisonment (11 sanctions; 13,92%). For the given period, only one probation-fine was imposed (1,27%). Hence,

if the imposed sanctions are being compared to the prescribed sanctions, then the following finding can derive – for the given period a mild penal policy was characteristic for the Macedonian courts (taking into consideration that mostly imposed sanctions were probation-imprisonment or fine).

Table 3: *Convicted adult persons by the type of imposed criminal sanction*

CC's Article (Criminal act)	Type of criminal sanction	2009	2010	2011	2012	2013	2014	Total
Article 157 (Violation of author's right and related rights)	Imprisonment	/	/	/	/	/	1	1
	Fine	/	/	/	/	1	4	5
	Probation-imprisonment	/	/	/	/	/	1	1
	Total	/	/	/	/	1	6	**7**
Article 157-a (Violation of the rights of distributors of technically…)	Imprisonment	/	/	/	/	1	1	2
	Fine	/	1	2	1	/	2	6
	Probation-imprisonment	/	2	2	/	3	4	11
	Total	/	3	4	1	4	7	**19**
Article 157-b (Piracy of audio-visual works)	Imprisonment	/	2	5	/	/	/	7
	Fine	4	/	2	4	3	1	14
	Probation-imprisonment	4	6	8	9	/	/	27
	Probation-fine	1	/	/	/	/	/	1
	Total	9	8	15	13	3	1	**49**
Article 157-c (Piracy of phonograms)	Imprisonment	/	/	1	/	/	/	1
	Fine	/	/	/	1	/	/	1
	Probation-imprisonment	/	1	/	1	/	/	2
	Total	/	1	1	2	/	/	**4**
							Total	**79**

If a separate analysis is done about the imposed sanctions for the four criminal acts, then it can be established:

- Article 157 – 5 imposed fines dominated with 71,43% in the total number of imposed sanctions. The rest went to imprisonment and probation-imprisonment (1 sanction each; 14,29% each);

- Article 157-a – the least imposed sanction was imprisonment (2 sanctions; 10,53%), followed by fine (6 sanctions; 31,58%), and mostly imposed sanction was probation-imprisonment (11 sanctions; 57,89%);

- Article 157-b – 49 imposed sanctions had the biggest participation in the total number of 79 sanctions. Probation-imprisonment took the first place of imposed sanctions (27 sanctions; 55,10%), fine took the second place (14 sanctions; 28,57%) and imprisonment took the third place (7 sanctions; 14,29%). One of the Article 157-b' characteristics was that 1 probation-fine was imposed (2,04%), which cannot be seen in the other criminal acts;

- Article 157-c – the lowest number of sanctions were imposed for this criminal act, i.e. only 4 sanctions divided to 2 probation-imprisonment (50,00%), 1 imprisonment (25,00%) and 1 fine (20,00%).



Chart 2: *Convicted adult persons by the type of imposed criminal sanction – percentage*

CONCLUSION

Taking into consideration the CC's basic text of 1996 and its amendments of 2004 and 2008, but also the other relevant legal acts, it can be concluded that the Macedonian legislation has made serious efforts concerning the definition and protection of the intellectual property rights. The Macedonian legislator tries to follow the current situation and to combat the new forms of crime not only by stipulating the criminal act from the Article 157, and later by stipulating the criminal acts from the Article 157-a, Article 157-b and Article 158-c, but also by strengthening the penal policy, or to be more precise – by increasing the level of the prescribed sanctions.

Concerning the statistical data and the low number of the reported, accused and convicted persons and its fluctuation in the given period, a trend of movement cannot be foreseen for the future. Moreover, from such low number, two conclusions can be made. The first one is that the number represents the actual situation, i.e. the number of perpetrators is low. However, the other conclusion can be seen as more realistic, i.e. that there is a big "black" number of perpetrators who are committing the criminal acts against intellectual property. The similar remark was also given by the European Commission in the 2014 Progress Report, i.e. "data on investigations, prosecutions and trials for offences relating to intellectual property rights have been collected systematically since 2013, but the State Statistical Office has not yet produced a reliable enforcement record". The remark given in the 2015 Progress Report is even harder, i.e. "The commitment and capacities of the institutions responsible for enforcing and protecting intellectual property rights and the *acquis* vary, but remain insufficient. A satisfactory track record on investigation, prosecution and judicial handling of piracy and counterfeiting is lacking."

Interesting fact regarding the state policy (prescribed and implied) about these criminal acts, is that the legislator has been increasing the prescribed sanctions, but the courts have a "mild" penal policy when it comes to the imposed sanctions. Therefore, it is necessary to strengthen all institutional capacities, starting from the Police, Public Prosecution Office and Courts. They should be trained to recognize such criminal acts, and afterwards to report, accuse and convict the perpetrators.

Finally, the public awareness of the intellectual property rights should be raised. An answer to the question "If I notice violation of my intellectual property rights, what should or can I do?" is given by UNCTAD/WTO & WIPO, i.e. "Before taking a decision on which option to take it is generally convenient to: Identify who is infringing…; Determine the extent of the problem; Consider whether it is likely to increase; Calculate, if possible, how much direct or indirect loss have you suffered or will suffer. Once you have a clear idea of the facts of the matter, the focus on the costs and benefits of your response. However, also bear in mind that on occasions it may be advisable to act as fast as possible rather than wait too long."[36]

The last recommendation should be applied not only to the person whose intellectual property rights have been violated, but also by the relevant authorities. They must act and they must act promptly, since the passivity creates a climate of impunity and encourages such criminal acts further to be committed.

REFERENCES

1. Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) (available at: https://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm).
2. Constitution of the Republic of Macedonia ("Official Gazette of the Republic of Macedonia" No. 52/1991), and its Amendments ("Official Gazette of the Republic of Macedonia" No. 01/1992, 31/1998, 91/2001, 84/2003, 107/2005, 03/2009, 13/2009, 49/2011).
3. Criminal Code ("Official Gazette of the Republic of Macedonia" No. 37/1996, 80/1999, 04/2002, 43/2003, 19/2004, 81/2005, 60/2006, 73/2006, 07/2008, 139/2008, 114/2009, 51/2011 – two changes and amendments, 135/2011, 185/2011, 142/2012, 166/2012, 55/2013, 82/2013, 14/2014, 27/2014, 28/2014, 41/2014, 115/2014, 132/2014, 160/2014, 199/2014, 196/2015, 226/2015).
4. Дабовиќ-Атанасовска, Јадранка/Гавриловиќ, Ненад: Аспекти на хармонизацијата на домашното право на интелектуална сопственост со правото на ЕУ, во *Зборник од научната расправа „Методи за хармонизација на националното законодавство со правото на Европската унија"*, Книга 2, Скопје, 2008 (Македонска академија на науките и уметностите, Скопје, 02/04/2008).
5. Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (available at: http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32004L0048R(01)&from=EN).
6. Ђорђевић, Ђорђе: *Кривично право – посебни део,* Београд, 2009.
7. European Commission: *The Former Yugoslav Republic of Macedonia Report 2015,* Brussels, 2015 (available at: http://ec.europa.eu/enlargement/pdf/key_documents/2015/20151110_report_the_former_yugoslav_republic_of_macedonia.pdf).
8. European Commission: *The Former Yugoslav Republic of Macedonia Report 2015,* Brussels, 2015 (available at: http://ec.europa.eu/enlargement/pdf/key_documents/2015/20151110_report_the_former_yugoslav_republic_of_macedonia.pdf).
9. Government of the Republic of Macedonia: *Draft-Law on Changing and Amending Criminal Code* (submitted to the Assembly in May 2007) (available at: http://www.sobranie.mk).
10. Government of the Republic of Macedonia: *Strategy on Intellectual Property of Republic of Macedonia, 2009-2012*, Skopje, 2009.
11. http://ec.europa.eu/enlargement/countries/package/index_en.htm.

36 See: International Trade Centre UNCTAD/WTO & World Intellectual Property Organization: *Secrets of Intellectual Property – A guide for small and medium-sized exporters,* Geneva, 2003, p. 125.

12. http://www.wipo.int/about-ip/en/.
13. https://www.wto.org/english/tratop_e/trips_e/intel1_e.htm.
14. International Trade Centre UNCTAD/WTO & World Intellectual Property Organization: *Secrets of Intellectual Property – A guide for small and medium-sized exporters,* Geneva, 2003.
15. Law on Author's Right and Related Rights ("Official Gazette of the Republic of Macedonia" No. 15/2010, 140/2010, 51/2011, 147/2013, 154/2015).
16. Law on Broadcasting ("Official Gazette of the Republic of Macedonia" No. 100/2005, 19/2007, 103/2008, 152/2008, 06/2010, 145/2010, 97/2011, 13/2012, 72/2013).
17. Law on Culture ("Official Gazette of the Republic of Macedonia" No. 31/1998, 49/2003, 82/2005, 24/2007, 116/2010, 47/2011, 51/2011, 136/2012, 23/2013, 187/2013, 44/2014, 61/2015, 154/2015).
18. Law on Custom's Measures for Protection of the Intellectual Property Rights ("Official Gazette of the Republic of Macedonia" No. 38/2005, 107/2007, 135/2011).
19. Law on Electronic Communications ("Official Gazette of the Republic of Macedonia" No. 39/2014, 188/2014, 44/2015, 193/2015).
20. Law on Film Production ("Official Gazette of the Republic of Macedonia" No. 82/2013, 18/2014, 44/2014, 129/2015, 152/2015).
21. Law on Industrial Property ("Official Gazette of the Republic of Macedonia" No. 21/2009, 24/2011, 12/2014).
22. Камбовски, Владо: *Казнено право – посебен дел (четврто, дополнето издание),* Скопје, 2003.
23. Поленак-Акимовска, Мирјана/Бучковски, Владо/Дабовиќ-Атанасовска, Јадранка: Интелектуална сопственост – предизвик на модерното општество, во Поленак-Акимовска, Мирјана (главен и одговорен уредник): *Право на индустриска сопственост – избор на текстови,* Скопје, 2003.
24. Поленак-Акимовска, Мирјана/Дабовиќ-Атанасовска, Јадранка/Бучковски, Владо/Пепељугоски, Валентин/Варга, Лиљана/Наумовски, Горе: *Индустриска сопственост – домашна и меѓународна пракса*, Скопје, 2004.
25. Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Macedonia, of the other part (available at: http://ec.europa.eu/enlargement/pdf/the_former_yugoslav_republic_of_macedonia/saa03_01_en.pdf).
26. State Statistical Office of the Republic Macedonia: *Perpetrators of criminal offences in 2009–2014* (available on: http://www.stat.gov.mk).

UDC: 343.143:343.91-053.6
343.97(497.11)
343.97(497.6)

INSTITUTIONS OF PROSECUTOR' S OFFICE AS A FACTOR OF INCENTIVE FOR YOUNG PEOPLE TO COMMIT CRIMINAL OFFENCES[1]

Zivorad M. Milenovic, PhD[2]
University of Pristina, Teacher Education Faculty, Prizren

Abstract: With the aim of trying to solve and prove the cases of war crimes and serious criminal offences of crime organizations and organized criminal groups in Serbia and in Bosnia and Herzegovina, prosecutors' offices have introduced institutions as follows: witness collaborator earlier and defendant witness and convicted witness recently introduced in Serbia, and witness repentant in Bosnia and Herzegovina, according to the plea bargain. Persons in this status are provided protection and are given minimal sentence, in special circumstances even under the minimum. Depending on the significance of their cooperation with the prosecutor`s office, some of them are proveded with special benefits as follows: they are granted immunity from prosecution and there is a possibility of their international relocation under a new identity with an employment provided. Due to the aforementioned reasons, a justified question arises regarding the possibility that a part of young population knowingly joins an organized criminal group or criminal organization, commits serious criminal offences that would give them material benefit, aware that under certain circumstances they may cooperate with the prosecutor`s office and gain the mentioned benefits in return. In order to identify the state of affairs, during the months of March and April in 2014, the research was conducted on the sample encompassing 264 persons from the regions of Serbia and Bosnia and Herzegovina. The data collected during the research was processed by the factor analysis and the Man-Witney U test. The three components were separated as follows: 1) incentive for young people to commit offences, 2) contribution to the criminal activities increase and 3) protection of the offenders (KMO = .895; p = .000), while the Man-Whitney U test showed that there is no significant difference in the assessements between the young people in Serbia (Md = 34.50; n = 118) and Bosnia and Herzegovina (Md = 35; n = 146) on the institutions of prosecutors` offices as possible factors of incentive for young people to commit criminal offences: U = 24637.000; p = .254 (Table 5).

Keywords: institution of the Prosecutor`s Office, witness, collaborator, defendant witness, convicted witness, plea bargain, witness repentant, war crime, crime, criminal organization, organized criminal groups

INTRODUCTION

Modern society respects perspective, humanistic, intercultural and multiethnic values. It has, at the same time, achieved strong development of science, technics and technology, that lead to globalization of world economy without boundaries and affirmation of creativity

1 Prepared as a part of the project *Material and spiritual culture of Kosovo and Metohia* (No. 178028), supported by the Ministry of Education, Science and Technological Development of the Republic of Serbia.
2 E-mail: zivorad.milenovic@pr.ac.rs.

and creative individuals. The position of man is raised to the level of human dignity. His autonomy, freedom, criticism and creativity are respected. Regardless of social and economic development, man has always lived in and adapted himself to a certain social community and values protected by that community. "Social communities have, considering them socially unacceptable, tried to suppress" various attacks against those values "by different penalties."[3] Legal penalties against such persons are applied.

Factors that motivate young people to commit criminal offences are numerous. The most common ones include the following: spiritual aspect, general state of the society and family situation. The spiritual aspect is of special significance for this research. It reveals an interesting relationship between psychic state and aggressiveness of young people, which is often an incentive to commit criminal offences. Aggressiveness is caused by fear and a lack of power to have beliefs. That is why, it is said that the most serious problem of young people lies in the feeling of a lack of finding sense in the existence, which then leads one to the existential frustration and aggressiveness.[4] How significant the spiritual aspect can be as a factor of incentive for young people to commit criminal offences is best reflected in the crimes of terrorist organizations motivated by religious reasons.[5] Influence of various spiritual aspects on the criminal behaviour of young people is indicated by the research of influence of the feeling of powerlessness of young people due to unemployment.[6] Some researches published in the leading world journals specifically reveal the influence of young people's distrust of society on their option to commit criminal offences.[7]

Criminal behaviour of young people is often an act of revolt against a lack of love. In modern societies, many values and standards of life are distorted. Life is very stressful. Young people are always in a hurry, burdened with a number of problems. There is a lot of poverty and unemployment around them. That is why public protests of young people for better life and employment are growing in numbers.[8] In addition to it, in all states of former Yugoslavia, at the end of the twentieth century, savage wars took place and young generation grew up with violence and crime. Systems of values in all the countries fell apart in the same way as Yugoslavia did. Therefore, it is natural that one cannot expect from young people to behave as if they were academics, at least not until some things in the society change.

It is evident that the criminal behaviour of young people has become an alarmingly serious phenomenon. It is worsened by the fact that the incentive for violence and criminal offence often comes from the family and is due to the fact that the changes in society are reflected in the changes of the family. Its fundamental characteristic is a lack of stability and warmth and lack of means for an unobstructed development of young generation. In addition, modern parents are occupied with their own problems and problems of struggling for the basic family functioning and its survival. They are too preoccupied with problems of their

3 Milenović, Ž. (2010). *Rad i prevaspitanje osuđenih lica (Work and rehabilitation of the convicted persons).* Beograd: Zadužbina Andrejević, p. 7.
4 Milenović, Ž. (2012). Obrazovanje u funkciji suzbijanja nasilja navijačkih grupa na fudbalskim utakmicama (Education performing the function of fan groups violence in the football matches). *Bezbednost,* 54(1), 7-23.
5 Mayhew, M. & Bryant, A. (2013). Achievement or Arrest? The Influence of the Collegiate Religious and Spiritual Climate on Students' Worldview Commitment. *Research in Higher Education*, 54(1), 63-84.
6 General Accounting Office (1982). *Labor Market Problems of Teenagers Result Largely from Doing Poorly in School. Report to the Honorable Charles B. Rangel, United States House of Representatives, by the U.S. General Accounting Office.* Washington: DC.
7 Khamisa, A. (2006). A Father's Journey from Murder to Forgiveness. *Reclaiming Children and Youth: The Journal of Strength-based Interventions*, 15(1), 15-18; Schaible, L. & Hughes, L. (2012). Neighborhood Disadvantage and Reliance on the Police. *Crime & Delinquency*, 58(2), 245-274.
8 Milenović, Ž. (2012). Obrazovanje u funkciji suzbijanja nasilja navijačkih grupa na fudbalskim utakmicama (Education performing the function of fan groups violence in the football matches). *Bezbednost,* 54(1), 7-23.

relationships and their careers. That is why conflicts within the family occur.[9] However, this is what a modern marriage today looks like.[10] In such families, young people are not able to establish unison either within themselves or within their closest surroundings. That leads them to a danger of feeling that there is no way out. Emotions of young people are disturbed. They are also secretly restless. These aforementioned reasons make up possible factors of their incentive to become criminals.

Scientific achievements are not used only for the benefit of man and development of society. They are also used by the offenders, who are getting more and more organized and well equipped. That is why solving and particularly proving of criminal offences is made difficult. In the region of Serbia and in Bosnia and Herzegovina, there are numerous organized criminal groups and crime organizations that have committed a number of, still unsolved, serious criminal offences previously unheard of in these regions in terms of numbers and cruelty. There has been a great number of unsolved cases of serious war crimes and crimes against humanity and international law in the recent history, committed during the war conflicts in the states within the region of former Yugoslavia.

Economic power and wealth of the members of organized criminal groups and crime organizations are mostly accompanied by their readiness to use violence in order to force their will upon the others and thus maintain their acquired positions in the world of crime, including social positions. They gain power mostly in an indirect way, corrupting even the highest state officials. If the unwritten *code of silence* is added to it, one should not be surprised by the fact that there is a justified danger that the crimes will remain unsolved and their offenders unpunished, because they are protected by those very state officials. With the aim of resolving the war crimes and crimes against humanity and international law and criminal offences committed by the organized criminal groups and crime organizations, prosecutors' offices in Serbia and Bosnia and Herzegovina have, according to the Anglo-Saxon law model,[11] introduced innovations into solving and proving of criminal offences (institution of the Prosecutor`s Office).[12] This possibility is envisaged by The *UN Convention against Transnational Organized Crime*, where according to Article 26 each state party is obliged to take appropriate measures to encourage persons who participate or have participated in organized criminal groups: *1) to supply information useful to competent authorities for investigative and evidentiary purposes on such matters as* (*a) the identity, nature, composition, structure, location or activities of organized criminal groups, b) links, including international links, with other organized criminal groups and c) offences that organized criminal groups have committed or may commit*) *and 2) to provide factual, concrete help to competent authorities that may contribute to depriving organized criminal groups of their resources or of the proceeds of crime.* In this regard, the Convention suggests two ways of *assessing cooperation with such persons*: *possibility of mitigating punishment* or *granting immunity from prosecution to a* person who provides substantial cooperation, binding the states to enter into agreements or arrangements in accordance with good practice and fundamental principles of their domestic law.[13]

9 Bošković, M. (1999). *Kriminologija i socijalna patologija (Criminology and social pathology).* Novi Sad: Matica srpska.
10 Mardahaev, L (2003). *Социальная pedagogika (Social pedagogy).* Moskva: Gardariki.
11 Morissette, Y. (2002). McGill's Integrated Civil and Common Law Program. *Journal of Legal Education*, 52(1-2), 12-28.
12 O'Mahony, B. (2010). The Emerging Role of the Registered Intermediary with the Vulnerable Witness and Offender: Facilitating Communication with the Police and Members of the Judiciary. *British Journal of Learning Disabilities*, 38(3), 232-237.
13 ***Konvencija Ujedinjenih nacija protiv transnacionalnog organizovanog kriminala (The UN Convention against Transnational organized crime),* usvojena na Generalnoj skupštini UN Rezolucijom 55/25 od 15. novembra 2000. godine.

Based on the listed recommendations, an institution of *witness collaborator* had already been introduced to the Prosecutor`s Office in Serbia.[14] New legal regulations have replaced the institutions of the *defendant witness* and *convicted witness*.[15] There is a significant difference between these two institutions. A plea bargain is a written agreement between prosecutors on one side and the defence and defendants on the other side, where the defendants knowingly and voluntarily fully agree to plead guilty to some or all the criminal charges against them in exchange for concessions from the prosecutors such as the type and length of the sentence i.e. for more lenient sanctions, and granted immunity from prosecution for criminal offences not encompassed within the plea bargain, criminal proceedings expenses, legal property, a waiver of the parties and their defenders of the rights to appeal against the court decision made on the basis of the plea agreement, after the court`s full acceptance of the agreement. Plea agreement with a convicted witness can be agreed when the prosecutor estimates that the defendant possesses significant knowledge about the criminal offences from the area of organized criminal activities or war crimes, that have not been solved and that such statement is of key importance in proving it.

Significant difference between this institution and the former one is in that the collaborator who gives information on criminal offence has previously been neither charged nor sentenced. In cases where the prosecutor obtains a final and binding verdict in the proceedings, he is under the obligation to submit a request to the court, within a month, that the defendant gets a lighter sentence or punishment as agreed by the bargain. There is no limit in the legal code concerning the extent of a sentence reduction, and new provisions leave possibility of the acquittal.

Signing of the plea agreement with the defendant or the convicted person is important because of its advantages. These are as follows: increasing efficiency of legal proceedings for criminal offences, prompt resolving of cases, reduction of the expenses, time saving and avoiding of unnecessary legal formalities with the maintenance and protection of fundamental rights of subjects in the criminal proceedings, the defendant ones, above all. The legal sanction which should be weighed within the legal range of time. It should also pass under the legal minimum only in special cases, but in reality, it is always practiced. Apart from numerous advantages, these institutions have their disadvantages. The most common one is a possibility of abuse. The knowledge of existence of such institutions may be the cause of young people`s decision to enter the world of crime knowing that, at a certain point, they may cooperate with the prosecutors with the expectations of being granted immunity from prosecution, reduction of prison sentence or even the acquittal. Taking into account the fact that depending on the significance of defendants` cooperation with the prosecutor, they may be granted an international relocation and identity change together with a job provided, which is, in the times of economic crisis, a dream of many young people from the region of former Yugoslavia some doubts that these institutions under certain circumstances may be a factor of young people incentive to enter the world of crime are thus justified. This issue will be discussed on the pages that follow.

METHOD

The subject of our research includes the institutions of prosecutors` offices as a possible factor of incentive for young people to commit criminal offences.

14 ***Zakonik o krivičnom postupku SR Jugoslavije (The legal code on criminal proceeding of SR Yugoslavia)* ("Sl. list SRJ", br. 70/2001 and 68/2002 and "Sl. glasnik RS", br. 58/2004, 85/2005, 115/2005, 85/2005 - dr. zakon, 49/2007, 20/2009 - dr. zakon and 72/2009), *čl. 504o-504ć.*

15 ***Zakonik o krivičnom postupku Republike Srbije (The legal code on criminal proceedings of the Republic of Serbia), adopted* by the National Assembly of the Republic of Serbia on 26/11/2011.

Variables of the research

Independent variable is presented by a part of young people from the region of Serbia and Bosnia and Herzegovina population affinity for committing criminal offences, while the dependent variable is presented by their assessment of institutions of the Prosecutor`s Office as a possible factor of incentive for the young people to commit criminal offences, both being examined by the Scaler – IT-FPMBK.

Research sample

Population encompasses all young people affinity for committing criminal offences, in Serbia and in Bosnia and Herzegovina, in the months of March and April in 2014, when the research was conducted. The sample consists of 264 persons from the region of Niš, Sarajevo and Pale encompassed by the research. The research sample is deliberate. During the research, we had a help from the people with rich experience of combating the organized criminal groups. Persons with criminal record had been selected. The research tried to encompass some of the secondary importance and/or key members of the strongest organized criminal groups and crime organizations in Serbia and in Bosnia and Herzegovina, with an unsatisfactory success.

Measuring instrument

The Scaler – IT- FPMBK is used in the research. It consists of 20 statements. The Scaler is of Likert type, with three-step-scale intensity accordance. It has been constructed for this research.

Table 1. *Instrument reliability*

α	α standard	N
.990	.991	264

Instrument reliability was tested by Cronbach alpha coefficient and is extraordinarily high (Table 1).

Data processing

The data collected by the research was processed by the factor analysis and Man-Witney U test.

RESULTS

In order to identify the components which, according to the young people`s assessment, indicate that the institutions of prosecutors` offices may be an incentive factor for the young people to commit criminal offences, the data collected by the research was first subjected to the analysis of the main components by factor analysis according to Varimax criteria.

Table 2. *KMO and Bartlet test of sphericity*

KMO		.895
Bartlet test of sphericity	χ^2	7612.154
	df	70
	p	.000

KMO test has shown a very good value (KMO = .895). Bartlet test sphericity has achieved a statistical significance at the level of p<.001 (p = .000) and points to the factorability of matrix and justification of factor analysis (Table 2).

Table 3. *Characteristic roots and percentages of explained variance after Varimax rotations*

Component	Total	% of Variance	Cumulative % of Variance
1.	3.657	27.288	27.288
2.	2.364	20.097	47.385
3.	2.168	16.223	63.608

By the use of Guttman-Kaiser criteria, three main components are obtained with a characteristic root greater than one, that in total explain 63.608% of shared variances (Table 3).

Table 4. *Rotated matrix of factor structure according to Varimax criteria with communalities*

Items	Components			H
	I	II	III	
a8 Sometimes it crosses my mind to join a criminal group in order to gain material benefit, and then with full awareness with their defender offer my cooperation to the prosecutor`s office and thus avoid criminal charges.	.652			.516
a5 I would not have anything against committing the offence that would bring me material benefit if I accept to be prosecutor`s office collaborator and in that way get a minimal sentence or even be totally acquitted.	**.645**	.364		.588
a9 Many young people knowingly opt for the criminal offences knowing that if they become collaborators of Prosecutor`s Office they would not be charged with the criminal offences they have committed.	.632		.314	.664
a6 It is useful to be a collaborator of Prosecutor`s office because of the possibility of an international relocation under a new identity and employment provided.	.569			.554
a15 I think that the collaborators of the Prosecutor` s Office knowing that they are protected, are of an arrogant behaviour and often do not say the truth in the court but say what is expected from them to say.	**.521**	.308		.659
a4 It is useful to be a collaborator of the Prosecutor`s Office.	.519			.582
a16 I know young people who knowingly make offences and who will, at a certain point, cooperate with the Prosecutor`s Office in order to avoid charges with the criminal offences they have committed.	.508		.302	.462
a19 Prosecutor`s Office gave their contribution to the increase of the criminal activities.	.267	**.502**		.399
a20 The collaborators of Prosecutor`s Office could probably be persons who have committed petty criminal offence and without possibility of being charged with criminal offences and granting immunity from prosecution.		.497		.391

a14 I have heard that the collaborators of the Prosecutor`s Office perpetrate criminal offences in the country and abroad during the trial as well i.e. while having this status in the country and abroad and also during the trial proceedings.		**.463**	.301	.598
a18 Collaborators of the Prosecutor's Office during the trial behave as if they were prosecutors and judges.		.413		.555
a16 Since I have heard of the possibility of one`s becoming a collaborator of the Prosecutor`s Office I do not have too much confidence in the judiciary any more.		.407		.344
a13 Collaborators of the Prosecutor`s Office are often more protected than the state officials.		.402		.390
a3 I know of the trials in which the collaborators of the Prosecutor`s Office are persons who have admitted commitment of serious crime offences within the organized criminal groups.		.397		.570
a12 I do not feel at ease, when I hear that somebody who has committed serious crime offences was never charged and is walking freely along the streets of the city I live in.		.248	**.391**	.466
a7 Collaborator of the Prosecutor`s Office should not be a person who had committed serious criminal offences regardless of the nature of the information he offered to the prosecutor and who he testified against in the court.			.384	.339
a2 Institutions of Prosecutor`s Office may become instruments of abuse.			**.374**	.401
a10 Up till now the collaborators of the Prosecutor`s Office in the trials have been well known criminals.			**.346**	.502
a1 It is intolerable that the offenders of serious criminal offences are to be acquitted of charges because they collaborate with the Prosecutor`s Office.			**.320**	.549
a11 Institutions of the Prosecutor`s Office are in direct collision with the constitution, because they make it possible for the criminal activities and crime to remain unpunished.			**.309**	.311

Three components have been separated. The first one is explained by 27.288% total variance; it is determined by seven items and is named *incentive for young people to commit offences. The second one* Dis explained by 20.097% of the total variance; it is determined by seven items and is named *contribution to the criminal activities increase*. The third one is explained by 16.223% of the total variance; it is determined by six items; it is named *protection of the offender* (Table 4).

Man-Whitney U test was used to investigate the assessment differences between the young people from Serbia and Bosnia and Herzegovina of the institutions of prosecutors` offices as a factor of incentive for young people to commit criminal offences.

Table 5. *Man-Whitney U test*

	Total: Serbia-B&H
Man-Whitney U test	24637.000
Z	-1.364
P	0.254

n/Md (SR)	118/34.50
n/Md (B&H)	146/35.00
n/Total:	264/35.00

Man-Witney U test did not reveal significant difference in the assessments of young people from the region of Serbia (Md = 34.5; n = 118) and Bosnia and Herzegovina (Md = 35; n = 146) of institutions of Prosecutor`s Office as a factor of possible incentive for young people to commit criminal offences: U = 24637.000; p = 0.254 (Table 5).

CONCLUSIONS AND DISCUSSIONS

Based on theoretical study of the issue concerned, one can come to the conclusion that the most common reasons why a part of young people enter the world of crime are the following: spiritual aspect, society state and family situation. In order to combat criminal offences, the Prosecutor`s Office, following the practice of the International prosecutors office, uses institutions taken from the Anglo-Saxon law – the institutions of the defendant witness and the convicted witness (previously the witness collaborator), who give contributions to solving and proving the cases of war crimes and crimes against humanity and international law, including the most serious criminal offences in the area of general and economy crime. Regardless of the evident contribution of these institutions, they may have negative effects at a certain point and instead of their contribution to suppressing the crime, they may become a factor of incentive for young people to commit criminal offences. This derives from different privileges for people who enter the procedure of being granted the status of the witness collaborator. This claim is supported by the results of the research which showed that the young population with affinity to commit offences in Serbia and in Bosnia and Herzegovina assessed that the institutions of Prosecutors` Office on one side is an incentive for young people to commit offences and contribute to its development, while on the other side, they protect offenders of serious criminal offences, who are granted minimal sentences or even the acquittal in exchange for their cooperation with the prosecutors. In that way the culture of thinking that offence and crime may remain unpunished is nurtured, which is an evident incentive for many young people to commit criminal offences.

The components separated by the research analysis show that the young people with affinity of committing criminal offences, hold that the institutions of prosecutors` offices may at a certain point become a strong incentive for them to enter the world of crime. It is confirmed by the events from the judicial practice in Serbia and in Bosnia and Herzegovina. The fundamental purpose of the institution of Prosecutor`s Office is to make the job easier for the prosecutors and increase efficiency of solving criminal offences.[16] In addition, persons encompassed by these institutions gain certain benefits depending on a type of criminal offence and information significance given to the Prosecutor`s Office. They may, under certain circumstances, be exempted from the prosecution. In special cases, they may be granted with an international relocation and identity change with a job provided. In that way, some crimes or criminal offences these persons have committed remain unpunished forever, while the very intent of the institutions of the Prosecutor`s office is combating the criminal activities and creating such social conditions in which the crime and the offenders of criminal offences

16 Primorac, D. i Šarić, S. (2013). Svjedok pod imunitetom (svedok pokajnik) u krivičnom zakonodavstvu Bosne i Hercegovine (Witness with immunity (witness repentant) in the criminal proceeding of Bosnia and Herzegovina). *Zbornik radova Pravnog fakulteta u Slitu,* 50(3), 589-613.

should not remain unpunished. Those judicial innovations have been taken from the legal system of the states with an experience of combating the organized crime, Italy and the USA, in the first place.[17]

Numerous trial proceedings still taking place at the highest judicial institutions in Serbia and in Bosnia and Herzegovina show that the Prosecutors` offices of these states often use institutions mentioned. Thus, there was a number of the Prosecutor`s Office collaborators in the trial proceedings of the largest organized criminal groups and organizations: trial of Zemun clan members in Serbia and organized criminal groups and crime organizations of Semsudin Hodzic, Amir Pasic, Muhamed Gasi, Zijad Turkovic and others in Bosnia and Herzegovina. During these proceedings, as the Prosecutor`s Office collaborators there appeared persons with extensive criminal records and persons who had declared in public their participation in the aforementioned organized criminal groups and crime organizations, in which they as their members participated in preparation, organization and commitment of most serious criminal offences: car thefts, serious thefts, armed robberies, murders, drug trade, kidnapping, ransom and other. The list of these persons is rather an extensive one: Miladin Suvajdzic, Dejan Milenkovic, Emir Zekovic, Sead Dumanjic, and in the criminal circles of Bosnia and Herzegovina known as *professional witness repentant and witness collaborator* Isljam Kalender. To what extent these institutions are motivated by personal interests can be illustrated by the fact that certain individuals after being granted this status and signed agreements with the Prosecutor`s Office gave different testimony in the court as Mirza Drinic from Zenica did or even refused to testify, like Daniel Planincic from Bijeljina (both cases in the proceedings against the members of organized criminal groups and crime organizations of Zijad Turkovic). Even a number of verdicts passed by The International Court of Justice for the crimes committed in the region of former Yugoslavia in the Hague, are passed to a large extent, on the bases of the statements of the witness collaborators and protected witnesses such as Drazen Erdemovic, the head of KOS of JNA general Aleksandar Vasiljevic and the others, who testified in a number of proceedings, while their obvious and only motive of cooperation with the Prosecutor`s Office was to free themselves from the years-long imprisonment for the crimes they had been charged with or should have been charged with as their either direct or indirect offenders or issuer of the order, but also because of the benefits they had been awarded by the Prosecutor` Office. Their statements before the international court are an obvious proof that they testify in the way which suits the Prosecutor`s Office, and not because they have been forced to do so, as Drazen Erdemovic claims, or did it from the human reasons for they did not know that some crimes had been committed and now they feel ashamed of it, as general Aleksandar Vasiljevic claims.

There are cases in which the mentioned persons during the given status carry on with committing the criminal offences despite their vow and signed bindings before the court that they would not do so in future, they still get caught in such criminal activities in the country and abroad as well. To make problems worse, this status is often granted on the basis of suggestions by the prosecutors, as in the case of the prosecutor of the State Prosecutor`s Office of Bosnia and Herzegovina - Oleg Cavka, in the trial proceedings of Zijad Turkovic and his group, who was during the proceeding being accused of cooperation and corruption by the very persons, who had been given the status of collaborators by the institution of the Prosecutor` s Office in some of the previous judicial proceeding, of which some special investigative activities had been carried out even by the Cantonal Prosecutor`s Office in Sarajevo.

Research results have shown that there is no significant difference in the young people from Serbia and from Bosnia and Herzegovina assessment of institutions of The Prosecu-

17 Pavišić, B. (2002). *Talijanski kazneni postupak (Italian criminal process)*. Sveučilište u Rijeci Pravni fakultet.

tor`s Office as possible incentive for young people to commit criminal offences. Such results have been expected, because these young people share similar mentality. War conditions and the environment full of arms of various types, in which the young people have been growing up back to twenty years or more, have given their contribution to it. In addition, almost all organized criminal groups in Serbia and in Bosnia and Herzegovina are mixed and consist of the criminals from both states.

Based on these facts, there is a justified doubt that a part of young population which mainly has affinity for stars cult[18] often having for their idols leaders and members of organized criminal groups,[19] knowingly and with intent become members of criminal groups themselves. In this way, they gain certain material benefit from committing offences.[20] At some point, they would offer their cooperation to the Prosecutor`s Office, with the help of their defenders, in order to have the status of collaborator granted by the Prosecutor`s Office thus gaining the benefits which comprise a minimal sentence or the immunity of being charged, or if they had already been sentenced reduction of sentence or its acquittal. Those most cooperative ones may be internationally relocated under a different identity with an employment provided. Taking into account, that it is a dream of many young people exactly, one should not be surprised at the possibility of these young people for the reasons aforementioned knowing joining the organized criminal groups, thus becoming criminals. In this way, institutions of the Prosecutor`s Office instead of being a means of combating the criminal activities, become a factor of incentive for young people to commit the criminal offences.

Research results have shown that the institutions of the Prosecutor`s Office may be a factor of incentive for young people to become offenders. It does not necessarily mean that they should be proclaimed as socially and legally unwelcome or be totally closed down or dismissed. On the contrary, a number of positive examples from the everyday judicial practice show their efficiency in the solving of war crimes and serious criminal offences that have been committed by the members of organized criminal groups and crime organizations. Based on the aforementioned, a general conclusion we came to is that on one side, the institutions of Prosecutor`s Office should be constantly supported and developed. On the other side, though, their overall efficiency should be reexamined and measures for reducing the disadvantages observed, possible abuse and negative effects should be undertaken. In such way, institutions of the Prosecutor`s Office will be raised to a higher level and in the service of fighting the criminal activities.

18 Milenović, Ž. (2008b). Mesto, značaj i uloga osnovne škole u sprečavanju agresivnosti učenika prema nastavnicima (The place, importance and role of elementary school in the prevention of pupils` aggressive behaviour towards their teachers). *Radovi Filozofskog fakulteta,* 10(10/2), 313-329; Ivković, M. i Milenović, Ž. (2009). *Agresivnost učenika osnovne škole prema nastavnicima (Aggressive behaviour of the primary school pupils towards their teachers).* U: Lj. Milosavljević, N. Jovanović i D. Stjepanović Zaharijevski (ur) (2009). Tematski zbornik radova *Protivurečnosti socijalizacije mladih i uloga obrazovanja u afirmaciji vrednosti kulture mira (Socialization contradictions of young people and the role of education in the affirmation of culture of peace values),* sa naučnog skupa s međunarodnim učešćem održanog u Nišu, 05.06.2009. godine (137-154). Univerzitet u Nišu Filozofski fakultet Centar za sociološka istraživanja.

19 Milenović, Ž. (2010). *Rad i prevaspitanje osuđenih lica (Work and rehabilitation of the convicted persons).* Beograd: Zadužbina Andrejević.

20 Milenović, Ž. (2009). Motivacija za rad i prevaspitanje osudjenih lica u penološkoj ustanovi (Motivation for work and rehabilitation of the convicted persons in the penal institutions). *Radovi,* 12(12), 375-391; Milenović, Ž. (2008a). Međuzavisnost rada osuđenih lica i njihovog vaspitanja i prevaspitanja u penološkoj ustanovi (Interdependence of the convicted persons work and their education and rehabilitation in the penal institution). *Beogradska defektološka škola,* 14(1), 133-143; Milenović, Ž. (2006). *Rad kao faktor vaspitanja i prevaspitanja osuđenih lica (Work as a factor of education and rehabilitation of the convicted persons).* U: D. Branković (ur.) (2006). Tematski zbornik radova *Kultura i obrazovanje (Culture and education),* sa sedmih *Banjalučkih novembarskih susreta,* održanih u Banjaluci, 10.-11.11.2006. godine (453-464). Univerzitet u Banjlauci Filozofski fakultet.

Starting from the results of this theoretical-empirical study which point to the possible disadvantages of the institutions of the Prosecutor`s Office, it is necessary to give some suggestions, in order to improve efficiency of the institution of the Prosecutor`s Office in combating the organized crime. First of all, it is necessary to limit granting benefits for a specific criminal offence or criminal offences under the trail ; not to eliminate possibilities of prosecution of persons, who have committed serious criminal offences, in the specific court proceedings and are charged with other criminal offences which are not encompassed by the specific trial proceedings; envisage the possibility of the strictest responsibility of persons, who in the status of persons of the institution of the Prosecutor`s Office before court or in any other respect do not testify correctly; specify the legal provision according to which *convicted witness* for his cooperation may get reduction of sentence given of 1/3 at most; it is also necessary to specify to what proceedings phase it is possible to grant the status of the *defendant witness*.

This problem has not been studied to a sufficient extent and there are very few published studies on the issue in Serbia. It has been mostly studied indirectly within the problem of organized crime.[21] Unlike Serbia, this issue was given much more attention in other countries.[22] The issue of institutions of prosecutors' offices is a frequent subject of numerous studies published in the leading world journals on this field.[23] That is why there is an empty space in our system for scientific research of this significant but insufficiently studied issue. With the aim of overcoming the problems observed, it is suggested to the future researchers to examine the findings of this and all the other studies on this issue and reveal some new, still undetermined or insufficiently clarified facts in their own studies. The results of the study presented in this paper point to that end.

REFERENCES

1. Antonić, V. i Mitrović, D. (2010). *Imunitet svedoka, Jačanje tužilačkih kapaciteta u sistemu krivičnog pravosuđa (Witness immunity, the strengthening of the prosecutors`capacities in the criminal justice system).* Sarajevo: Visoko sudsko i tužilačko vijeće.

2. Bošković, M. (1999). *Kriminologija i socijalna patologija (Criminology and social pathology).* Novi Sad: Matica srpska.

3. General Accounting Office (1982). *Labor Market Problems of Teenagers Result Largely from Doing Poorly in School. Report to the Honorable Charles B. Rangel, United States House of Representatives, by the U.S. General Accounting Office.* Washington: DC.

4. Decker, S., Katz, C. & Webb, V. (2008). Understanding the Black Box of Gang Organization: Implications for Involvement in Violent Crime, Drug Sales, and Violent Victimization. *Crime & Delinquency*, 54(1), 153-172.

5. Ivković, M. i Milenović, Ž. (2009). *Agresivnost učenika osnovne škole prema nastavnicima (Aggressive behaviour of the primary school pupils towards their teachers).* U: Lj. Milosavljević, N. Jovanović i D. Stjepanović Zaharijevski (ur) (2009). Tematski zbornik radova *Protivurečnosti*

21 Ignjatović, Đ. (1998). *Organizovani kriminal.* Policijska akademija u Beogradu.
22 Antonić, V. i Mitrović, D. (2010). *Imunitet svedoka, Jačanje tužilačkih kapaciteta u sistemu krivičnog pravosuđa.* Sarajevo: Visoko sudsko i tužilačko vijeće.
23 Stys, Y. & Ruddell, R. (2013). Organized Crime Offenders in Canada: Risk, Reform, and Recidivism. *Journal of Offender Rehabilitation*, 52(2), 75-97; Loyens, K., Maesschalck, J. & Bouckaert, G. (2011). Delphi in Criminal Justice Policy: A Case Study on Judgmental Forecasting. *Qualitative Report*, 16(6), 1477-1495; Decker, S., Katz, C. & Webb, V. (2008). Understanding the Black Box of Gang Organization: Implications for Involvement in Violent Crime, Drug Sales, and Violent Victimization. *Crime & Delinquency*, 54(1), 153-172; Keser, N. & Ozel, A. (2008). Geo-Political Position and Importance of Turkey in the Crime Trafficking between the Continents Asia, Europe and Africa. *International Journal of Environmental and Science Education*, 3(2), 75-81.

socijalizacije mladih i uloga obrazovanja u afirmaciji vrednosti kulture mira (Socialization contradictions of young people and the role of education in the affirmation of culture of peace values), sa naučnog skupa s međunarodnim učešćem održanog u Nišu, 05.06.2009. godine (137-154). Univerzitet u Nišu Filozofski fakultet Centar za sociološka istraživanja.

6. Ignjatović, Đ. (1998). *Organizovani kriminal (Organized crime).* Policijska akademija u eogradu.
7. Keser, N. & Ozel, A. (2008). Geo-Political Position and Importance of Turkey in the Crime Trafficking between the Continents Asia, Europe and Africa. *International Journal of Environmental and Science Education*, 3(2), 75-81.
8. *Konvencija Ujedinjenih nacija protiv transnacionalnog organizovanog kriminala (The UN Convention against Transnational organized crime),* usvojena na Generalnoj skupštini UN Rezolucijom 55/25 od 15. novembra 2000. godine.
9. Khamisa, A. (2006). A Father's Journey from Murder to Forgiveness. *Reclaiming Children and Youth: The Journal of Strength-based Interventions*, 15(1), 15-18.
10. Loyens, K., Maesschalck, J. & Bouckaert, G. (2011). Delphi in Criminal Justice Policy: A Case Study on Judgmental Forecasting. *Qualitative Report*, 16(6), 1477-1495.
11. Mardahaev, L (2003). *Sociaдвная pedagogika (Social pedagogy).* Moskva: Gardariki.
12. Mayhew, M. & Bryant, A. (2013). Achievement or Arrest? The Influence of the Collegiate Religious and Spiritual Climate on Students' Worldview Commitment. *Research in Higher Education*, 54(1), 63-84.
13. Milenović, Ž. (2012). Obrazovanje u funkciji suzbijanja nasilja navijačkih grupa na fudbalskim utakmicama (Education performing the function of fan groups violence in the football matches). *Bezbednost,* 54(1), 7-23.
14. Milenović, Ž. (2010). *Rad i prevaspitanje osuđenih lica (Work and rehabilitation of the convicted persons).* Beograd: Zadužbina Andrejević.
15. Milenović, Ž. (2009). Motivacija za rad i prevaspitanje osudjenih lica u penološkoj ustanovi (Motivation for work and rehabilitation of the convicted persons in the penal institutions). *Radovi,* 12(12), 375-391.
16. Milenović, Ž. (2008a). Međuzavisnost rada osuđenih lica i njihovog vaspitanja i prevaspitanja u penološkoj ustanovi (Interdependence of the convicted persons work and their education and rehabilitation in the penal institution). *Beogradska defektološka škola,* 14(1), 133-143.
17. Milenović, Ž. (2008b). Mesto, značaj i uloga osnovne škole u sprečavanju agresivnosti učenika prema nastavnicima (The place, importance and role of elementary school in the prevention of pupils` aggressive behaviour towards their teachers). *Radovi Filozofskog fakulteta,* 10(10/2), 313-329.
18. Milenović, Ž. (2006). *Rad kao faktor vaspitanja i prevaspitanja osuđenih lica (Work as a factor of education and rehabilitation of the convicted persons).* U: D. Branković (ur.) (2006). Tematski zbornik radova *Kultura i obrazovanje (Culture and education),* sa sedmih *Banjalučkih novembarskih susreta,* održanih u Banjaluci, 10.-11.11.2006. godine (453-464). Univerzitet u Banjlauci Filozofski fakultet.
19. Morissette, Y. (2002). McGill's Integrated Civil and Common Law Program. *Journal of Legal Education*, 52(1-2), 12-28.
20. O'Mahony, B. (2010). The Emerging Role of the Registered Intermediary with the Vulnerable Witness and Offender: Facilitating Communication with the Police and Members of the Judiciary. *British Journal of Learning Disabilities*, 38(3), 232-237.

21. Pavišić, B. (2002). *Talijanski kazneni postupak (Italian criminal process)*. Sveučilište u Rijeci, Pravni fakultet.

22. Primorac, D. i Šarić, S. (2013). Svjedok pod imunitetom (svedok pokajnik) u krivičnom zakonodavstvu Bosne i Hercegovine (Witness with immunity (witness repentant) in the criminal proceeding of Bosnia and Herzegovina). *Zbornik radova Pravnog fakulteta u Slitu,* 50(3), 589-613.

23. Schaible, L. & Hughes, L. (2012). Neighborhood Disadvantage and Reliance on the Police. *Crime & Delinquency*, 58(2), 245-274.

24. Stys, Y. & Ruddell, R. (2013). Organized Crime Offenders in Canada: Risk, Reform, and Recidivism. *Journal of Offender Rehabilitation*, 52(2), 75-97.

25. Zakonik o krivičnom postupku SR Jugoslavije (The legal code on criminal proceeding of SR Yugoslavia) ("Sl. list SRJ", br. 70/2001 i 68/2002 i "Sl. glasnik RS", br. 58/2004, 85/2005, 115/2005, 85/2005 - dr. zakon, 49/2007, 20/2009 - dr. zakon i 72/2009)*, čl. 504o-504ć.*

26. Zakonik o krivičnom postupku Republike Srbije (The legal code on criminal proceedings of the Republic of Serbia), donet na sednici Narodne skupštine Republike Srbije, 26.11.2011. godine.

UDC: 343.211(497.6)
340.142:341.645(4)

APPLICATION OF THE *NE BIS IN IDEM* PRINCIPLE IN CRIMINAL PROCEDURES AND MINOR OFFENCE PROCEDURES DURING PROSECUTION OR TRIAL FOR THE SAME "OFFENCE"

Darko Jokic, PhD[1]
Mirela Jokic, PhD[2]
University of Banja Luka, College of the Internal Affairs

Abstract: This paper refers to the problematics of application of the *ne bis in idem* principle in criminal and minor offence procedures, reflected through the prism of the application of the judgment of the European Court of Human Rights delivered in the case of *Muslija v. Bosnia and Herzegovina*. The afore mentioned judgment held Bosnia and Herzegovina responsible for violation of Article 4 of the Protocol No. 7 with the Convention of Human Rights, i.e. for non-application of the *ne bis in idem* principle. At the same time Bosnia and Herzegovina was ordered to remove the applicants' rights violations as well as to conduct general measures which will prevent future human rights violations in situations analogous to the presented case. With a critical review of the existing situation in the laws and jurisprudence of Bosnia and Herzegovina in regards to the appliacation of the *ne bis in idem* principle in criminal procedures and minor offence procedures, the authors give concrete proposals of the measures necessary to reform the BH criminal justice system and to harmonize it with the jurisprudence of the European Court of Human Rights in regards to the application of the afore mentioned principle. The authors conclude that the final goal of the reforms is to differentiate the nature of criminal offences and minor offences, which is necessarily preceded by a systematic analysis of all minor offence laws and criminal laws. The authors further conclude that due to the complicated state structure of Bosnia and Herzegovina, the conduction of such activities will demand long-term efforts. Therefore, until criminal justice regulations are harmonized, adoption of binding guidelines is recommended with the purpose of avoiding double jeopardy and thus infringement of the *ne bis in idem* principle which will be applied by prosecutions, courts, police agencies, as well as all the state agencies in BH competent for instituting minor offence procedures.

Key words: *ne bis in idem*, European Court of Human Rights, harmonization of BH regulations, minor offence procedures and criminal offence procedures.

1 darko.jokic@mup.vladars.net
2 mirela.jokic@rocketmail.com

INTRODUCTION

The *ne bis in idem* principle is important part of all criminal law systems. It has been implemented since ancient Roman law, i.e. from the beginning of the institute of litiscontenstation, the last phase of legisactionis and formular process that has been led in front of a magister. The advent of litiscontenstation (latin: *litis* – litigation, and *contestation* – call for witness) means that judge is selected and legal presumptions of process are determined, and from that moment in the same legal matter against the same person on the same grounds there cannot be another process.[3] The *ne bis in idem* principle in common law legal system implies double jeopardy prohibition, and that means that in the same criminal matter the same person cannot be prosecuted or the prosecutor in case that legal matter is already adjudicated (*res iudicata*), as well as in case that there is more ongoing processes but still without judgment. There are two different approaches in the implementation of this principle. The first one, *nemo debet bis puniri pro uno delicto*, means that no one can be punished twice for the same crime, and the second *nemo debet bis vexari pro una et eadem causa* means that there cannot be two ongoing processes against same person for the same crime. It is certain that, by applying of the *ne bis in idem* principle in Anglo-Saxon legal system, judicial protection is exercised of citizens from state's *ius puniendi*, which is one of due process principles and the principles of fair trial. On the other hand, respecting of *res iudicata* principle is an important prerequisite for legal state and legitimacy of legal system and state.[4] In legal systems of the continental legal traditions, *ne bis in idem* principle, beside the fact that it is fundamental human right, represents a guarantee for protection of the authority of final court's judgment, as well as the authority of the court which issued that judgment. This principle has also a function of some sort of sanction for bodies of criminal proceedings.[5]

The *ne bis in idem* principle is proclaimed by many international legal instruments that protect human right. International pact on civil and political rights prescribes that no one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country. Because the European convention of human rights and fundamental freedoms does not prescribe this principle, in Article 4 of Protocol 7 (1984) it is prescribed that no one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

The European court for human rights has, in its decisions about applications for protection of human rights, violations of the *ne bis in idem* principle subsumed under the right on a fair trial, proclaimed by "rubber norm", that is by Article 6 of ECtHR.[6]

---

3 Romac A., The dictionary of Roman law, Zagreb, 1975, page 234; Mojovic N., Judicial proceeding in Roman Law, Banja Luka, 2008, page 73.

4 Vervaele, J.A. European Criminal Law and General Principles of Union Law, Croatian annual For Criminal Law and Practice, Vol 12, 2/2005, page 861.

5 Ivicevic-Karas, E., Regarding judgment of ECtHR in case *Maresti v Croatia* - Analysis of possible influence on reform of misdemeanor law in Republic of Croatia, The Third specialists European Criminal Law and General Principles of Union Law, 2009.

6 *Ne bis in idem* principle is prescribed by other international legal acts such as The European Convention on Extradition, Additional Protocol to the European Convention on Extradition, The European Convention on the Transfer of Proceedings in Criminal Matters, The European Convention on the International Validity of Criminal Judgments, The Convention Implementing the Schengen Agreement, The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, Framework decision on the European arrest warrant, The Charter of Fundamental Rights of the European Union.

NE BIS IN IDEM PRINCIPLE – *DE LEGE LATA* IN BOSNIA AND HERZEGOVINA

In order to adopt civilizational legal achievements in Articles 1 and 2 of the Constitution of Bosnia and Herzegovina it is prescribed that BH will provide the highest level of internationally recognized rights and fundamental freedoms, and that the rights and freedoms prescribed within ECtHR and the Protocols will be directly implemented in BH, as well as that these acts will have priority over all laws.[7] It is also prescribed that all courts, institutions and state authorities in BH, that are within the jurisdiction of the Republic of Srpska and the Federation of BH, will be obliged to implement and respect all human rights and fundamental freedoms from ECtHR and its Protocols. In Annex 1 of the BH Constitution it is prescribed that, among other agreements on human rights, the International pact on Civil and Political Rights will also be implemented in Bosnia and Herzegovina. In the catalogue of rights listed in the BH Constitution a dominant place is taken by the right to a fair trial in civil and criminal matters and other rights related with criminal proceedings.[8] This kind of Constitutional solution leaves no doubt that ECtHR and IPCPR are incorporated in internal legal system, which is particularly evident in the practice of the Constitutional Court of BH.

Considering that constitutionally the right to a fair trial is addressed to courts and state authorities to implement, further formulations and elaborations are left to the Law on criminal proceeding of BH, the Law on criminal proceeding of the Republic of Srpska, the Law on criminal proceeding of the Federation of BH, the Law on criminal proceeding of District Brcko. The Criminal Procedure Code of BH in Article 4 proclaims principle *ne bis in idem* in such a way that it is prescribed that no one shall be prosecuted again for an offense for which he was already prosecuted and that proceeding has been concluded by a final decision.[9]

For this principle to be applicable there have to be fulfilled two cumulative conditions: that criminal proceeding was conducted against certain person for certain criminal offense, and that in that proceeding a final and binding judgment was reached. Thus, double jeopardy prohibition refers to person (*eadem persona*) and offence (*eadem rem*) for which criminal proceeding has already been conducted and for which the final court decision has been brought. By the court decision here we understand the judgment and decision which enters into force, that is the decision that cannot be challenged by efficient legal remedy – *res iudicata*.[10] The decision like this one is taken for true, and that means that case was resolved by final and binding judgment, and that because of subjective and objective identity there cannot be another proceeding, with exception of retrial. That is why it is of great importance that the judgment is directly linked to the indictment, i.e. that it can only refer to a person who has been charged only with the offense which is the subject of the charges contained in the confirmed indictment (Article 280, the Criminal Procedure Code of Bosnia and Herzegovina). The identity of crime exists if there is identity of an offense or identity of an act from the past which is the cause of criminal or misdemeanour process in its important parts. In that case the identity of accusation and judgment is not changed if in judgment circumstances the closer characteristic of criminal offence are changed, that is if those circumstances are not crucial for the change of the subject of the accusation.[11] That implies that by the final judgment the subject of accusation is solved and that because of undisputed subjective and objective identity the proceeding cannot be conducted again, except in case of retrial. The Law on criminal

7 Annex 4 to General framework Agreement for Peace in Bosnia and Herzegovina, initialed on 21st November 1995 in Dayton and signed in Paris on 14th December 1995.
8 Article II -3 e of Constitution of BiH.
9 Norms od identical content provides The Criminal Procedure Code of RS, FBiH and BD BiH as well.
10 Sijercic-Colic, H. and others, The Comment on Criminal Proceeding Act, Sarajevo, 2005, page 51-52.
11 Ibid, page 9.

proceeding of BH allows to the prosecutor to reopen criminal proceeding that has finally been suspended before the start of the trial and that is in the case that the prosecutor has withdrawn all charges after its confirmation of the indictment, which is conditioned by obtaining the authorization or issuance of a decision by the judge for preliminary hearing (Article 326 in connection with Article 232). Criminal proceeding can be reopened in favour of a defendant as well, by applying the *ne bis in idem* principle. In Article 327 paragraph (1) item d) there are two possible legal grounds provided for reopening of the procedure. The first one is the existence of more than one judgment for some persona for the same criminal offense, i.e. the existence of subjective and objective identity. The second one is that there exists one judgment for more than one person for the same criminal offense which could not be committed by all of them but only one person.

The Misdemeanour law of BH (Official Gazette of BH 41/07 and 18/12) in Article 12 paragraph (2) provided that "Basic Principles" from the Law on criminal proceedings of BH *mutates mutandis* are applied, which means the implementation of Article 4, that is the *ne bis in idem* principle. In the same way this problem is solved in Article 18 of the Misdemeanour law of the Federation of Bosnia and Herzegovina (Official Gazette FBH no. 63/14), and in Article 9 paragraph 2 of the Misdemeanour law of Brcko District (Official Gazette of BD BIH no. 3/07), while The Misdemeanour law of the Republic of Srpska (Official Gazette of RS no. 63/14) in Article 8 explicitly provides that no one can be subject to a misdemeanour proceedings or be imposed misdemeanour sanctions if there is a final decision, except in cases provided for in this Act. In paragraphs (3) and (4) of the same article it is provided that misdemeanour proceeding cannot be initiated, and if it is initiated it cannot be led any further, if there are confirmed charges against the perpetrator or the final judgment for the criminal offense which includes that same misdemeanour offense.

A Legal source of implementation of the *ne bis in idem* principle is the Law on international legal help in criminal matters (Official Gazette BH, no. 53/09 and 58/13), as well as many bilateral treaties which Bosnia and Herzegovina has signed, and those which have been inherited by the notification on succession.[12]

Beside the abovementioned, the implementation of the *ne bis in idem* principle by the International Criminal Court for Former Yugoslavia is reflected on Bosnian legal system, in the way that in Article 10 of the Statute of the mentioned Court it is prescribed that no one can be trialled before a national court for acts constituting serious violations of international

12 Here we will mention only some from different periods: Agreement on Extradition between Serbia and Netherlands from 28.02 (11.03) in 1896 (the Agreement was published in 1896, "Serbian Gazette" No. 275/1896, which came into force six weeks after the exchange of instruments of ratification which is made on 5-17 December 1896); The Agreement on the mutual extradition of criminals between Serbia and Great Britain from 06 December 1900 (The Agreement was published in the "Serbian Gazette" No. 35/1901, which came into force on 23 February 1901); Convention on Extradition between the Kingdom of Serbs, Croats and Slovenes and the Republic of Albania from 22 June 1926 (the Convention was published in 1929 "Official Gazette", No. 117/29 and entered into force on 17 May 1929); Agreement between the FPRY and the People's Republic of Bulgaria on Mutual Legal Assistance of 23 March 1956 (The contract was published in the "Official Gazette FPRY" - Addendum No. 1/57, which came into force on 17 January 1957); Agreement between the Republic of Croatia and Bosnia and Herzegovina on mutual execution of court decisions in criminal matters, drawn up on 5 December 2003 (published in the "Official Gazette of BH", International Treaties, No. 1/96); Agreement between Bosnia and Herzegovina and Serbia and Montenegro on legal assistance in civil and criminal matters, the Agreement between Bosnia and Herzegovina and Serbia and Montenegro on mutual execution of court decisions in criminal matters (Agreements were published in the "Official Gazette of BH" - International widget Treaties 11/2005); Agreement between Bosnia and Herzegovina and the Republic of Macedonia on legal assistance in civil and criminal matters, the Agreement between Bosnia and Herzegovina and Macedonia on mutual execution of court decisions in criminal matters, the Agreement between Bosnia and Herzegovina and the Republic of Macedonia on extradition (Agreements have been published in the "Official Gazette of BH"- International Treaties 9/2006 appendix).

humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal. Nevertheless, in paragraph 2 of the same Article so called "vertical conflict of jurisdictions" is additionally considered and the *ne bis in idem* principle is derogated by the provision that a person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal only if:

1. The act for which he or she was tried was characterized as an ordinary crime; or
2. The national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.[13]

JUDGMENT OF THE ECHR IN THE CASE OF MUSLIJA V. BOSNIA AND HERZEGOVINA

The European Court of Human Rights on 10 December 2013, in the case *Muslija v. Bosnia and Herzegovina* (application no. 32042/11), after deliberation and voting on a closed session, brought a judgment in which it found that in this case there was violation of rights of the applicant under Article 4 of Protocol no. 7 to the ECHR, that is that there was violation of the *ne bis in idem* principle because the authorities conducted both a misdemeanour offence proceeding and a criminal proceedings. The above mentioned judgment resulted in the obligation for Bosnia and Herzegovina to take measures to eliminate by ruling determined violations for the applicant (individual measures) and to prevent the future violations of the *ne bis in idem* principle (general measures). With the implementation of individual measures, there were no doubts, but the situation is much more complicated with general measures. For general measures to be implemented, it is necessary to reform the whole Bosnian system of misdemeanour offenses and to harmonize it with criminal law system.

For proper understanding of the scope and content of the abovementioned reforms, here we will give a short analysis of *Muslija v. Bosnia and Herzegovina* judgment, its consequences and possible solutions. Muslija Adnan was charged with physical attack on his ex-wife M.P. on 12 February 2003, around 6 pm in her apartment in Kakanj, in a way that he hit her on the head several times and then continued hitting various parts of her body in the presence of their under-aged children. In the decision delivered on 16 August 2004, the Minor Offence Court ruled that the applicant was guilty of a minor offence against the public order prescribed in the Article 3 § 1 of the Law on Public Peace and Order of the Zenica-Doboj Canton (Official Gazette of the Zenica - Doboj Canton no. 8/00. 15/03. 11/07 and 8/08), for what he was imposed a fine of 150 BAM. On 19 November 2004, the Cantonal Minor Offence Court confirmed the lower court's decision and it became final. On 8 January 2008, the Municipal Court convicted the applicant for the same act, qualified it as a grievous bodily harm according to Article 177 §§ 1 and 2 of the Criminal Code of the Federation of Bosnia and Herzegovina from 1998 (Official Gazette of Federation of Bosnia and Herzegovina no. 43/98. 2/99. 15/99. 29/00 and 59/02) and sentenced the applicant to three-month imprisonment, and this judgment was confirmed by the Cantonal Court on 7 April 2008, whose fine was afterwards replaced with a fine of 9000 BAM on the request of the applicant. On 4 June 2008, the applicant filed an application to the Constitutional Court of Bosnia and Herzegovina. The Constitutional Court held that the acts of the applicant for which he was punished where factually the same, but that they are different in their nature, because the applicant was convicted for a

13 In the same way the exception was provided in the Article 9 paragraph 2 item a) of ad hoc Statute of International Court for Ruanda.

minor offence against public order in the minor offence procedure and for the grievous bodily harm in the criminal procedure. The fourth section of ECtHR in its Ruling on Application no. 32042/11 decided that in this case there was violation of applicant rights by Article 4 of Protocol 7 to the ECHR, that is that there was violation of the *ne bis in idem* principle because the applicant was charged in criminal and in misdemeanour offense proceedings at the same time. The Court in its ruling explained three crucial questions: was the penalty imposed in misdemeanour offense a criminal penalty, were the offences for which the applicant was sentenced the same (*idem*), was there was a duplication of proceedings (*bis)?*

WAS THE PENALTY IMPOSED IN MISDEMEANOUR OFFENSE A CRIMINAL PENALTY?

In terms of determining the criminal nature of the judgment, ECtHR applied "*Engel criteria*" (the qualification of the offense in the domestic law, the nature of the offense and the degree of punishment) from which the second and the third are set in the alternative, not necessarily cumulative. Explaining the application of the first criteria, ECtHR in the abovementioned judgment explained the current practice in the work of the Court, quoting paragraph 58 of *Maresti v. Croatia* judgment, with the conclusion that certain acts have criminal connotation although in the domestic law they are considered trivial for the application of criminal law and criminal procedure. As regards the second criteria, the ECtHR concluded that the nature of the offense for which the appellant was convicted in the proceedings before the first-instance and second-instance court for misdemeanour offenses were a criminal nature, on the grounds that the provisions serve to protect human dignity and public order, the provisions are of general character (directed towards all citizens), and that they are aimed at punishment and prevention. Explaining the third criterion of the criminal nature of the penalties imposed on the appellant, the ECtHR noted that in all cases where for misdemeanour offense it is possible to impose a prison sentence, it is a criminal offense, and that it is irrelevant type and amount of penalty. That means that only possibility of imprisonment is enough.

WERE THE OFFENCES FOR WHICH THE APPLICANT WAS SENTENCED THE SAME (*IDEM*)?

The ECtHR, in its jurisprudence which is reflected in decisions in different cases has defined the identity of offences in different ways. Thus, in order to put a stop to legal uncertainty that was created through many years of different approaches in defining the identity of offences, in the case of *Zolotukhin v. Russia*[14]the ECtHR took the stance that Article 4 of Protocol 7 must be interpreted in a way that forbids the criminal prosecution or trial to the same person for other criminal offence to the extent that it arises from identical facts or facts which are "substantially" the same as those relating to the first offense.[15] This warranty applies when procedure is initiated after the previous acquittal judgment or conviction becomes *res iudicata*. Therefore, for deliberation of the existence of the same offense in the context of *idem* as one of

14 ECtHR, *Sergej Zolotukhin v. Russia*, application No. 14939/03 od 10.02.2009, avalaible at: http://hudoc.echr.coe.int/sites/eng/pages/ search.aspx?i=001-91222#{%22itemid%22:[%22001-91222%22]}

15 In the Judiciary of ECtHR the criteria for determination of identity of offense (idem) evolved from "same conduct", that is "identical facts" in the judgment *Gardinger v. Austria*, through "same essential elements" in the judgment Fisher v. Austria, to "material identity of the offense" that is "identical facts or facts which are substantially the same" in the *Zolotukhin v. Russia* judgment)

the primary components of the *ne bis in idem* principle, the legal qualification of the offenses that the perpetrator is charged with in two different proceedings is irrelevant, as well as the identity of the protected legal goods and the decisive approach is the identity of the facts. The decisive factor is whether the same person in the two proceedings is charged with the same or essentially the same case facts.[16]

Applying this approach the ECtHR in the case of *Muslija v. Bosnia and Herzegovina* concluded that the misdemeanour and criminal proceedings were about the same offences. After the case of *Zolotukhin v. Russia* the stance of the Constitutional Court of BH has evolved, and thus on 30 March 2012, in the case of Nuris Selimović, which was nearly identical to the case of *Muslija v. Bosnia and Herzegovina,* the court concluded that there was a breach of the *ne bis in idem* principle.[17]

WAS THERE A DUPLICATION OF PROCEEDINGS (*BIS*)?

In the case of *Muslija v. Bosnia and Herzegovina*, the ECtHR concluded the Misdemeanour court has issued a decision on 16 August 2004, which became final on 19 October 2004. Given that the criminal proceeding was initiated on 18 September 2003, it can be concluded that both procedures were conducted simultaneously. However, when the Cantonal court for misdemeanours in Zenica confirmed the decision of the Misdemeanour court, the decision from the misdemeanour proceeding has already become final and gained the status of *res iudicata.* In the view of the ECtHR, after a final decision in the first proceeding, the Municipal court should have had suspended the criminal procedure and when deciding upon the applicant appeal the Constitutional court should have harmonized its jurisprudence with the approach taken by the ECtHR in the case of *Zolotukhin v. Russia* (paragraph 37 of the judgment *Muslija v. Bosnia and Herzegovina* and paragraph 115 of the judgment *Zolotukhin v. Russia*).

JURISPRUDENCE IN BH AFTER THE JUDGMENT MUSLIJA V. BH

The issue of simultaneous and subsequent conduct of criminal and misdemeanour proceedings against perpetrators who have simultaneously accomplished the elements of both criminal and misdemeanour offences by executing one or more actions has been reflected from Strasbourg to the Bosnian courthouses. In recent judicature, after the judgment *Muslija v. Bosnia and Herzegovina* the courts in Bosnia and Herzegovina have started to apply the criteria established in the decisions of the ECtHR.

16 Paragraph 48-57 of the judgment *Zolotukhin v. Russia*.

17 The Constitutional Court of BH on an appeal by Nuris Selimović in the case No. AP 133/09 found there was a breach of article 4 paragraph 1 Protocol 7 to the ECHR and has revoked the judgment of the cantonal court in Zenica. With the above mentioned judgment the appellants appeal was rejected and the judgment of the municipal court was confirmed by which the appellant was found guilty for the commitment of the criminal offense of minor injury from article 173 paragraph 1 in connection with the article 54 of the Criminal Law Act of the Federation of Bosnia and Herzegovina and due to that he was sentenced to a single penalty of three months in prison which will not be executed provided that he does not commit another criminal offence for a one year period. The appellant claimed that the *ne bis in idem* principle had been breached, because earlier, he was found responsible for the same incident by decision of the municipal court dating from 21.03.2008. He was found responsible for violation of the public order, participation in a fight and especially impertinent behaviour, prescribed by the article 3 paragraph 1 items 2 and 3 of The Law on Public Peace and Order for which he was admonished and fined with 200 BAM

Thus, the Court of BH, on 24 October 2012, by delivering a judgment in the first instance no. S1 2 K 0100136 12 K, has stated that instituting and conducting for the same act for which the accused has been found responsible and fined in misdemeanour procedure represent a breach of the *ne bis in idem* principle. In the present judgment in the proceeding versus Sedin Ćejić, the accusation for the criminal offence of tax evasion from article 210 paragraph 3, in conjunction with paragraph 1 of the Criminal Code of BH was rejected because it was concluded that the accused was already sentenced for the same offense in a misdemeanour proceeding that was conducted before the Municipal court in Bihać. In this proceeding he was sentenced to probation. In the same case, the same decision was brought by the panel of the appellate division of the Court of BH, which relied on the criteria referred to in the judgment of the ECtHR, *Engel and Others v. the Netherlands*.

The Court of BH, in the panel of the Appellant division II for organized crime, economic crime and corruption, when deciding in the second instance in the case of the defendant Nan Wang and the legal entity Emerald investment Ltd Sarajevo, on 08 October 2014, brought the judgment no. S1 K 013381 14 Kžk, in which it dismissed the charges and found that the defendants have already been prosecuted and fined in a misdemeanour proceeding, thus in accordance with Article 4 of the Criminal Procedure Act of BH and Article 4 of Protocol 7 with the ECtHR cannot be tried for the same offence. The first instance judgment of the Court of BH from 23 April 2014, found the defendant Nan Wang guilty for committing the criminal offence of tax evasion from Article 210 paragraph 1 of the Criminal Code of BH in conjunction with Article 54 of the Criminal Code of BH, while the defendant Emerald Investment Ltd Sarajevo was found guilty for disposal of illegally gained property, which was in the name, for the account and in favour of Van Nang gained as the director and responsible person of the said legal entity. With the present judgment Nan Wang was sentenced to six-month imprisonment, while the legal entity Emerald Investment Ltd Sarajevo was sentenced to paying a fine to the amount of 10.000,00 BAM, and the acquired gain with the criminal offence to the amount of 26.542,17 BAM was seized from the defendant Van Nang. On appeal, the Appellate Panel in making its decision took into account the fact that previously the defendants had misdemeanour orders issued by the Organ for Indirect Taxation of BH for committed offenses punishable under the Law on VAT with the imposition of fines. In respect to the criteria of the ECtHR („*Engel criteria*"), it was concluded that the fine in the misdemeanour proceeding was criminal in its nature, that the offences were the same (*idem*) and that there was duplication of proceeding (*bis*).

That there are various situations in which the misdemeanour court in its final decisions includes the factual substratum of the crime activating the *ne bis in idem* in criminal proceedings was confirmed in the decision of the Supreme court of the Federation of BH No.58 0 K 057238 11 Kžž from 14 December 2011. It is clear from the presented decision that the defendant in the criminal proceeding were found guilty for the crime of illegal fishing from Article 300 of the Criminal Code of BH and were sentenced to paying fines, but that they have been fined for the same actions by the Municipal Court in Mostar for the offense referred in Article 14 of the Law on freshwater fishing. Since the appeal of the defendant was partially upheld in the decision of the Supreme Court of the Federation of BH and thus the second instance judgment of the Cantonal Court of Mostar was returned back for retrial on the grounds that the appellate court did not reason its conclusion, from the above results indicate that in each specific case where the same event leads to simultaneous or subsequent conduct of criminal and misdemeanour proceedings, the court must take into account the "*Engel criteria*" and that the reasoning of its decisions must be visible whether it is possible to apply the principle of *ne bis in idem*.

NE BIS IN IDEM PRINCIPLE – *DE LEGE FERENDA* IN BH

A new role of the European Court of Human Rights has been awarded in accordance primarily with the Treaty of Amsterdam and with the Treaty on European Union (the Maastricht Agreement from 1992), of strengthening the third pillar of the EU, i.e. to develop the general legal principles of the European Union which regulate and realize the principles of freedom, safety and justice through its jurisprudence. According to the Articles 1 and 2 of its Constitution, Bosnia and Herzegovina has obliged to apply directly the rights and freedoms proclaimed by the ECtHR and its Protocols and that these regulations have priority over all domestic regulations. At the same time BH has obliged that all courts, institutions, state organs and institutions on all levels, shall apply and respect the mentioned rights and freedoms.

To date, the ECtHR, while ruling on the petitions of the citizens of Bosnia and Herzegovina for the violation of the rights and guarantees of the ECtHR has issued numerous judgments and decisions and each in their own way have an impact on the social and legal developments within Bosnia and Herzegovina. The ECtHR judgment in the case of *Muslija v. Bosnia and Herzegovina* has caused a great interest of the professional public in BH. In this judgment the ECtHR has concluded that due to the breach of the *ne bis in idem* principle, there has been systematic breaching of the ECtHR in the legal system of BH, and therefore the respondent Bosnia and Herzegovina has the obligation of taking individual measures which will remove the breaches of the applicants rights from the judgment, as well as general measures which will prevent the future similar violations of human rights in accordance with Article 4 of Protocol 7 with the ECtHR in situations analogous to the present case. In order to implement general measures, Bosnia and Herzegovina, as well as many other countries, has to reform its criminal and misdemeanour legislation and to conduct "internal" harmonization and harmonization with the international legislative and judicature as well. In accordance with that the Ministry council of Bosnia and Herzegovina on 29 December 2014 on the 116th session has issued a decision of naming a task force for the development and monitoring of the implementation of the Action Plan for the execution of general measures by the judgment of the European Court of Human Rights in the case *Muslija v. Bosnia and Herzegovina*. The task force consists of the representatives of the Ministries of justice of BH, the RS and the FBH, The Ministries of internal affairs of the RS and the FBH and the Police of Brčko DC, as well as the Prosecutions of BH, the RS, the FBH and Brčko DC. The Task force, as a temporary professional body of the Council of Ministers, has harmonized the text of the Action Plan and activities are underway on the development of Instructions for dealing in criminal and misdemeanour cases when there is risk of breaching the *ne bis in idem* principle. The present Instructions will be of temporary character, i.e. they will be used until the adoption of amended criminal and misdemeanour material legislation in Bosnia and Herzegovina. With the amendment of the criminal and misdemeanour material legislation, a clear distinction between misdemeanour and criminal offenses will be achieved, so the possibility of conducting criminal and misdemeanour proceedings for the event, i.e. the breach of the *ne bis in idem* principle will be avoided.

It is our opinion, that the present Instructions, in accordance with the present positive criminal procedure and misdemeanour procedural regulation, should proscribe that in all cases when there is cognition and assessment that an event has the elements of both criminal offence and misdemeanour, an evaluation and decision from the competent Prosecutor should be awaited on whether an investigation will be instituted. Doing so will neutralize the possibility of selective perception, which would be applied by prosecutors and police officers as well as various observers on the same event.[18] Due to short statute of limitations in misde-

18 Zupančić, B., *Ne bis in idem (the ban on re-trial for the same offense) la belle dame sans mersi,* Crimen: criminal science magazine, year 2 No. 2 Belgrade, 2011, page 173.

meanour procedures, the prosecutor should decide in the shortest possible deadline and at the latest within six months. If the prosecutor decides to prosecute the offense, a misdemeanour proceeding should not be instituted. Only if the prosecutor issues an order of non-implementation of investigation, the authorized person could issue misdemeanour warrant or submit a request for initiating a misdemeanour proceeding. Thereby, the Instructions should provide for actions of prosecutors and entities responsible for initiating criminal proceedings in all possible situations, such as:

- Deprivation of liberty;
- Taking actions of proving;
- Issuing orders on institution, non-institution and termination of the investigation;
- Raising and conformation of the indictment;
- Cognition about the existence of grounds for suspicion of committing a criminal offense after submitting a request for initiating criminal proceedings or in the course of the court decision after issuing a misdemeanour warrant.

CONCLUSION

The European Court of Human Rights in Strasbourg when deciding upon the application of BH citizen Adnan Muslija on the breach of the *ne bis in idem* principle has concluded that in this specific case there was a violation of the ECtHR and Protocol 7 with the Convention. As under the terms of Article 44, paragraph 2 of the ECtHR the present judgment became final on 14 April 2014, the respondent Bosnia and Herzegovina has been obliged from that date to implement individual measures to eliminate the violations of the applicants rights stated in the judgment, as well as to implement general measures which will prevent the future similar violations of human rights under Article 4 of Protocol 7 with the Convention in situations analogous to the present case.

In terms of the individual measures there are no doubts about their implementation, while the situation is more complex with the implementation of the general measures, which ultimately impose obligations on reforming the entire system of misdemeanour law. As it stated in the judgment *Muslija v. Bosnia and Herzegovina*, as well as in other numerous judgments of the ECtHR, simultaneous or subsequent criminal and misdemeanour prosecution or trial for the same offense of the same person is not allowed, in that analysis it would be necessary to identify the misdemeanour and criminal offences where their characteristics overlap. This is due to the fact that the legal description of criminal offence and misdemeanour, as consequence has the same factual description in the initial act of misdemeanour (misdemeanour order or request for initiating a misdemeanour proceedings) and the initial criminal act (indictment).

Only after extensive research and analysis of misdemeanour and criminal justice system it is possible to intervene by changing misdemeanour laws and other regulations, i.e. to execute their harmonization with the criminal laws. However, there is extremely complex state structure of Bosnia and Herzegovina where the criminal law domain is regulated on both state and entity level (including Brčko District) and the misdemeanour law domain both at state and entity level, as well as at cantonal and municipal level. Therefore, it is certain that the implementation of these general measures will require longer-term activity with the possibility of encountering numerous obstacles. In our opinion a realistic assumption for the effective implementation of general measures by an intervention in the procedural sense is in the sense of adopting binding instruction on the model of the Instruction on cooperation of prosecu-

tors and police officers which will be applied in the whole of BH. The present Instructions would also apply to all other subjects authorized to initiate misdemeanour proceedings (the Administration for Indirect Taxation, tax administrations, inspectorates, inspection services, municipal police, government agencies…),

Only such a synergistic action of subjects on all levels makes the efficient implementation of the obligations imposed by the jugment *Muslija v. Bosnia and Herzegovina* possible as well as avoidance of breaching the *ne bis in idem* principle, which happen in cases of simultaneous or subsequent initiation and carrying out criminal and misdemeanour proceedings for the actions based on the same facts. However, such instructions should have a temporal character with as short-term application as possible because the matter of differentiation of misdemeanours and criminal offenses in each particular case is left in the jurisdiction of the assigned prosecutor and member of the law enforcement agency, which does not guarantee that in identical situations all citizens will be treated equally. Therefore, it is necessary to adopt measures of a permanent nature, and by that we mean interoperable operation of representatives of different levels of legislative, executive and judicial authorities of Bosnia and Herzegovina and arrangement of the legislative frame in the form of amendments of the legal description of misdemeanours and their clear distinction and harmonization with criminal offences.

REFERENCES

1. Ivicevic-Karas, E., *Regarding judgment of ECtHR in case Maresti v Croatia - Analysis of possible influence on reform of misdemeanor law in Republic of Croatia,* The Third specialists European Criminal Law and General Principles of Union Law, 2009, pages 1 – 18.
2. Mojovic N., *Judicial proceeding in Roman Law,* Banja Luka, 2008.
3. Romac A., *The dictionary of Roman law*, Zagreb, 1975.
4. Sijercic-Colic, H. and others, *The Comment on Criminal Proceeding Act,* Sarajevo, 2005.
5. Vervaele, J.A., *European Criminal Law and General Principles of Union Law*, Croatian Annual of Criminal Law and Practice, Vol 12, 2/2005.
6. Zupančić, B., *Ne bis in idem (the ban on re-trial for the same offense) la belle dame sans mersi,* Crimen: criminal science magazine, year 2 No. 2, Belgrade, 2011.

UDC: 343.9.02

FORMS OF ORGANIZING OF CRIMINAL ASSOCIATIONS

Zeljko Nincic, PhD[1]
Ministry of the Interior of the Republic of Serbia

Abstract: Driven by different motives people in criminal environment are connecting in different units, in that way combining their individual features and directing them to exercise criminal offenses. Actions of such groups, united in joint criminal venture, if certain conditions are fulfilled, are complicity. However, forms of organizing of such associations are not the same, as it may be concluded at first glance. Depending on the connection method, organizational structure, mutual (hierarchical) relationships, there are different modalities of their organizing. In theory and in practice the most mentioned are conspiracy (complot), gang, group, criminal crowd and criminal sect as forms of organizing of criminal associations. Each of the aforementioned forms has certain specifics by which it stands out, such as program, resources that are used, work methods, etc.

In that sense, this paper the conditions that have to be met in order for criminal association to exist have been presented. The necessity of a criminal plan is underlying, as well as the execution of one or more criminal offenses and the existence of intent. Particularly emphasized are specifics of certain forms of organizing criminal associations, and indicates their relationship.

Key words: crime, criminal association, criminal plan, premeditation

INTRODUCTION

A criminal offense is a human's action that is treated by law as a criminal offense and is unlawful and wrongful. It can be committed by one person or it can be a joint operation of several persons. Usually it is a one person operation, but if it represents a result of a joint operation, then, under specific circumstances, there is complicity. Complicity is a special form of committing a criminal offense, but it is also a special form of criminality. It is, in fact, collective criminality, for it represents a sum of criminal energy of several persons during the realization of a criminal offense. This characteristic makes complicity more severe and more dangerous form of criminality. Complicity requires certain conditions:[2]

- it is necessary that larger number of persons took part in the committing of a criminal offense, and their activities must be connected so that they lead to the same goal – the prohibited consequence and

- all accomplices must be aware of the fact that their mutual activity contributes to the prohibited consequence – committing a criminal offense.

This means that complicity, in its general meaning, represents participation of several persons in the commission of a specific criminal offense, but this is only a premise for complicity,

1 E-mail: zeljko.nincic@mup.gov.rs.
2 Нешић, Љ.: *Кривично право*, ВШУП, Београд, 1996, стр. 45–50.

as one cannot talk about this institution unless two or more persons participate in the commission of a criminal offense. It is also necessary to fulfill several other requirements, which all come down to the existence of a certain tie, an "attachment point", which unites actions of several persons – accomplices into one mutual act.[3] In this respect, complicity in the narrow sense should be distinguished from complicity in the wider sense. According to the contribution activities carried out for the sake of the occurrence of the consequence – committing a criminal offense, complicity in the wider sense is divided into the following groups: the activity which means the action of committing a criminal offense is called perpetration, the activity which doesn't mean the action of committing a criminal offense is called complicity in the narrow sense. This activity can occur as encouragement, aiding and organizing a criminal association. A criminal offense performed by several persons, whereby some of them perform the action of committing a criminal offense while others encourage, aid or organize, represents the joint act of all participants.[4] The only form of complicity which requires a criminal organization is organizing criminal associations. Complicity is different from organized criminality and their relationship cannot be seen generally, but individually in respect of each type of complicity.[5]

The term "cooperation" appeared for the first time in "The Saxon Mirror", the most famous written legal document from 13th century. In this legal document not only was the term "cooperation" used, but it was also defined as assisting or advising the perpetrators of theft or robbery. In this document identically equal punishment was provided for thieves and robbers, people who hid them as well as for all those who provided them with cooperation in the form of assistance or advice.[6]

In the older legislation, complicity was being looked upon only as encouragement and aiding, while joint perpetration was considered to be perpetration itself. However, modern theory of criminal law and modern legislation treat organization of criminal associations as a form of complicity and joint perpetration as perpetration itself, but there is a difference between complicity that includes joint perpetration and complicity that includes encouragement, aiding and organizing criminal associations. The first law that closely regulates the matter of complicity as a special institute of criminal law is The French Penal Code of 1791, in the chapter entitled "On accomplices in the crimes".

CONDITIONS OF CRIMINAL ASSOCIATION'S EXISTENCE

Organizing criminal associations, as a special form of complicity, is conditioned by the existence of specified elements, or the fulfillment of specified conditions. These are the special conditions arising from the specific essence of organizing criminal association in relation to other forms of complicity. For existence of criminal associations, it is necessary that the following conditions are met[7]:

- The creation of new or exploitation of an already existing, association to commit criminal acts;

- The existence of the criminal plan;

3 Шкулић, М.: *Организовани криминалитет, појам и кривичнопроцесни аспекти*, Београд, 2003, стр. 113–122.
4 Чејовић, Б.: *Кривично право – општи део*, Службени лист СРЈ, Београд, 2002, стр. 359–362.
5 Бошковић, М.: Облици организованог криминалитета у нашем кривичном законодавству, *Безбедност*, Београд, број 3, 2003, стр. 14.
6 Јовић, М.: *Кривично право – општи део*, Београд, 2008, стр. 291–316.
7 Петровић, Д.: *Организовање злочиначких удружења,* Српско удружење за кривично право, Београд, 1996, стр. 135.

- One or more crimes committed and
- Organizing criminal associations is committed with intent.

It is, however, necessary to make the difference between the criminal association and agreement to commit a crime. Criminal association needs to be created, or to be its member, with the aim of committing crime. In agreement to commit a crime, the requirement for the crime is that the agreement is related to the specific crime. In criminal association, the condition for the crime is that criminal association is not related to the commission of some specific crime, but any crime. This means that criminal association is formed not only to commit specific crime, but is created for unspecific crime commission. This practically means that the criminal association is more durable than the agreement to commit a crime. The crime is committed by organizing a group of persons, or their affiliation to such a group. If, in the context of criminal association, it comes to the actual commission of a crime, the perpetrators will not be responsible only for commission of that crime, but for affiliation to criminal association which is crime by itself.[8]

Creating a new or exploit existing association to commit criminal acts. The criminal associations are formed under special conditions, or under unusual circumstances. They are formed to operate in illegal conditions, away from the "eyes" of the public. This means that the organizer of a criminal association formed an association that is preparing to operate in conditions of strict secrecy, which is the main difference in relation to each other, legally permitted association.

The creation of criminal associations implies taking action, such as finding a person for a criminal action, linking them with each other or with the organizer and directing them to commit crimes under mutual agreement, or planned the organizers.[9] After that comes concrete negotiation for the joint commission of crime, including the precise definition of the objectives and policies of criminal association. This is usually done by one of the persons who is affiliated to criminal association presents his plan of crime commission, which is accepted in full or with certain amendments by others. So, the agreement between the number of persons about the criminal activity is the moment of creating the criminal association. For the existence of a criminal association it is essential that we talk about individuals who have gathered for the commission of crimes, with the existence of a prior agreement or arrangement on the execution one or more crimes.

A very important issue is a form of agreement between the members of a criminal association. There are two equally important forms of this agreement known in criminal law doctrine, the explicit agreement and an agreement of implicit actions[10]. Explicit agreement is the most obvious proof that the will of the consensus is reached among members, about mutual crime commission in accordance with the criminal plan. The second case is more complicated. In practice, considered that the communication with the purpose of the formation of a certain criminal association, can only be achieved by agreeing on the express, or to communicate through implicit action (tacit communication) should not be given a greater significance. This tacit understanding, actions or conduct, must be understandable and clear to all participants. It is feasible and possible between persons with special, specific features (experienced persons, those who have already engaged in criminal activities, people who have already been convicted and the like). In practice, this method of forming criminal associations is rare, for example, when it comes to a criminal group, which is formed for the execution of a specific crime, and since it is realized, criminal association ceases to exist.

8 Чејовић, Б.: *Кривично право*, Досије, Београд, 2007, стр. 602–603.
9 Јовановић, Љ., Јовашевић, Д.: *Кривично право – општи део*, Полицијска академија, Београд, 2003, стр. 237.
10 Авакумовић, Ј.: *Саучешће*, Београд, 1985, стр. 81.

When speaking of the organizing criminal associations, very important issue is determining the exact number of persons whose participation is required at the time of the creation of a criminal association. Associating persons in a criminal association comes under the agreement. The agreement "associates" a series of individual characteristics of persons who are part of the criminal association, consolidates them and determines the place each of them in the criminal associations system. Criminal association unites individual criminal energy of its members. Its existence requires an agreement by several persons, or two persons at least. One person cannot form a criminal association, as the requirement for the creation is the agreement on criminal activity, and agreement can be made between at least two persons. One person cannot make agreement with themselves. However, theoretical opinions in terms of "several persons", as a condition for organizing criminal associations, are different. Mainly based on differences or inaccurate interpretations of the category "two faces" (whether that was a reference to the organizer and another person, or organizer and at least two faces), but many authors make a distinction in relation to the form of criminal association.

The question of the number of members of criminal organizations, regardless of the different opinions, conditioned by many circumstances that affect the functioning of criminal associations, and most types and extent of criminal activity which should be committed by criminal association, the size of the territory covered by the criminal association, available resources, capabilities and skills of persons who will be included criminal association and the like.[11]

When creating a criminal association, it is always about the new association, an association which has not existed before. Before that, there were only mutually unrelated persons in the sense of an association, which are gathered by the organizer of the association by different methods of influence and whose activity is directed towards the commission of offenses. This is a new creation, resulting from a number of persons of different physical, intellectual, professional and other skills, who are driven by different interests, consolidated by their affinity to a criminal association.

Exploitation of the existing criminal association is considered as the action of organizing. The term "exploitation" of the association, means undertaking the same activities by organizer as in the creation of a criminal association. Exploiting existing association means diverting members of the association towards achieving the criminal plan. The difference is that an association already exists and it has already been created by another person, not as a conceptual organizer holder of organized criminal activity.[12]

The existence of the criminal plan. Another important condition for the existence of a criminal association, as a form of complicity, is the existence of the criminal plan. It is the starting point for the activities of the criminal association. It refers to crimes that criminal association or its members should commit. It can be in the form of a written document or verbal agreement between the members of a criminal association. Depending on the type of crimes involved by the criminal plan, we can judge the objectives and nature of the criminal organizations. Criminal plan represents a synthesis of the criminal activities of the association and it should define and develop the goals for which it has been formed a criminal association. When creating a criminal plan, the organizer of the criminal association plays a key role.[13]

Criminal acts covered by the plan are those crimes that were directly mentioned in the criminal plan, crimes for which association was created. Criminal acts from the criminal plan

11 Јовановић, Ж.: Организовање злочиначких удружења као посебан облик саучесништва (докторска дисертација), *Правни факултет*, Београд, 1961.
12 Јовановић, Љ., Јовашевић, Д.: *Кривично право – општи део*, Полицијска академија, Београд, 2003, стр. 237.
13 Перовић, К.: *Организовање злочиначких удружења као посебан облик саучесништва и као самостално кривично дело*, Никшић, 1990, стр. 40.

are crimes which are not directly mentioned in the criminal plan, but their character makes objective connection with the offenses covered by the criminal plan.[14] Criminal plan, therefore, includes offenses whose execution directly address the goals, but also criminal offenses arising from a criminal plan to achieve all the set objectives, whose realization for criminal association and formed. Although criminal plan includes the possibility to perform numerous crimes, it does not mean that the members of the criminal association have no boundaries. Criminal plan cannot be related to any crime, but only to the crimes which are objectives of criminal association and vice versa. Crime which is not related to criminal objectives cannot be considered as a part of criminal plan.

The commission of one crime or more crimes. The third element, essential for the existence of a criminal association as a form of complicity, is the commission of at least one crime, or attempted crime, which is provided by criminal plan. The generally accepted view is that responsibility and punishment of accomplices can be best regulated if so dependent on something that should be on the side of the perpetrator - the existence of a criminal offense. Some authors claim that the action accomplice in itself does not contain any constituent element of the offense, it is criminal only because of its tendency, at its end, and cannot be penalized as a special felony.[15] This emphasizes the complicity as the joint participation of all stakeholders in the realization of someone else's crime, in which the legal work will be realized by another person as the perpetrator, or the outcome of the main criminal offender. Culpability accomplices carried out only from criminality committed criminal acts or acts of complicity may become criminally punishable solely in connection with the actions of the offender.[16]

Any offense covered by criminal plan, and executed by a member of a criminal association, is a joint work of the organizer and a member of a criminal association, the perpetrator. It is a criminal act that occurs as a result of joint actions and relations as well as the organizers and accomplices of members as the direct perpetrators of committed or attempted crime, covered by criminal plan or arising from the criminal plan, and thus the orientation of these persons to commit the offense, which is reflected in the action organization. Connection between the organizers of criminal association and the direct perpetrators, members of a criminal association, its contribution to the criminal act that the crime was committed or attempted (provided that the case of offenses covered by the criminal plan or stemmed from the criminal plan) make sufficient reason to justify criminality organizers of criminal associations as an accomplice. The social danger of the act itself of organizing such conscious and volitional action associated with the operation of the direct perpetrator of the offense (a member of a criminal association), and aimed at the violation of the protected object, and the fact that the union resulting from the crime (punishable attempt or preparation) that is included criminal plan or stemmed from the criminal plan is sufficient basis for the punishment of organizers of criminal associations.[17]

The existence of intent. This condition can be self-assumed, because it is difficult to imagine a situation where one person creates or exploits criminal association, then to participate in decision-criminal association's plan which envisages the exercise of one or more criminal offenses, and that during that time with him or her there was intent in relation to those activities.[18]

In order to have intent as a form of culpability, the existence of two elements is necessary: awareness and volition. However, often, with these elements occur also some other character-

14 Перовић, М.: *Кривично право СФРЈ–општи део*, Титоград, 1986, стр. 257.
15 Bačić, F.: *Krivično pravo – opšti dio*, Zagreb, 1978, стр. 338.
16 Трајнин, А.Н.: *Учење о саучесништву*, Архив за правне и друштвене науке, Београд, 1949, стр. 103..
17 Петровић, Д.: *Организовање злочиначких удружења,* Српско удружење за кривично право, Београд, 1996, стр. 198.
18 Чејовић, Б.: *Кривично право – општи део*, Службени лист СРЈ, Београд, 2002, стр.394.

istics of a subjective nature, such as the intention in which the offense was committed, the aim of which is managed by the perpetrator and motives, and initiatives that have been launched by the offender to commit an offense. As a rule, for the existence of intent it is sufficient that there be established the existence of consciousness and desires with the offender. No other characteristic is necessary for the existence of intent. In such a case there is a direct intent. Intent exists when there is awareness about the crime, no desires of this crime and agreeing with it. Then it comes to the eventual intent.[19]

The organizer of criminal association does not need to know who the direct executer of the crime is, nor must he or she know the other participants in the crime, as he or she must know not all members of a criminal association, but the intent of the organizers is not relevant knowledge of the direct perpetrator nor awareness of the concrete form of the crime. Of importance is the awareness that the association is working towards achieving the goal which has created or used the association or the organizer of guilt is the consciousness of the importance that the criminal plan included a criminal offense and will be made a member of a criminal association.

FORMS OF ORGANIZING CRIMINAL ASSOCIATIONS

The complexity and great diversity of organizing criminal associations depend on the way of connecting the members of the criminal association. In theory and in in practice, the most common forms of organizing criminal associations are conspiracy (complot), gang, group, criminal crowd and criminal sect, as the forms of organizing criminal associations. They are different for theirs programs as well as for their means, methods of work etc.

Conspiracy (complot). In legal literature, trying to formulate criteria reliable enough, necessary for the existence of this form of criminal association, the authors propose different solutions, both in terms of the conceptual definition of conspiracy and in terms of the ways of punishing individual participants, given the specific situation in which participants in the conspiracy can be found.

Feuerbach thinks that "complot is an association of several persons, formed for the sake of joint commission of one or more than one specific crime by mutual, often explicit promise of mutual assistance." From this definition of complot, Suc came to four conclusions, which are: in complot the participants of the complot mutually instigate each other; each participant can be considered a joint perpetrator; each participant is equally guilty for the planned criminal offense and is punished by law; complot is different from the agreement between the instigator and the perpetrator. Theoretically universal definition of complot defines complot as an agreement of several persons for joint commission of one or more than one specific crimes.[20]

Complot means an agreement of several (at least two) persons to joint commission of specific criminal offenses or specific criminal offense. The agreement itself is considered an attempt of a criminal offense, whose commission is agreed, and the participants of complot are by agreement considered mutual instigators and on that basis those who did not take part in the crime execution are also punished as joint perpetrators. [21]

The conspiracy exists when organizing is done with the purpose of committing criminal offenses against constitutional order and safety, that is, of committing political crimes, and complot exists when organizing is done with the purpose of committing criminal offenses

19 Јовановић, Љ.: *Кривично право – општи део*, Београд, 1978, стр. 195.
20 Јовановић, Ж.: Организовање злочиначких удружења као посебан облик саучесништва (докторска дисертација), *Правни факултет*, Београд, 1961, стр. 38–39.
21 Живановић, Т.: *Кривично право – општи део*, II књига, Београд, 1937, стр. 189.

that are the so-called "*general criminality*".[22] That is the most organized and socially most dangerous group of people who unite for accomplishing mutual criminal goals, first of all committing political criminal offenses. The main characteristic of conspiracy is conspiracy (secrecy) in its work.[23] Most frequently it is formed on the basis of the same or similar conceptual, political, religious or other beliefs. The level of secrecy is higher when it comes to conspiracy in comparison to other forms of criminal associations. The conspiracy has a temporary character and is canceled when the goal for which it is formed is achieved.[24] It is an agreement between two or more persons to commission of a specific criminal offense or specific criminal offenses (by the place and object).[25]

Complot is consisted of agreement to commission of criminal offenses mentioned in law or commission of just one such criminal offense. Actually, this kind of complot is called a complot of more severe nature. In the same time, a punishment is also predicted for the participation expressed in the form of so called agreement or complot of less severe nature. The characteristics of this kind of complot are that the agreement was made to commit a specific criminal offense and that it is made by several persons (at least three).[26] The main trait of a complot is the association or agreement with another person to commit a specific crime. Two persons are sufficient for the existence of the agreement. [27]

The main condition for the existence of complot, according to many theorists, is mutual promise of assistance. This means that each participant's decision is conditioned by agreed expectance of assistance and collaboration of all other. Even though the organizer of a complot first came up with the idea of committing a criminal offense, and then the others joined in at different times, the promise of a mutual participation and assistance is what determines each participant to a criminal intent and without which none of them can perform the work because otherwise they would not care to find accomplices. Uniting makes them all one subject of a criminal offense, so it doesn't matter in which way each individual participates, whether by acting or by failing to act, by previous or subsequent action, the main or secondary activities.

Criminal liability of the complot participants is also treated differently. There is a difference between the complot after which the crime was committed and the sole planning of the crime. In the first case, the distinction lies in whether the planned criminal offense has been committed or not, whether the exact prohibited consequence which was the subject of the agreement was realized or not, and whether the participant behaved the way it was planned or not. Considering that the participants of the complot are considered joint perpetrators, they must be punished as the perpetrators of the crime themselves, but the dilemma whether they should be all punished by the same penalty remains. The fact that a certain participant remains passive in committing the planned crime must be reflected on his criminal liability, so that the penalty is applied to him as well as for the attempted criminal offense. If the criminal liability of the participants should be more accurately determined, it would be important whether the participant that remained passive made a statement that he was withdrawing from the agreed or said nothing, and did not state to participate in its execution. [28]

---

22 Јовановић, Љ., Јовашевић, Д.: *Кривично право – општи део*, Полицијска академија, Београд, 2003, стр. 238.
23 Перовић, М.: *Кривично право СФРЈ–општи део*, Титоград, 1986, стр. 256.
24 Лазаревић, Љ.: *Кривично право – посебан део*, Савремена администрација, Београд, 1983, стр. 38.
25 Šeparović, Z.: *Kriminologija i socijalna patologija*, Poslovna Politika, Zagreb, 1987, стр. 224.
26 Чубински, М.: *Научни и практични коментар Кривичног законика Краљевине Југославије*, Београд, 1934, стр. 161.
27 Таховић, Ј.: *Кривично право – општи део*, Београд, 1961, стр. 90.
28 Петровић, Д.: *Организовање злочиначких удружења,* Српско удружење за кривично право, Београд, 1996, стр. 163.

In the first case, the participant of the complot shouldn't be punished, and in the second case it is necessary to distinguish whether the withdrawal was done implicitly or explicitly, in a specific form. Accordingly, an alternative option of prescribing impunity is provided, or the possibility of prescribing a punishment as the one for the attempt or the full penalty prescribed for that offense.[29]

Gang. Many debates on the true meaning of the concept of the band are being led in the literature. A significant number of authors are prone to identify complot with a band, for their mutual characteristics. Among these authors is Feuerbach, who defines band as a form of complot: "Complot is called a gang if its purpose is committing individually still unspecific crimes of one kind or more kinds." Gibb and Berner are of an opposing opinion - they don't consider gang a kind of a complot and emphasize that the difference between these concepts is large, insurmountable and that it is not expressed only in the way of the occurrence of these concepts, but also in the degree of social danger, the type and amount of damage caused. Also, Berner believes that the question of the number of members is totally irrelevant for the creation and existence of gangs. [30]

Gang (troop, family, yawl) is, besides conspiracy, a typical criminal association founded with the purpose of committing criminal offenses which are not individually determined beforehand.[31] It is an association of larger number of persons that are mutually connected for engaging in criminal activity. Social milieu on which a gang is formed is characterized by exceptional organization (organizing activities planned with absolute division of labor), permanent association a number of persons and hierarchical organizational structure. According to the level of organization it is similar to the conspiracy and features a high level of interconnectedness between the members and their total subordination to the gang boss.[32] It is an association of at least three or more persons for committing criminal offenses. Organizationally it is, as a rule, firmly connected and its members know each other. A gang acts together, which does not exclude the possibility that the objectives for which it was organized can be achieved through small groups or individual members. Gang members can be gathered together for a long time, but it is more often the case that the gang assembles only when the crime should be committed, and in the meantime its members perform regular activities.[33]

The aim of organizing gangs is most often committing property crimes, and rarely committing political crimes. Gang is not characterized by strict conspiracy, but by more permanent character of the organization and strict hierarchy.[34] It is more permanent and to a greater extent organized association of persons (three or more) connected for joint perpetration of greater criminal activity.[35]

Gang members live and work by the mutual rules of conduct. Gang has its own system of norms and sanctions, typical for anti-social subculture. It is a micro-structural community that opposes society.[36] These rules are an integral part of the mechanism by which a gang exists. In everyday life, we often find cases where members of the gang, in its organization or the construction of internal organization, mimic the legal systems and their internal structure.

29 *Ibid.*
30 Јовановић, Ж.: Организовање злочиначких удружења као посебан облик саучесништва (докторска дисертација), *Правни факултет*, Београд, 1961, стр. 44.
31 Таховић, Ј.: *Кривично право – општи део*, Београд, 1961, стр. 416.
32 Перовић, М.: *Кривично право СФРЈ–општи део*, Титоград, 1986, стр. 257.
33 Лазаревић, Љ.: *Кривично право – посебан део*, Савремена администрација, Београд, 1983, стр. 38.
34 Јовановић, Љ., Јовашевић, Д.: *Кривично право – општи део*, Полицијска академија, Београд, 2003, стр. 239.
35 Šeparović, Z.: *Kriminologija i socijalna patologija*, Poslovna Politika, Zagreb, 1987, стр. 224.
36 Водинелић, В.: Криминалитет са мрежном структуром и организовани криминалитет профита, *Безбедност*, МУП РС, Београд, број 1,1992, стр. 13.

Punishment of the gangs is considered when a crime is not committed. For this case it is necessary to pay attention to four different points of view. The first implies that the creation of gang itself and accessing it is the unfinished attempt to perform the most severe planned act. According to another view, the very act of creation of a gang or becoming a gang member is considered as an attempt of committing an average crime planned by the gang. According to the third view, the creation of gangs is a preparatory act which is not punishable. The fourth point of view considers the formation of gangs and accessing it as a separate criminal offense.[37]

When it comes to organizing and participating in gang activity, special attention should be paid to the punishment of the gang members. There are two cases - culpability in case of withdrawal from the commission of the offense and culpability in case when the criminal offense, provided by the criminal plan, is executed. In the first case, there are two situations. First, when all gang members withdraw from the commission of the crime, planned by the gang, and second, when only some members of the gang withdraw. In the first case, according to earlier beliefs, there is impunity for the participants in the gang. However, the question is how to proceed if only one part of the members withdraw from the commission of the crime? In this context, it is impossible to determine an unprecedented criminal justice regime, without value assessment of the behavior of each individual member of the gang. In such value assessment, it is necessary to make a distinction between ordinary members and an instigator, or a leader. Culpability for gang members appears if they have promptly announced their decision on withdrawal to other members of the gang, including leading figures in the gang. For others, the instigators and leaders of the gang, there is only a mitigation of punishment, but at the same time there is room for impunity, provided they submit an application of the gang to the authorities, and do everything in their power to persuade and deter other members from the realization of criminal intent. Another case, related to the problem of punishment, is the punishment in the case of the offense. In that case there is a difference between direct perpetrators and those who are not directly involved in the crime. The first ones are charged with actual committing of the offense and attempt of the most severe offense. There are differences among the authors in regard of punishing others. Some argue that they cannot be charged with a criminal offense, while others advocate the notion according to which the gang leaders should be punished for the attempt or even for helping.[38]

The role of the leader of the gang also leads to different interpretations, especially when it comes to his culpability. Some believe that leaders must be held accountable for all the crimes of gang members, which were committed at his order, or which gang members committed in a criminal action in which they were sent on. However, for those crimes that have not been committed at his order, but are the result of incitement by the other members of the gang, a gang leader could not be called to criminal responsibility.

Group. By group is meant "any association to commit crimes implied in legal regulation that does not appear as a conspiracy or as a gang. This group of persons, first of all, can mean uniting three or more persons for the execution of the specified crimes, which has no character of gangs". Furthermore, "group members, however, are not members in terms of gang members, but rather individuals who are linked only by joint task of their prosecution."[39] The level of organization of the group is smaller than that of conspiracy and gang. There is no leader to represent an absolute authority, so there is generally equality among members.[40] For the group

37 Петровић, Д.: *Организовање злочиначких удружења,* Српско удружење за кривично право, Београд, 1996, стр. 170.
38 Јовановић, Ж.: Организовање злочиначких удружења као посебан облик саучесништва (докторска дисертација), *Правни факултет*, Београд, 1961, стр. 45.
39 Таховић, Ј.: *Коментар кривичног законика*, Београд, 1957, стр. 248.
40 Милошевић, М.: *Организовани криминал, збирка прописа с уводним напоменама*, Београд, 2003, стр. 14.

as an organized community, it is sufficient organization, which by nature is a necessity in every joint action of more people, which is reflected in a certain division of labor, and the division of tasks in the context of this joint action and coordination of joint activities.[41]

By group should be meant a larger number of people (at least three but some say five) related to the criminal purpose. This does not mean that the group is not a permanent association. There is a constant connection between group members, but they usually act only *ad hoc*, as given chance to realize criminal purpose.[42] This is a collective of people (at least three specific) without any major organization, connected with the goal to perform a criminal activity, or to commit crimes that have not been concretized.[43] Although there is a consensus in the group to commit crimes, association members of the group is not as solid and enduring as in conspiracy or gang. The group may also occur spontaneously, and be directed after that, while the creation of conspiracy or gang as a rule, preceded by appropriate organizational arrangements. A conspiracy or gang are mostly generated to commit more crimes, while the gang is usually a one-time agreement to commit a crime.[44]

This is a very incoherent group of people of different ages, occupations and gender, which has committed one crime or many crimes caused by some external factor, influenced by sudden fury committed one or more offenses, but later dispersed as if nothing had happened.[45] It is made up of at least three persons connected for permanent or temporary commission of crimes. It does not have to have defined roles for its members, continuity of its membership or a developed structure.[46]

Group as a form of criminal association, regarding that each criminal association presupposes a certain necessary connection, requires the existence of a certain level of organization. Group does not require a higher degree of the organization, but also that, even the lowest level of organization, must manifest itself at least in the division of labor and tasks between group members, for the successful realization of the joint venture, and the realization of the group goal, and that is crime commission. Such organized criminal groups may have different structure strength. Organization of the group can be smaller and bigger. Smaller, in relation to a gang and bigger in relation to the criminal crowd. However, regardless of temporary character, the group can sometimes grow into the gang, too, as a stronger and more durable criminal structure.

Criminal crowd. Criminal crowd is a specific amorphous mass of people, accidently locally and mentally related, which commits one crime, or many crimes, under the influence of an unexpected event and due to the excitement or under the influence of suggestion. Criminal crowd is not an organized association of several persons gathered by common criminal purpose. Unlike the members of the conspiracy or gang, who have entered the association and with acceptance of the plan decided in advance to commit crimes, the group participants approach the commission of one or more crimes under the influence of excitement and passion that has the character of a collective induced psychosis.[47]

In principle, it is a psycho-social phenomenon, the complex of behavior of heterogeneous and unorganized crime family in which operates a specific socio-psychological law. Participant of criminal crowd is sometimes forced to adapt to this kind of criminal acting of the criminal crowd. In the criminal crowd, a symbiosis of personal and collective destructive na-

41 Златарић, Б.: *Напомене о саучесништву у новом кривичном законику*, Београд, 1951, стр. 123.
42 Атанацковић, Д.: Кривично право – посебан део, Београд, 1985.
43 Šeparović, Z.: *Kriminologija i socijalna patologija*, Poslovna Politika, Zagreb, 1987, стр. 224.
44 Лазаревић, Љ.: *Кривично право – посебан део*, Савремена администрација, Београд, 1983, стр. 38.
45 Перовић, М.: *Кривично право СФРЈ–општи део*, Титоград, 1986, стр. 257.
46 Član 112 Krivičnog zakonika Republike Srbije, „Službeni glasnik RS“ br. 85/2005, 88/2005 – ispr. 107/2005 – ispr., 72/2009, 111/2009, 121/2012, 104/2013 i 108/2014).
47 Атанацковић, Д.: *Кривично право – посебан део*, Београд, 1985, стр. 536.

ture is accomplished. Especially dangerous are individuals whose personality is not yet strong enough, that can eventually become active participants, starting as ordinary observers. The crime of the crowd, as a rule, is not a reflection of some of its members, but the psychology of the crowd itself, which actually reflects its exceptional danger.

Although, criminal crowed is characterized by a disorganization, there is a difference between people who manage criminal crowd (leader) and other members of the criminal crowd. A special role in the criminal group is played by the leader, which spontaneously emerged as a leader, using the psychosis of the crowd. On the other hand, on the psychological interaction with the crowd, and often affected himself by the psychosis, leader directs and enhances the destructive effect of the crowd. This is a person who claims himself at the head of the crowd, or a person whose influence and example led and managed the crowd in the realization of its actions. As opposed to the leader, there are those who follow him, and who can be active or passive. Active members participate in all activities of the crowd, while a passive do nothing, they are only present. Further, in case of passive members of criminal activities there are those who approve of the activities of the criminal crowd and those who are just observers.[48]

In the case of the crime commission, general provisions on criminal responsibility, or the general rules of the commission and participation are applied to the responsibility of the persons who are directly involved in its commission, due to the fact that certain members of the criminal activities appear in the role of a co-perpetrator, a second in the role of accomplices, instigators and assistant. However, in the case of criminal crowd, we cannot talk about a real co-perpetrating, or of complicity in the true sense of the word. In terms of this general principle, other participants of the criminal crowd are responsible only for participation in a criminal crowd.

Criminal sect. Criminal sect is a collection of entities related to certain religious or political, deviant conviction, as regulated association for the implementation of this conviction, which perform or just expression as socially deviant, incriminate them into conflict with the legal order.[49] Members of the sect do not commit crimes under the influence of passion and mass suggestion, but consciously, because of their loyalty to the religious views or political ideas.[50] Criminal sect is located between the conspiracy and the gang, on the one hand, and criminal crowd, on the other.[51]

Religious and political ideas, for many become the lifestyle and the driving force behind some of their actions. This convictions, which are hidden and suppressed, are bordering with fanaticism, deeply rooted in the tradition and dogmatic views of the world, with the extravagant, sometimes terribly cruel and brutal political ideas. Members of the criminal sect and members of certain religious sects, such as the Nazarenes, Jehovah's Witnesses, Adventists, and others who commit crimes for religious reasons, but also members of certain political groups, who commits crimes for their political motives, thereby conscious to the loyalty of the character of their ideas.

48 Šeparović, Z.: *Kriminologija i socijalna patologija*, Poslovna Politika, Zagreb, 1987, стр. 225.
49 Живановић, Т.: *Основи кривичног права Краљевине Југославије – општи део*, Београд, 1935, стр. 192.
50 Јовановић, Љ., Јовашевић, Д.: *Кривично право – општи део*, Полицијска академија, Београд, 2003, стр. 239.
51 Петровић, Д.: *Организовање злочиначких удружења,* Српско удружење за кривично право, Београд, 1996, стр. 185.

CONCLUSION

The criminal organization, from its inception, is the diversity of programs, tools and methods in achieving the ultimate goal, and that is organized crime commission. When creating a criminal organization, the members of this association create mutual relations and act as a compact unit, satisfying their individual aspirations and motivation. Mutual action must be joint and lead to the fulfillment of common objectives, which are intended by criminal plan of the association. For this it is necessary to have the appropriate level of organization, which includes the connection of the members of the criminal association. This connection is necessary for the implementation of activities which realize the objectives defined by the criminal plan. Connections between members of a criminal association are not same in all associations. For each such link can be simple and loose, and with other complex and stronger, more stable, because of the stronger mutual relations between the members of the association, there is a strict division of labor and strict discipline. Depending on the degree of organization, is the realization of the criminal enterprise.

This way of organizing and functioning of the different groups of individuals, with the object of committing criminal acts is complicity. It has emerged late as a criminal law remedy, although is mentioned in legal literature in ancient times. However, it does not mean that very different understanding of this phenomenon from the beginning are closer to present. Although the approach to this problem is various, sometimes even contradictory, there is a unique understanding that it represents extremely dangerous social activity, which provokes, some most vital social interests, the emergence whose overcrowding and risk are becoming increasingly important.

REFERENCES

1. Авакумовић, Ј.: *Саучешће*, Београд, 1985.
2. Атанацковић, Д.: *Кривично право – посебан део*, Београд, 1985.
3. Bačić, F.: *Krivično pravo – opšti dio*, Zagreb, 1978.
4. Бошковић, М.: Облици организованог криминалитета у нашем кривичном законодавству, *Безбедност*, Београд, број 3, 2003.
5. Водинелић, В.: Криминалитет са мрежном структуром и организовани криминалитет профита, *Безбедност*, МУП РС, Београд, број 1,1992.
6. Живановић, Т.: *Кривично право – општи део*, II књига, Београд, 1937.
7. Живановић, Т.: *Основи кривичног права Краљевине Југославије – општи део*, Београд, 1935.
8. Златарић, Б.: *Напомене о саучесништву у новом кривичном законику*, Београд, 1951.
9. Јовановић, Ж.: Организовање злочиначких удружења као посебан облик саучесништва (докторска дисертација), *Правни факултет*, Београд, 1961.
10. Јовановић, Љ., Јовашевић, Д.: *Кривично право – општи део*, Полицијска академија, Београд, 2003.
11. Јовановић, Љ.: *Кривично право – општи део*, Београд, 1978.
12. Јовашевић, Д.: Подстрекавање као облик саучесништва у кривичном праву, *Правни зборник*, Удружење правника Црне Горе, Подгорица, бр. 1–2/1999–2000.
13. Јовић, М.: *Кривично право – општи део*, Београд, 2008.
14. Лазаревић, Љ.: *Кривично право – посебан део*, Савремена администрација, Београд, 1983.

15. Милошевић, М.: *Организовани криминал*, *збирка прописа с уводним напоменама*, Београд, 2003.
16. Нешић, Љ.: *Кривично право*, ВШУП, Београд, 1996.
17. Перовић, К.: *Организовање злочиначких удружења као посебан облик саучесништва и као самостално кривично дело*, Никшић, 1990.
18. Перовић, М.: *Кривично право СФРЈ–општи део*, Титоград, 1986.
19. Петровић, Д.: *Организовање злочиначких удружења,* Српско удружење за кривично право, Београд, 1996.
20. Таховић, Ј.: *Коментар кривичног законика*, Београд, 1957.
21. Таховић, Ј.: *Кривично право – општи део*, Београд, 1961.
22. Трајнин, А.Н.: *Учење о саучесништву*, Архив за правне и друштвене науке, Београд, 1949.
23. Чејовић, Б.: *Кривично право – општи део*, Службени лист СРЈ, Београд, 2002.
24. Чејовић, Б.: *Кривично право*, Досије, Београд, 2007.
25. Чубински, М.: *Научни и практични коментар Кривичног законика Краљевине Југославије*, Београд, 1934.
26. Šeparović, Z.: *Kriminologija i socijalna patologija*, Poslovna Politika, Zagreb, 1987.
27. Шкулић, М.: *Организовани криминалитет, појам и кривичнопроцесни аспекти*, Београд, 2003.

UDC: 340.134:343.13(497.11)
351.74/.75(497.11)

REFORMED CRIMINAL PROCEDURAL LEGISLATION AND LEGITIMACY OF SERBIAN POLICE IN EUROPE (DOCTRINE, STATISTICS AND CONSISTENCY)

Dragana Čvorović, LLM[1]
Academy of Criminalistic and Police Studies, Belgrade
Veljko Turanjanin
University of Kragujevac, Faculty of Law

Abstract: Contemporary doctrinal tendencies of consistency at the European level, as well as the convergence of elements from two large criminal procedural systems, as a proven doctrinal explication of achieving the desired efficiency, imply the alleviation of the distinctive elements on both regional and universal levels. One of the indicators of the above fact is the reform of the criminal procedural legislation in Serbia and, accordingly, the changes in police conduct during criminal proceedings, which through realization of legal proclamation, achieve their de facto manifestations, that is, the legitimacy of actions is doctrinally differently specified.

In accordance with the importance of the police action in the reformed criminal procedural legislation of Serbia and its contribution to achieving the key objectives of criminal procedural legislation, it is necessary to make a correlation between the legal framework (legality) and the other side of legitimacy significant for the police as one of the main subjects of the preliminary investigation or preliminary proceedings at the European level.

Accordingly, it is necessary to determine the key determinants of achieving the legitimacy of the police, so the authors of this study will analyze this issue through the following groups of questions: Firstly, the police and the implementation of international standards as a determinant of legitimacy (Introduction); Secondly, the legal norm as a factor in the efficiency of police action and achieving legitimacy; Thirdly, the legitimacy of the police in Europe (statistics and the position of the Republic of Serbia); Fourthly, concluding observations, which should contribute the full and more efficient realization of de facto manifestations of legality in police proceedings.

Key words: legitimacy, police, consistency, doctrine, criminal procedural legislation, Serbia

POLICE AND THE IMPLEMENTATION OF INTERNATIONAL STANDARDS AS A DETERMINANT OF LEGITIMACY

Modern ideology of the police action in the criminal matters often raises the questions of equivalence between legality and legitimacy, the degree of consistency and the significance of the realization of de facto manifestations of legality for the sake of reaching the key value

1 E-mail:dragana.cvorovic@kpa.edu.rs.

elements in contemporary society which exist, not in terms of the principle of legality, but of higher value elements in the political, ethical and philosophical terms. Namely, as opposed to legality, legitimacy assessment is based on extrajudicial, value criteria,[2] which denotes justification in the broadest sense of the word, acceptability of certain institutions and norms, in other words, beliefs of citizens on whether they are justified from the point of view of a value criterion. Aspects of necessity, justification and proportionality are concepts rubber, the ones which the police assess often discretionarily, acting in accordance with the legal standard, but within the limits of the normative framework and international, as well as contemporary determinants of police action, which sets its existence within the international universal level only in the Universal Declaration Of Human Rights[3]. International standards of police procedures[4] set out in international documents, represent conditio sine qua non of the realization of the legitimacy of police action, particularly when taken into consideration from the point of view of binding international documents (EK).

As previoulsy noted, the Universal Declaration of Human Rights of 10 December 1948 definitely stands as a milestone in humanity when it comes to documents that proclaim human rights at the universal level. The principles of it represented the foundation of modern international documents, both in its original form, and through the process of improvement. Although the very process of unification of human rights exercised itself for many years, the result of the work undertaken is the above mentioned international document. The very mentioned ideological items have paved the way to modern constitutionalism, which will, together with the declaration and documents that are yet to be adopted, stand for the basic principles of modern, transparent and democratic society that will not only create a European legal order, but will strive for universal one through its expansion, at least when it comes to the protection of human rights, placing the police as a major player in the implementation of international standards and legitimacy, as well as the value element of modern society. Accordingly, in addition to the already existing ways of revolutionary ways of struggling for the realization of achieving basic rights, the biggest step forward and the biggest turning point in the development of human mankind, which presuppose the existence of a degree of universal and futuristic model of the future development of the modern legal system, is the Universal Declaration of Human Rights of 1948. Tendencies of universality[5] and the strive of providing firm guarantees for the exercise of the fundamental rights of citizens, such as the right to a fair trial, the prohibition of unlawful arrest, that is the right to freedom and security of a person, prohibition of torturing, the right to privacy-are just some of the predicted rights which have been ensured by the adoption of a universal aspect of the Universal Declaration Of Human Rights. Adequate legal order should safeguard a peaceful development of the country within the limits prescribed, the improvement of social life in greater freedom, progress of the value of the human personality and to ensure prosperity not only at the national, but also at international level.[6] Likewise, a high degree of harmonization enables the principles of the rule of law, without which one cannot imagine a modern, democratic country. In order to achieve such a result, especially in the sense of the international, universal aspect, it is necessary to constantly work to improve and harmonize national legislation with the tendencies that are

2 Стојановић, З. Кривично право, Правни факултет, Универзитета у Београду, 2009. год., стр. 41.
3 Усвојена и проглашена резолуцијом Генералне скупштине Уједињених нација 217 А (III) од 10. децембра 1948.год.
4 See: Кесић, Т. Међународни стандарди полицијског поступања у кривичним стварима, докторска дисертација, Крагујевац, 2011 год.
5 See: Lord Leonard Hoffmann, the Universality of Human Rights, 125, Law Quarterly Review 416, (2009).
6 Чворовић, Д., Турањанин, В., " Идеали правичности и реформисано кривично процесно законодавство Републике Србије, У Збор." Четрдесет година од потписивања хелсиншког завршног акта - 40 years since the signing of the Helsinki final act ", Институт за упоредно право и Организација за европску безбедност и сарадњу, Београд, 2015. год., стр. 467- 488

present in comparative competent jurisdictions. The Universal Declaration has made the first, very important step in the field of advanced training and achieving modern achievements that are now reflected in the numerous relevant international documents that proclaim the fundamental human rights. The relevant international documents, previously regulating the issue of human rights, were of a regional character, starting from the firstly mentioned declaration of France, the United States Declaration of Independence[7], the African Charter on Human and Peoples' Rights[8], while taken into consideration from the universal aspect, the Universal Declaration of Human Rights appears to be the first and justifiably takes precedence in the development of human rights at the universal level[9] and achieves legitimacy through the justification and necessity of compliance with international standards, the legitimacy of derogations and limitations as the validity criteria of necessity to protect fundamental rights and freedoms in the contemporary society. Namely, the international standards that are important from the aspect of reaching the desired legitimacy of the police, such as the right to freedom and security of a person, explicit and implicit aspects of a fair trial, the prohibition of torture and inhuman and degrading treatment and punishment, in addition to the necessity of respect, stand as determinants of legitimacy, and set a derogation and limitation of fundamental rights and freedoms, which contain valuable elements needed to protect the key values in a democratic society. If the police respect international standards, implement the values of necessity, necessary in their police conduct, then we can ascertain the legitimacy of police action, or beliefs of the citizens of the de facto implementation of the efficiency of police action.

Deviations from the absolute, in other words-inviolable law that, in addition to its limits of capping restrictive aspects may also predict the restrictions of fundamental rights and freedoms within its scope, under the legally prescribed conditions, which as international standards [10], manifest the key elements of a democratic society, such as legality, necessity in a democratic society as an expression of protection of its basic values (public safety, national security, morality, etc.). The needs imposed by modern trends require an adequate regulatory framework, i.e. the legality of limitations, which in addition to the above should be legitimate as well, i.e. in terms of value estimated to be eligible to undermine the inviolability of fundamental human rights, i.e. that the interests of modern society outweigh the full achievement of human rights. In contrast to the derogation of human rights which requires the existence of exceptional circumstances within the territory of the entire country or produced effect regarding the same facts, the restrictions of fundamental rights and freedoms do not require such restrictive conditions, i.e. the margin of free assessment is wider. However, the margin is sufficiently limited to be legitimately opposed to restrictions of fundamental rights and freedoms.[11] The determinants of implementation of police legitimacy with regard to the limitation of international standards, are proclaimed by the European Convention and Art. 17, Art. 18 and Art. 53, which establish the legitimate border breaching the inviolability of fundamental rights and freedoms. The European Convention Art.

7 American convention on Human Rights, доступна на: http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.pdf

8 African Charter On Human And Peoples' Rights доступна на: http://www.humanrights.se/wp-content/uploads/2012/01/African-Charter-on-Human-and-Peoples-Rights.pdf

9 О историјском аспекту развоја људских права види: Hersch Lauterpacht, International Law and Human Rights, London, Stevens, 1950.

10 Speaking about the possibility of restricting the right to a fair trial, "...the European Court as far back as the 1970s , and held that the right to a fair trial to the extent surpasses other values of a democratic society that in normal social circumstances it cannot be revoked nor why others or legitimate interests (Case , Judgment of 17 January 1970, Series A No. 11, p . 15) " Quoted from: Ђурђић, В., Европски стандарди заштите слобода и права осумњичених и окривљених лица, Збор. `` Кривично законодавство Србије и стандарди Европске Уније``, Српско удружење за кривичноправну теорију и праксу, Златибор, 2010. год., стр. 166.

11 Чворовић, Д. Међународни стандарди дерогације и ограничења права на слободу и безбедност личности, Збор. '' Положај и улога полиције у демократској држави '', Криминалистичко-полицијска академија, 2014. год., стр. 27- 51.

17 proclaims the extent of their limitations, by its explicit provision that prohibits provisions in the Convention to be interpreted in a way that implies the right of countries, groups of individuals or persons to engage in any activity or perform any act aimed at destruction of any of the aforementioned rights and freedoms, or at their limitation to a greater extent than the ones provided by the Convention. The provision in question contains two segments of possible abuse of rights, in particular by cancelling any of these rights or by limiting the access to extensive restrictions, which are clearly determined and which do not allow the deviations from the prescribed limits. The aforementioned explicits of limitations sublime the police as well as the subject of respecting certain limits, as an instrument for the realization of police legitimacy. Furthermore, the provisions of the European Convention, apart from the prohibition of abuse of rights, also set the limits of the use of authorized law or the Articles. 18 implies the limitation of rights and freedoms only for purposes that are prescribed by the Convention. Deviations from the same lead to the violation of Art. 18, although it is usually done by a reference to breach overdraft limits some of the other provisions of the Convention, although Art. 18 has autonomy[12]. Additionally, Art. 53. of the European Convention has proclaimed that no provision of the Convention shall be interpreted as restrictive, or violating human rights and fundamental freedoms which were recognized by the laws of the High Contracting State or by any other agreement to which it is a contracting Party. Accordingly, it is legitimate to raise the national framework of the exercise of fundamental rights and freedoms to a higher level than the one guaranteed by the European Convention.

The police achieve the determinants of international standards listed during their procedure in criminal matters, and to the greatest extent in the realization of criminal procedure, which best reflects police legitimacy.

Despite satisfying the formal grounds, legality also demands the essential justification of determination of the fundamental rights and freedoms, which is manifested through legitimacy, i.e. the equivalence between the restrictions of fundamental rights and freedoms and the need to protect the key values in a democratic society. Accordingly, legitimacy as an international standard in itself sublimates all the existential elements of contemporary society, which from the point of view of the necessity of its protection with the aim of normal functioning, becomes the legitimate reason for restrictions. The elements that sublimate the police legitimacy proclaim the legitimacy of restrictive clauses and most importantly contain the traditional values of a democratic society, with few exceptions. As we have pointed out in the European Convention, the necessity is bound to a democratic society, while in other relevant international instruments it mainly appears as an autonomous element.

In accordance with the abovementioned, we may conclude that the correlation of realization between the implementation of international standards and police legitimacy can be seen best through legitimate restrictions of fundamental rights and freedoms as an international standard, which can be summed up so as to protect national security, public safety, health protection and morality, necessity to conduct criminal proceedings, protection of rights and freedoms of others, etc.

12 Јакшић, А. Европска конвенција о људским правима, Правни факултет, Универзитет у Београду, 2006. год., стр. 359.

THE LEGAL NORM AS A FACTOR IN THE EFFICIENCY OF POLICE ACTION AND THE ACHIEVEMENT OF LEGITIMACY

If we accept the hypothesis that the positive criminal procedural legislation stands in causal connection with the efficiency of the criminal proceedings, i.e. that the only adequate modern criminal procedural legislation is the one in line with the social reality on the efficiency, then the inevitable question arises*:* Is the reformed criminal legislation of Serbia (CPA / 2011),[13] i.e. its legal norm, from the point of view of content and its application, such that it may respond to the challenges of modern society and efficiency of criminal procedure or not? That is, whether the police as one of the subjects reaching the efficiency of criminal proceedings[14], the adequacy of legal norms, achieve legitimacy in contemporary society? If the legitimacy of the doctrinal orientations is seen as efficiency, being manifested in its quantitative and qualitative aspects, then it is certainly a legal norm conditio sine qua non of implementation of international standards or achievements of police legitimacy. Namely, the legitimacy is determined through a system of values, i.e. beliefs of citizens about the justification of certain institution and norm, and it sets its foundation in legal norms, and then in the practical realization, as an instrument for achieving the desired efficiency.[15] The determinants of police legitimacy when it comes to legal norms, should meet the following requirements: First, the quality of the legal norm; Second, its adequate implementation in practice; Third, the exclusion of abuse of rights; Fourth, the correlation between the public prosecutor and the police in preliminary investigation proceedings[16]; Fifth, the realization of time determinants of police action in preliminary proceedings (quantitative aspect of efficiency); Sixth, the respect of international standards of police action (qualitative aspect, the right to a fair trial, the right to freedom and security of person, etc.). Undoubtedly, if a specific legal text corresponds to the current demands of the fight against crime, and if its norms are adequately applied in practice, if the abuse of law is reduced to a minimum number of cases or only in its attempts, and if the police function properly, then we can conclude that the statutory norm, or reformed criminal procedural legislation of Serbia stands as the instrument

13 Види: Бејатовић, С., Тужилачка истрага као обележје рефоми кривичног процесног законодавства земаља региона, Збор." Тужилачка истрага ", Организација за европску безбедност и сарадњу, Београд, 2014. год., стр. 11- 33; Ђурђић, В., Концепцијске странпутице у новом кривичном поступку Србије, Удржење јавних тужилаца и заменика јавних тужилаца Србије, 2014, год., стр. 66- 87; Шкулић, М., Погрешна концепција и бројне правно- техничке новог Законика о кривичном поступку, , Удржење јавних тужилаца и заменика јавних тужилаца Србије, 2014, год., стр. 23- 66

14 See: Bootoms, A., & Tankebe, J. (2012). Beyond procedural justice: A dialogic approach to legitimacy in criminal justice. The Journal of criminal Law and Criminology, 102(1), p. 119- 170; Bradford, B. Murphy, K. & Jackson, J. (2014). Policing, procedural and the (re)production of social identity, British Journal of Criminology, 54 (4), p. 527- 550

15 Види: Бошковић, А., Страначка истрага у српском и италијанском кривичнопроцесном законодавству и ефикасност истражног поступка, Ревија за криминологију и кривично право, Српско удружење за кривичноправну теорију и праксу- Институт за криминолошка и социолошка истраживања, Београд, 2015. год., стр. 89- 111.

16 Бановић, Б., Међусобни однос и компетентност органа предистражног поступка, Ревија за криминологију и кривично право, Српско удружење за кривичноправну теорију и праксу- Институт за криминолошка и социолошка истраживања, Београд, 2015. год., стр. 69- 89; Чворовић, Д., Јавни тужилац и полиција као кључни субјекти предистражне и истражне фазе новог кривичног поступка, Збор.: „Положај и улога полиције у демократској држави", Криминалистичко- полицијска академија, Београд, 2013. год., стр. 111- 139.

of realization of criminal procedure[17] and police legitimacy.[18] The understanding of police legitimacy through the aspects of criminal procedure primarily implies the realization of the criminal policy in general[19], i.e. the policies of combating crime, when the legal norm which proclaims the actions of the police should be effective from the aspect of the inevitability of its application to any person when the legal conditions are met.

The explicitness of police action in accordance with achieving the desired legitimacy through the aspect of criminal procedure were proclaimed by the CPC as follows: First, the duty of police action, when there are grounds for suspicion that a criminal offense which supposed to be processed ex officio, to undertake the necessary measures to find the offender, for the perpetrator or accomplice not to hide or flee, to detect and secure the evidence of a criminal offense and objects which might serve as evidence, and to gather all the information that could be useful for the successful conduct of criminal proceedings (Article. 286 para. 1 of CPC). The above determinants of police procedures imply the quantitative and qualitative aspects of implementation efficiency, with the quantitative aspect as a rubber concept of proclaiming the majority of the actions and measures taken by the police in order to achieve the desired legitimacy. In fact, when it comes to operational measures and actions, the legislator determines that when it comes to taking measures and actions, the police should immediately, and no later than 24 hours after taking, inform the public prosecutor (Art. 286, para. 4 CPA). As opposed to the operating activities, if the police in preliminary investigation proceedings take actions of proving, they shall promptly notify the public prosecutor. We can see only a rubber term, without delay, even though the authority of the police to undertake evidentiary actions should only be observed as a derivative of general police powers (Art . 286 para. 1 of the CPC) , and in that respect, notifying the public prosecutor of proof in action taken within 24 hours [20]. Time determinants are extremely important when it comes to the limitation of international standards, and from the aspect of police legitimacy, the following determinants deserve special attention: Police arrest without delay, and no later than in the period of 8 hours; Retention of 48 hours from the moment of deprivation of liberty, handing in the decision on the detention immediately, and no later than 2 hours from the moment he was told that he was held, as well as the deadlines of six hours and four hours in the case of appeal against the decision on detention and the decision of the court of appeal. Secondly, when it comes to the correlation between the public prosecutor and the police with the aim of implementing international standards, the quantitative aspect is manifested, and the determinants of the order to conduct the investigation immediately and shortly after the first evidentiary action is taken by the public prosecutor and the police in preliminary investigation proceedings, but no later than thirty days after the public prosecutor is informed about the first evidentiary action taken by the police (Art. 296 para. 2 CPC).

The special significance when it comes to the qualitative aspect of effectiveness is realized through the proclamation of importance of non-judicial evidence, which the police, if performed in accordance with the provisions of the CPC may use in the further course of the proceedings and be the factual basis of the judgment, which is particularly evident from the

17 Види: Шкулић, М., Докази и доказни поступак на главном претресу, у Збор. „ Главни претрес и суђење у разумном року ", Организација за европску безбедност и сарадњу, Београд, 2015. год., стр. 193- 218.
18 Види: Бејатовић, С., Суђење у разумном року као међународни правни стандард, у Збор. „Суђење у разумном року и други кривичноправни инструменти адекватности државне реакције на криминалитет", Српско удружење за кривичноправну теорију и праксу, 2015. год., стр. 318.
19 Кесић, Т., Чворовић, Д., „Законодавна казнена политика и концепт истраге", Казнена политика као инструмент државне политике на криминалитет, Министарство правде Републике Српске-Српско удружење за кривичноправну теорију и праксу, Бања Лука, 2014. год., стр. 177- 189
20 Илић, Г., „Предистражни поступак", Приручник за примену Законика о кривичном поступку, Удружење јавних тужилаца и заменика јавних тужилаца Србије, Београд, 2013. год., стр. 227.

aspect of police legitimacy. However, the controversial issue in terms of realizing the ideals of due process, especially implies the equality of parties (equality of arms) and the oral proceedings, which should be realized in the resolution of the criminal procedure model existing in the criminal procedural legislation of the Republic of Serbia(CPA/2011).[21] Furthermore, it is necessary to express the fact of the importance of the legal norm as the factor of efficiency of police action and the achievement of legitimacy at the universal level as well, not only European, since the proclamation of efficiency as the first international standard is implemented through international documents and the implementation of the national borders in most countries. Accordingly, current trends in police proceedings in criminal matters as well as achieving legitimacy are followed and monitored outside the European framework, thus confirming once again the abovementioned premises of correlation of the police and achieving legitimacy at the universal level.[22] In support of these findings, we can mention the representatives of Asia, China[23] and Japan[24], which also pay much attention to the achievement of a fair procedure and criticism when it comes to the trial of the Uno period. Namely, when it comes to Japan, we may point out the problem of the trial within a reasonable time (speedy trial)[25], and as proposals of improving international standards, the scientific community points out the following: increasing the number of judges and prosecutors[26]; enabling the suspect to have a contact with a lawyer before being presented with the indictment[27]; the introduction of 'preparatory procedure' 'to resolve contentious issues between the prosecution and defense as a tool of increasing the efficiency of the criminal proceedings.

Finally, in accordance with the above, it is necessary to conclude that the statutory standards as a factor in the efficiency of police action and achievement do not recognize the legitimacy of the determinants, but through aspects of universal and precise ones, provide adequate policies of combating crime, which, through their practical application, achieve legitimacy.

THE LEGITIMACY OF THE POLICE IN EUROPE (INDICATORS AND STATISTICS OF THE REPUBLIC OF SERBIA)

In addition to the legal standard as a factor in the efficiency of the criminal proceedings, its characteristics should be the necessity of its application to each and every person in the

21 Ђурђић, В., Основна начела кривично процесног права и поједностављене форме поступања у кривичним стварима, Збор.: „Поједностављене форме поступања у кривичним стварима", Организација за европску безбедност и сарадњу, Београд, 2013. год., стр. 62- 63; Бејатовић, С., Главни претрес и његов допринос обезбеђењу суђења у разумном року, Збор. „Главни претрес и суђење у разумном року"', Организација за европску безбедност и сарадњу, Београд, 2015. год., стр. 9- 34; Царић, С., Право на суђење з разумном року у кривичним стварима: Ставови Европског суда за људска права, , Збор. „Главни претрес и суђење у разумном року"', Организација за европску безбедност и сарадњу, Београд, 2015. год., стр. 34- 49.

22 Allen, G.F. 1987. Where are we going in criminal justice? Some insights from Chinese Criminal justice System, International Journal of offender Therapy and Comparative Criminology, pp. 101- 109; Ames, Walter L. (1981). Police and Community in Japan, Berkley; University of California Press; Goodman, Carl F. (2003). The Rule of Law in Japan: A Comparative Analysis. The Hague: Kluwer Law International

23 Fu, H. 1991. Police accountability: The Case of the People's Republic of China. Police Studies 14: 40- 49; Du, X., and Zhang, L. 1990. China's legal system: a general survey, Beijing: New World Press

24 Fenwick, Charles R. (1983b), "Law Enforcement, Public Participation and Crime Control in Japan: Implications for American Policing". American Journal of Police 3: 83- 109

25 Araki, Nobuyoshi (1985), "The Flow of Criminal Cases in the Japanese Criminal Justice System" Crime and Delinquency 31: 601- 629; Dando, Shigemitsu (1965). Japanese Criminal Procedure, tr. B.J. George Jr. South Hackensack, NJ: Fred B. Rothman

26 Ito, Shigeki (1986), "Characteristics and Roles of Japanese Public Prosecutors". Resource Materials No.30, pp. 67- 75, Tokyo: UNAFEL

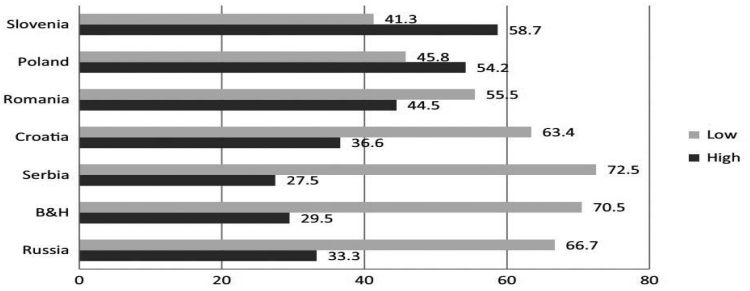
27 George, B.J., Jr (1990), " Rights of the Criminal Accused ", Law and Contemporary Problems 53: 71- 107

case when the legal requirements are met. The conducted research is the best indicator of the hypothesis in question, and the obtained results in Europe indicate the not-so-great position of the Republic of Serbia. The realized survey by students at the Faculties of Law in Europe is extremely important, both in terms of the adequacy of the normative framework in the future as well as future cooperation with the police. Namely, from the viewpoint of the conducted research, special attention was paid to the following aspects of police legitimacy: the legitimacy of the general segment;[28] efficiency; the cooperation between police and prosecutors; procedural justice; moral aspects. Those segments indicate the distinction when it comes to individually observed aspects of research, therefore, it would be in favor of that statement to mention the indicated position of Serbia, which is not exactly representative of the segments of legitimacy [29]and effectiveness[30], while when it comes to cooperation[31] and moral aspect[32], a special procedural justice[33], the results are much better. However, despite the success of Serbia in the above segments, the survey conducted in the countries of Central and Eastern Europe, in terms of legitimacy, indicates a not so good position of Serbia, followed only by BiH and Russia. Accordingly, the reformed criminal procedural legislation of the Republic of Serbia and the new Police Act , are just one of the instruments to improve the realization of de facto manifestations of legality in police procedures .

	Legitimacy	Effectiveness	Cooperation	Procedural justice	Moral credibility
M/SD	*M*/SD	*M*/SD	*M*/SD	*M*/SD	
Slovenia	2.49/0.54	2.55/0.56	3.27/0.60	2.41/0.50	2.09/0.59
Croatia	2.24/0.54	2.36/0.50	3.40/0.58	2.16/0.55	2.07/0.55
B&H	2.25/0.51	2.19/0.50	3.19/0.67	2.16/0.54	2.19/0.61
Serbia	2.24/0.54	2.27/0.52	3.23/0.61	2.61/0.56	2.20/0.55
Romania	2.39/0.51	2.44/0.48	3.12/0.68	2.23/0.49	2.22/0.61
Poland	2.51/0.55	2.42/0.51	3.05/0.66	2.40/0.54	2.20/0.57
Russia	2.24/0.47	2.19/0.47	2.96/0.68	1.99/0.48	1.88/0.50
F	12.14	11.53	7.28	15.67	7.37
p	0.00	0.00	0.00	0.00	0.00

One- way ANOVA- comparison between the countries; ANOVA computed for variables where the assumptions of homogeneity of variances have not been violated

28 Beetham, D., (1991a). Max Weber and the legitimacy of the modern state, Analyse & Kritik, p. 34- 45
29 Herbert, S., (2006), Tangled up in blue: Conflicting paths to police legitimacy, Theoretical Criminology, p. 481- 504; Hinds, L., & Murphy, K. (2007), The public satisfaction with Police: Using Procedural Justice to improve police legitimacy, The Australian and New Zealand Journal of Criminology, p. 27- 42; Tyler, T.R. (2003). Procedural Justice, Legitimacy And The Effective Rule Of Law. In M. Torny (ed.), crime and justice: A review of research, Chicago, IL: University of Chicago Press.
30 Murphy, K., Tyler, T.R., Curtis, A. (2009), Nurturing regulatory compliance: Is procedural justice effective when people question the legitimacy of the law? Regulation and Governance, p.1- 26
31 Lasley, J. R. (1994): The impact of the Rodney King incident on citizen attitudes towards police. Policing and Society 245- 255; Carter,D.L. (1985), Hispanic perception of Police performance: An empirical assessment, Journal of Criminal Justice, p. 487- 500; Gallup, G (1999), The Gallup poll: Public opinion 1999, Wilmington: Scholarly Resources.
32 Skitka, L.J. & Houston, D.A. (2001), When duo process is of no consequence: Moral mandates and presumed defendant guilt or innocence. Social Justice Research, p. 305- 326
33 Thibant, J., & Walker, L. (1975), Procedural Justice: A psychological analysis, Hillsdale, MI: John Wiley



Legitimicy of policing in central and east Europe: Results from cross national law student survey perceived police legitimacy

Percentage of students' agreement/disagreement for factor police legitimacy within country[34]

CONCLUSION

Theoretical considerations and the survey conducted imply the need for further work on the reform of criminal procedural legislation of Serbia, whereas the aspect of improvement can be best viewed through the new law on police. We think that the determinants of improving the normative frame of the Republic of Serbia in the field of police action in order to realize legitimacy, should be considered in the following suggestions : Firstly, the legal norm should be characterized by a high degree of precision of determining certain legal concepts and prescribing precise conditions for the implementation of the measures and institutes; Secondly, the objective of criminal policy is also achieved through the application of criminal legislation, which must be adequate and not just a dead letter; Thirdly, when it comes to the practical application of legal norms, the abuse of rights should be prevented or reduced to a minimum; Fourthly, the cooperation between the public prosecutor and the police must stand as the feature of the entire course of the proceeding, and not just one of its parts, bearing in mind that the concrete form of these relationships depends on the types of entities and types of activities on the occasion of establishing the cooperation in question; Fifth, the cooperation between the public prosecutor and the police has to be active and characterized by the professional relationship, and as such it must be based on the law or an appropriate sub-legal act; Sixth, the efficiency of the conduct of the police and the public prosecutor depends not only on the effectiveness of the actions in which they are taking part, but also the efficiency of the preliminary investigation as a whole. In accordance with this, the attitude of the author is that relevant factors should continue to work on the reform of criminal procedural legislation of Serbia as soon as possible, with the aim of creating adequate normative base which should be used to achieve the legitimacy of the police .

REFERENCES

1. Allen, G.F. 1987. Where are we going in criminal justice? Some insights from Chinese Criminal justice System, International Journal of offender Therapy and Comparative Criminology Ames, Walter L. (1981). Police and Community in Japan, Berkley; University of California Press
2. Araki, Nobuyoshi (1985), "The Flow of Criminal Cases in the Japanese Criminal Justice System" Crime and Delinquency

34 See: Mesko G. and Tankebe, J., (2015), Legitimacy of Policing in Central and Eastern Europe: Results from a Cross- national Law Student Survey, Trust and Legitimacy in Criminal Justice, Springer, p. 252- 253

3. Ames, Walter L. (1981). Police and Community in Japan, Berkley; University of California Press
4. Бановић, Б., Међусобни однос и компетентност органа предистражног поступка, Ревија за криминологију и кривично право, Српско удружење за кривичноправну теорију и праксу- Институт за криминолошка и социолошка истраживања, Београд, 2015
5. Бејатовић, С., Суђење у разумном року као међународни правни стандард, у Збор.: „Суђење у разумном року и други кривичноправни инструменти адекватности државне реакције на криминалитет", Српско удружење за кривичноправну теорију и праксу, 2015.
6. Бејатовић, С., Тужилачка истрага као обележје рефоми кривичног процесног законодавства земаља региона, Збор., „Тужилачка истрага", Организација за европску безбедност и сарадњу, Београд, 2014., стр. 11- 33.
7. Бејатовић, С., Главни претрес и његов допринос обезбеђењу суђења у разумном року, Збор.: „Главни претрес и суђење у разумном року", Организација за европску безбедност и сарадњу, Београд, 2015.
8. Beetham, D., (1991a). Max Weber and the legitimacy of the modern state, Analyse & Kritik
9. Bootoms, A., & Tankebe, J. (2012). Beyond procedural justice: A dialogic approach to legitimacy in criminal justice. The Journal of criminal Law and Criminology, 102(1), p. 119- 170;
10. Бошковић, А., Страначка истрага у српском и италијанском кривичнопроцесном законодавству и ефикасност истражног поступка, Ревија за криминологију и кривично право, Српско удружење за кривичноправну теорију и праксу- Институт за криминолошка и социолошка истраживања, Београд, 2015
11. Bradford, B. Murphy, K. & Jackson, J. (2014). Policing, procedural and the (re)production of social identity, British Journal of Criminology, 54 (4), p. 527- 550
12. Gallup, G (1999), The Gallup poll: Public opinio 1999, Wilmington: Shcolarly Resources
13. Goodman, Carl F. (2003). The Rule of Law in Japan: A Comparative Analysis. The Hague: Kluwer Law International
14. Dando, Shigemitsu (1965). Japanese Criminal Procedure, tr. B.J. George Jr. South Hackensack, NJ: Fred B. Rothman
15. Du, X., and Zhang, L. 1990. China's legal system: a general survey, Beijing: New World Press
16. Ђурђић, В., Концепцијске странпутице у новом кривичном поступку Србије, Удржење јавних тужилаца и заменика јавних тужилаца Србије, 2014
17. Ђурђић, В., Европски стандарди заштите слобода и права осумњичених и окривљених лица, Збор.: Кривично законодавство Србије и стандарди Европске Уније, Српско удружење за кривичноправну теорију и праксу, Златибор, 2010.
18. Ђурђић, В., Основна начела кривично процесног права и поједностављене форме поступања у кривичним стварима, Збор.: „Поједностављене форме поступања у кривичним стварима", Организација за европску безбедност и сарадњу, Београд, 2013.
19. Илић, Г., „Предистражни поступак", Приручник за примену Законика о кривичном поступку, Удружење јавних тужилаца и заменика јавних тужилаца Србије, Београд, 2013.
20. Ito, Shigeki (1986), "Characteristics and Roles of Japanese Public Prosecutors". Resource Materials No.30, pp. 67- 75, Tokyo: UNAFEL
21. Јакшић, А. Европска конвенција о људским правима, Правни факултет, Универзитет у Београду, 2006., стр. 359.
22. Кесић, Т. Међународни стандарди полицијског поступања у кривичним стварима, докторска дисертација, Крагујевац, 2011 год.
23. Кесић, Т., Чворовић, Д., „Законодавна казнена политика и концепт истраге", Казнена политика као инструмент државне политике на криминалитет, Министарство правде Републике Српске- Српско удружење за кривичноправну теорију и праксу, Бања Лука, 2014.

24. Lord Leonard Hoffmann, the Universality of Human Rights, 125, Law Quarterly Review 416, (2009).
25. Mesko G. and Tankebe, J., (2015), Legitimacy of Policing in Central and Eastern Europe: Results from a Cross-national Law Student Survey, Trust and Legitimacy in criminal Justice, Springer
26. Murphy, K., Tyler, T.R., Curtis, A. (2009), Nurturing regulatory compliance: Is procedural justice effective when people question the legitimacy of the law? Regulation and GovernanceLasley, J. R. (1994): The impact of the Rodney King incident on citizen attitudes towards police. Policing and Society
27. Skitka, L.J. & Houston, D.A. (2001), When duo process is of no consequence: Moral mandates and presumed defendant guilt or innocence. Social Justice Research
28. Стојановић, З. Кривично право, Правни факултет, Универзитета у Београду, 2009.
29. Tyler, T.R. (2003). Procedural Justice, Legitimacy And The Effective Rule Of Law. In M. Torny (ed.), Crime and Justice: A review of research, Chicago, IL: University of Chicago Press
30. Thibant, J., & Walker, L. (1975), Procedural Justice: A psychological analysis, Hillsdale, MI: John Wiley
31. Fu, H. 1991. Police accountability: The Case of the People's Republic of China. Police Studies
32. Fenwick, Charles R. (1983b) "Law Enforcement, Public Participation and Crime Control in Japan: Implications for American Policing". American Journal of Police
33. Hersch Lauterpacht, International Law and Human Rights, London, Stevens, 1950
34. Herbert, S., (2006), Tangled up in blue: Conflicting paths to police legitimacy, Theoretical Crimnology
35. Hinds, L., & Murphy, K. (2007), The public satisfaction with police: Using procedural justice to improve police legitimacy, The Australian and New Zealand Journal og Criminology
36. Царић, С., Право на суђење з разумном року у кривичним стварима: Ставови Европског суда за људска права, , Збор.: „Главни претрес и суђење у разумном року"", Организација за европску безбедност и сарадњу, Београд, 2015.
37. Carter,D.L. (1985), Hispanic perception of police performance: An empirical assessment, Journal of Crminal Justice
38. Чворовић, Д. Међународни стандарди дерогације и ограничења права на слободу и безбедност личности, Збор. „Положај и улога полиције у демократској држави", Криминалистичко- полицијска академија, 2014. , стр. 27- 51.
39. Чворовић, Д., Турањанин, В., „Идеали правичности и реформисано кривично процесно законодавство Републике Србије", У Збор. „Четрдесет година од потписивања хелсиншког завршног акта = 40 years since the signing of the Helsinki final act", Институт за упоредно право и Организација за европску безбедност и сарадњу, 2015.
40. Чворовић, Д., Јавни тужилац и полиција као кључни субјекти предистражне и истражне фазе новог кривичног поступка, Збор.: „Положај и улога полиције у демократској држави", Криминалистичко- полицијска академија, Београд, 2013
41. Шкулић, М., Докази и доказни поступак на главном претресу, у Збор.: „ Главни претрес и суђење у разумном року"", Организација за европску безбедност и сарадњу, Београд, 2015
42. Шкулић, М., Погрешна концепција и бројне правно- техничке новог Законика о кривичном поступку, Удржење јавних тужилаца и заменика јавних тужилаца Србије, 2014.

UDC: 343.851:343.54/.55
343.851:343.62

RESTRAINING ORDER FROM AN ACCESS TO A PROPERTY – DOMESTIC VIOLENCE

Slavko Milic, MSc[1]
Centre "Defendologija", Niksic

Abstract: Necessary amendments to the Criminal Code of the Republic of Serbia shall bring new safety measures which should appoint "Restraining order from an access to a property" to the offender of domestic violence (Article 194 of the Criminal Code of the Republic of Serbia). This is a major legal and social upheaval in the protection of victims of domestic violence, and will bring certain dilemmas to the professionals in the field of police, judiciary, prosecutors and social services. These measures would not be easily *ad hoc* eliminated, so they will require a large number of educational programs, inclusion of professional experts in introduction of inevitable by-laws, especially those ones that in practice will be very quickly identified, due to the lack of a special *lex specialis* regulation in this field. This paper considers some of the specific dilemmas, which have proven to be very controversial among professionals who deal with combating violence against women and domestic violence in Montenegro. Some of the disadvantages of legislation were recognized in the document called "Opinion on the impact of the ratification of the Council of Europe Convention on preventing and combating violence against women and domestic violence in the legislation in Montenegro". Some states in the region have taken these *ex parte* measures earlier than the Republic of Serbia and the implementation recognised certain disadvantages. As an example of implementation, the example of Montenegro will be elaborated, since from 2010 Montenegro has implemented a very small number of protective measures of restraining order from an access to a property in misdemeanour proceedings, as well as not a single "restraining order" measure in criminal court proceedings, which was adopted with the Law on Amendments to the Criminal Code dated back in October 2013.

Keywords: domestic violence, security measures, protective measures, restraining order from an access to a property, offender.

INTRODUCTION

Domestic violence consists from the application of violence, threats with the physical attack and life threats, in a daring and reckless manner which endangers the tranquillity, physical integrity or mental condition of a member of a family. In this context, provisions of the Criminal Law and Family Law in the Republic of Serbia (Article 197 of the Family Law) define the concept and characteristics of domestic violence. In this regard, it is important to emphasize that according to the provisions of the Family Law, domestic violence is behaviour of a family member endangering the physical integrity, mental health or tranquillity of another family member. Family legislation stipulates a wide range of activities which mainly include

1 milicslavko77@gmail.com.

all forms of violence: physical, psychological, economic, sexual, etc. As the object of protection, positive legislation is protecting the physical and mental integrity and dignity of the family members. The member of the family is considered to be unmarried spouse who lives in a factual relationship with a partner.

Illegitimate marriage is a behaviour of men and women who develop a relationship as if they were married[2], but also the male and female who have been with each other or are still in emotional or sexual relationship, and who have a child or a child is about to be born, although they have never lived in the same household.

The act of committing violence includes a number of alternative activities by the offender, namely: use of violence, threat of the physical and life threatening attack and an insolent and reckless behaviour (coarse, vulgar, rude behaviour to another person). Violence is any activity that directly, intimately and actually threats to the physical and mental integrity of the passive subject[3]. This means actions that can cause a risk of occurrence of a physical injury which may be caused in different ways and by different means. The threat is even suggestion or an announcement that another person will be directly attacked physically or in a life threatening manner. This is a qualified threat – making an apparent threat with the consequences of death or physical injury which must be real, possible, serious and irreparable. For an existence of the criminal offense, it is essential that action is taken towards a specific passive entity[4], a family member, who may be in direct line without limitation, in a lateral line to a certain extent by the law, adoptive, foster and certain other degree of kinship. In regards to the guilt, the intent is required. Domestic violence has a character of a *delicta propria*, because it may be committed by only certain persons, persons with special personal characteristic or attitude. For the basic form of this offence, a fine is prescribed or imprisonment of up to one year.[5] The crime of domestic violence has three heavier, qualified forms of expression and for them the law prescribes a more severe punishment. However, the criminal justice system towards the most important community – a family, relates with the utmost restraint in the part of interfering with interpersonal relationships of its members *ultima ratio*. In the legal life, theoretically and practically, there are situations where it is really necessary to take measures for the protection of the dysfunctional behaviour of family members. The social role of marriage, the family and cohabitation is large and it is reflected in the creation of functional members of the family, society and the community through a series of interpersonal relationships that take place within the family. Yet the law cannot regulate, nor protect all the relationships in marriage and the family as this is a delicate sphere of human personality.[6] Therefore, it is nevertheless necessary that the state, as the creator of the law, through the norms of law, protects the family members, by introducing new measures of protection[7].

SECURITY MEASURES IN THE PROTECTION AGAINST DOMESTIC VIOLENCE

Security measures are special form of criminal sanctions that may be imposed on any offender who has with or without the guilt committed a criminal offence. Security measures in protection against domestic violence represent the progress of the state towards confront-

2 Popović, 1978, p. 94.
3 Simić, I., Petrović, M., Criminal Code of Republic of Serbia – Practical implementation, Belgrade, Official Gazette, 2002, p. 17.
4 Mrvić, Petrović N., Criminal legislation, Belgrade, Official Gazette, 2005, pp. 285–287.
5 Jovašević, D., The family violence in the criminal legislation of Montenegro, Perjanik, 2015, p. 27.
6 Jovašević, D., Criminal legislation, Separate edition, Belgrade, Files 2014, p. 95.
7 Milic, 2011, p. 28.

ing crime and the protection of one of the most important social categories – family. Special preventive character that the security measures have is reflected in limiting certain rights to the perpetrator of the offence from the field of "Domestic Violence", and are applied against the will of the perpetrator, which indicates their compulsory character. Security measures are determined by the court within the statutory court proceedings, as stipulated as such in the law due to the dangerous condition manifested with such a dangerous crime. Otherwise, in accordance with Article 78 of the CCRS the purpose of security measures is to remove situations and conditions that could discourage the offender from committing such criminal acts in the future. Criminal legislation provides more security measures (Article 79 of the CCRS), a number of which are medical (curative) security measures and another group of security measures that deprive the perpetrator of certain rights or forbidding him/her to perform certain activities, because they can be misused to commit the crime and have a remarkable preventive character. With the crimes such as the domestic violence, the main purpose of these measures is that they achieve special prevention with the perpetrator of the crime, as a social-ethical reproach and to impose a neutral sanction based on risk of an offender re-committing the criminal act. The criminal legislation of the Republic of Serbia prescribes a very important security measure and that is the "restraining from approaching and communication with the victim".

Montenegrin criminal legislation did not provide this measure before the Law on Amendments to the Criminal Code in October 2013. However, this security measure regardless of its special preventive character which can prohibit the offender approaching the damaged party (passive entity) to a certain distance or prohibit access to the area around the place of residence or place of work as well as further communication with the victim, very often in practice has numerous ambiguities that occur when the offender and the victim live in the same house or flat. Then, this measure cannot have the full effect, because of the spatial proximity of the offender and the victim, because it cannot get its full effect without the duality of the measure with which the offender is restrained from an access to the property. In Montenegro, there is a need for immediate adjustment of criminal legislation in the part of prescribing security measures, which will involve the restraining of the abuser from the property or a common space for living, which is evidently necessary in the Republic of Serbia as well. In the Montenegrin criminal legislation, four medical measures are prescribed that can be in each particular case imposed on the perpetrator of the offence by the court, and two very important security measures such as: restraining order (Article 77a) and the restraining order from an access to the property and other living premises (Article 77b).

Restraining order may be imposed on the perpetrator of the crime against sexual freedom, criminal acts of violence in the family or in a family community, and the criminal offence of incest or other criminal acts endangering the life or a physical body of a person. The court will impose restraining orders from the victim or group of people or a certain place when there is a danger that the offender could again commit the same or similar offence towards these people or in that place. In the part related to provisions which prescribe this measure, the legislator makes a mistake in a provision which states that the same security measure cannot be imposed for less than one or more than five years from the date of the final decision. The Court can be imposed measure of restraining order from an access to the property or other housing space after the verdict, without taking into account the urgency of the execution of these measures (*ex parte*) and urgent protection of vulnerable family members. Also, execution and monitoring of these two security measures are usually hindered by appeals or lengthy legal processes. If a victim of domestic violence is not urgently protected from the effects of an offender, a further protection of a victim is undermined in practice as does the meaning and the purpose of these security measures. With the protective measure of "prohibition of approaching the victim" the legislator does not define a consistent state body in

charge of monitoring the execution of this security measure, although admittedly provides that it is a separate organizational unit of the ministry responsible for judicial affairs, which supervises the implementation of conditional release, whilst with other security measures such as restraining order from an access to the property and other premises for housing, states that state body in charge of monitoring is the authority responsible for internal affairs. It remains unclear what the legislator used as a guideline when prescribing the manner of execution of these two security measures and why the competent police authority in the place of permanent residence or temporary residence of the victims of violence isn't in charge.

Although in the Republic of Serbia there was a proposal of non-governmental sector for the introduction of "emergency protection measures" which would be contained in the Police Act, it is still not a good solution, especially if it is taken into account that the proposal for suspension of the offender was determined to 14 days, which would practically mean that the criminal proceedings in court had to adjourn within 14 days or provide that the court may impose a measure of security before initiating criminal proceedings.

Until now the measure of restraining order from an access to the property was imposed in civil proceedings, which also represents the weakest link in the system of protection. As recommended models in the countries of Europe there are *lex specialis* legislation in the field of protection of victims of violence in the form of the Law on Protection from Domestic Violence.

EXECUTION OF SECURITY MEASURES AND PROTECTIVE MEASURES BY THE POLICE

Police in Montenegro is not responsible for the execution of all prescribed security measures, as well as protective measures in misdemeanour proceedings in order to protect victims of domestic violence. There is no special ordinance that regulates the specific execution of security measures imposed in criminal proceedings, which creates some sort of confusion among professionals and uneven quality of protection of domestic violence victims in criminal proceedings. This type of solution was not proved to be the best, because for the two safety measures that police is in charge with, the officers appears to be in a dilemma. Dilemmas also exist within protective measures in misdemeanour proceedings. The law on protection against domestic violence is a continuation of the readiness of the state to provide better protection to the victims of violence. Standards relating to social and child protection are discretionary in nature, i.e. these standards do not impose new obligations to the institutions of social and child protection. Social protection is provided in accordance with the Law on Social and Child Protection.

On the basis of the Law on Protection from Domestic Violence, Ministry of the Interior adopted the Ordinance on detailed content and form of the order of suspension or prohibition of returning to the property or other living space. The police written restraining order of access to the property or other premises is a "precautionary" measure, which is applied in relation to the perpetrator of violence by the police officers in Montenegro, pursuant to Article 28, point 7 of the Law on Protection from Domestic Violence. The Ordinance determines the detailed content and the form of orders on suspension or prohibition of returning to apartment or other living space, with the borders of the areas within which the offender cannot move, stay or approach the victim as a precondition for the protection of victims as well as the obligation of the offender to handover to the police officer the keys to the apartment or other living space in order to ensure the safety of the victim. The content and appearance of the police command are established by a law that has established procedures adopted by the Ministry of Interior. Practical application of this order, if not explicitly specified by law,

should contain a procedure for issuing orders. Also, the lack of content of this order is that it has no information about the consequences of its violation, which should not be repeated by the legislative bodies of the Republic of Serbia. A police officer will carry out a restraining order from the property, house or other place where the perpetrator lives with the victim, as follows: supervised removal of the perpetrator from the residential building during which they can take their personal documents and items necessary for everyday personal use, warning the perpetrator to hand over the keys of the unit from which they are moving away, and deliver them to the victim or another person, which will deliver them to the victim, removing the perpetrator from the apartment, house or other property on the safe distance from the victim. The Ordinance does not specify to which distance the perpetrator should be moved away, which is a significant problem in its application as it happens in practice that the offender approaches meters away from the house or apartment, from which they watch and follow the victim. Protecting victims of domestic violence through the implementation of protection measures continued through the adoption of the Ordinance on detailed procedure for the execution of protective measures of restraining order of access to the property, restraining and prohibition of harassment and stalking of the victim, who were by the Law on Protection from Domestic Violence placed within the jurisdiction of the police, whose officers are responsible for the execution of the provisions given in order to more efficiently implement the Law on protection from domestic violence. Based on the risk assessment made of the victim's danger exposure, it is prescribed the provision of plan of execution of the protective measures, as well as the obligation of reports submission on the implementation of protective measures by the police officer in charge of the enforcement of protective measures. This Regulation determined the measures, actions and authority of the police officers in the implementation of protective measures prohibiting harassment or stalking of a person exposed to violence, and restraining measures from an access to the property or other living space. By creating these by-laws in a precise and quality manner the actions of police officers are regulated in the preparation, planning and implementation of protective measures for more efficient implementation of the Law on the prevention of domestic violence and the implementation of the Regulations which are in detailed manner prescribed by the police officers and provide the necessary protection of victims and eliminate the circumstances which affect the exercise of violence. According to the Law, the Ordinance on the implementation of protective measures of mandatory psychosocial treatment of perpetrators of violence has been adopted, but has never been implemented, primarily due to completely confusing and unclear provisions.

POLICE RESTRAINING ORDER FROM AN ACCESS TO THE PROPERTY IN MONTENEGRO

Police restraining order from an access to the property is not a protective measure or a security measure. With the entry into force of the Law on Protection from Domestic Violence, the police expanded the existing wide range of their authorities in the protection of victims of domestic violence. Applying its general and special powers, police officers in regards the protection of victims of domestic violence, may deprive the abuser of his/her liberty, transfer to another institution of the state, issue a restraining order from an access to the property, supervise the implementation of protective measures ordered by the court or other authority, etc. The restraining order from an access to the property and other premises is a response of the legislator and the determination of the state to protect the vulnerable members of the family from dysfunctional violent members' actions. Thus, the police officer can, in order to eliminate the danger to the physical integrity of victims, ban the perpetrator from returning to the apartment or other living space in which he/she lives with the victim or other family

members, by issuing written orders in three days. Initiation of misdemeanour proceedings after the written orders are issued usually takes within 12 hours after learning about the offense committed, or orders issued. The institutions within no longer than three days in a summary offense proceedings shall decide whether to impose a safeguard measure in which is included the period covered by police order. Cases of domestic violence require urgency in addressing[8]. A police officer issues written order to the abuser without the approval of a prosecutor or a magistrate, based on his/her own assessment of whether the victim is in a life-threatening situation, or is facing a serious threat. In criminal proceedings this is not possible because of changes to the law in October 2013 that did not allow this, so there are no *ex parte* proceedings. Moreover legislator made a mistake in which these security measures may only be imposed by the Court and after the verdict, which represents the worst form of protection for victims of domestic violence and is currently the weakest link in the entire system of protection of victims of domestic violence in Montenegro, having in mind the possibility of appeal proceedings by the abuser to the high courts in Podgorica and Bijelo Polje, or the very length of the court proceedings. Thus, the perpetrator of the crime classified as domestic violence from the Article 220 of the Criminal Code of Montenegro and violations from the Article 36 of the Law on Protection from Domestic Violence, may be based on the final decision of the competent judicial authority about the restraining order from the property or other premises, where they live together with the victim and other family members, regardless of the ownership right. This measure may not be imposed on *ex parte* basis in the cases of breach, or even in the absence of the offender when the offender does not have a legal representative with immediate effect. By a decision of the Magistrate Court, the perpetrator of violence can be restrained from an access to the property no longer than one year.

POSITIVE EXPERIENCES AND DILEMAS IN CASES OF RESTRAINING ORDER BY THE POLICE

By observing the provisions of laws and regulations in the countries in the region in the areas of protection of victims of domestic violence, one gets the impression that solutions related to security measures and protective measures such as restraining order preventing the perpetrator of domestic violence from the access to the property and other premises for housing, are not resolved in a way to remove police officers' dilemmas that occur in practice. In some neighbouring countries, the order is issued by police officers who first came to intervene in cases of domestic violence, and do not need the approval of the state prosecutor or police leaders. Police restraining order is imposed to the defendant imposed for the offense, i.e. only in misdemeanour matters, in proportion to the committed action and in the presence of at least two police officers. The practice of a police order issued by a police officer to the offender is not a good solution. In Montenegro, the police officer will issue a written order on restraining from the apartment and other premises in case that the abuser has violated the physical integrity of the victim or caused them an injury, threatened and caused a sense of fear and insecurity of the victim or minor children (regardless of whether they applied physical violence to the children), in such a way and intensity which indicate that there is a fear that the application of other legal powers cannot protect a victim of domestic violence. The way of abuser's removal from the property in practice showed the greatest dilemmas of police officers specialized in domestic violence, because most officers believe that the abuser must be provided an alternative accommodation. Not providing accommodation can bring the offender to a situation to make other offenses or perform some other dangerous actions to the public

8 Zeković, B., Milić, S., Zekić, S., Practical guide towards good practices for police officers, Podgorica, 2015, p. 40.

property or life and health of oneself. Domestic violence is a pattern of behaviour the offender has chosen to make, therefore it is not necessary that any state authority provides alternative accommodation to the offender. Other police officers' dilemmas also arise in situations when the perpetrator lives in an apartment with parents or the parents of victims of violence. A police officer shall warn household members that police issued an order to the abuser or possibly a security measure and will remove the perpetrator from the property. However, it remains unclear how the police will secure long-term the apartment or a house that is possibly owned by the offender for the duration of the safety measures, protective measures or police orders. It is very important that the legislation ensures that the perpetrator of violence in the presence of a sufficient number of police officers (depending on each specific case) is moved out from the apartment and other premises. Police officers need to exercise constant control over the abuser's behaviour during collection of personal items from the apartment, make the abuser realizes that no further communication with other members of the family and the victim is allowed, after which the police officer, only at the invitation of the victim and other family member, can access the property together with perpetrator. It is preferable that this act of accessing the apartment is attended by an official from the Centre for Social Affairs. The offender taking his/her personal belongings is accompanied by a police representative, and the police officer should ask the victim of the violence that at the time of arrival of the offender, if it is feasible, they stay out of the apartment, because this can help avoid additional problems which in practice often arise, which brings a police officer again to the situation where they have to apply their authorities once again. A police officer has an obligation to order the perpetrator of domestic violence to hand over the keys to the apartment, but in practice, the offender often does not want to hand over the keys even if in accordance with an order of a court or police order this needs to be done. In practice, this is where the problems arise, especially when the content of the order does not provide solution, such a possibility or the subordinate legislation does not closely regulate this situation. Also, it is questionable whether a police officer can keep the keys to the apartment and how long is required to deliver them to the victim or representative of the Centre for Social Affairs, which is also a dilemma which the officer is facing. It is also very important that the police officer explains to the offender that without a court order, in duration of protection measures, they cannot enter the building and introduce them to the existing positive legal solutions.

Provisions prohibiting the prevention of an authorized person in the performance of duties in previous situations can also be applied against the offender. The content of safety measures, protective measures or police restraining orders from an access to the property, especially in the part of monitoring their implementation, it is essential that there is information on the further residence of the perpetrator. If the perpetrator of violence, which is most often the case, does not want to give information about his/her further residence, this can present a huge problem for police to exercise control over the execution of these measures. With the police orders, this may constitute grounds for deprivation of liberty in misdemeanour cases and the implementation of the simplified misdemeanour proceedings. The Istanbul Convention – Council of Europe Convention on preventing and combating violence against women and domestic violence, in the official opinion obliges States parties to "consider" that the violation of all measures including a police order is a criminal offense rather than offense, which is the case at the moment in Montenegro. Although contempt of written orders issued by a police officer presents a misdemeanour (Article 38) of the Law on protection against domestic violence, the perpetrator of violence is being deprived of his/her liberty in all situations when they try, after a warning, to enter or succeed in the action of accessing the space that they were banned of entry by an order in writing. Deprivation of liberty is conducted in accordance with the Law on Misdemeanours of Montenegro. Dilemmas for police officers exist in the treatment of minors who are perpetrators of acts of domestic violence. Given that by the positive

regulations applicable in Montenegro, the precise provisions for this category of perpetrators are not defined, it remains unclear what the legislator had taken as their guideline when they had not anticipated any situation that may arise, however, given that the legislator uses the word "perpetrator of violence", without using additional legal constraints, it is believed that this measure can be implemented also for juvenile offenders, older than 14 years, who are responsible in the criminal sense. However, the provisions that always alert in the best interest of the child, still must be interpreted more broadly, thereby alternative accommodation issue must be resolved (with the temporary guardian, institutional educational measures or other alternative accommodation under the direction of the guardianship authority), and is imposed as an obligation of the competent judicial authority and guardianship authorities. The possibility of abuse of measures of protection from the family members is also one of the possible dilemmas. Bearing in mind that the Order is issued in proportion with the committed action and in situations that are already listed, and for a period of no longer than three days, the possibility of abuse is reduced to a minimum.

CONSLUSION

When a victim of domestic violence seeks help, it is important to keep in mind what is expected from employees in state institutions. Experience in practice shows that victims expect from person they ask for help to devote a time and listen to them, protect them and instruct them as to where they could get the adequate help. The legislative bodies of the Republic of Serbia should in an unequivocal manner ensure to cover all the dilemmas that will arise in practice with the police officers, the competent social welfare authorities, prosecutors and other state bodies, which will leave no room for doubt and enable them to carry out these measures and work directly with victims. Police officers are often in doubt about what is expected of them and no matter that they believe they act properly, usually they are not aware of the message they are sending with their approach to the problem to the domestic violence victims. These messages can be in regards to the victim to be a part of the problem or a part of the solution. The role of experts should be encouraging victims of violence to speak about the violence they survived, listening to the victims without giving advice, but informing about the different possibilities that can help. The interview should be focused on the immediate problem or immediate events. When we become part of the problem then we breach confidentiality, we condemn the victim, disrespect their independence and ignore the needs of the victim.

REFERENCES

1. Zeković, B., Milić, S., Zekić, S., Practical guide towards good practices for police officers, Podgorica, 2015.

2. Zeković B., Gligorović, A., Institutional mechanisms of protection from the family violence, Podgorica, 2014.

3. Jovašević, D., Criminal legislation, Separate edition, Belgrade, Files 2014.

4. Jovašević, D., The family violence in the criminal legislation of Montenegro, Perjanik, 2015.

5. Konstatinović, Vilić, S., Criminological analysis of family violence, Faculty of Law, Niš, 2003.

6. Mrvić, Petrović N., Criminal legislation, Belgrade, Official Gazette, 2005.

7. Simić, I., Petrović, M., Criminal Code of Republic of Serbia – Practical implementation, Belgrade, Official Gazette, 2002.

8. Spasić, D., Characteristics of family violence in Serbia, Zadužbina Andrejević, Belgrade, 2009.

9. Spasić, D., Kekić, D., Strategy of elimination of the family violence in Sweden, European legislation, 2010.

UDC: 343.541/.543(497.11)

IMPORTANT CHARACTERISTICS OF THE CRIME OF ILLICIT SEXUAL ACTS

Sinisa Karanovic, MSc[1]
Ministry of the Interior of the Republic of Srpska

Abstract: The author is concerned with the criminal offense of the illicit sexual acts, because this crime is not a classic sexual assault. Namely, the crime of illegal sexual act does not have its "being" but "is relying" on the criminal offenses under Article 178, paragraph 1 and 2, Article 179, paragraph 1, Article 180, paragraph 1 and Article 181, paragraph 1 to 3 of the Criminal Code of the Republic of Serbia (rape, sexual intercourse with a helpless person, sexual intercourse with a child and sexual intercourse by abusing of position). It has no legal elements and we can rightfully ask the question – what are the illicit sexual acts? Therefore, in theory and case law there is a problem of determining the actions of perpetration, because there is a doubt which actions are included in the area covered with this incrimination. The only thing not in dispute, and about which the doctrine and jurisprudence agree, is that they do not fall within the concept of sexual violation and acts equal to it. The contents of the work systematized in Chapter XVIII consist mostly of the crimes whose activities are perpetration of sexual violation or an equal act, or other sexual acts on the victim's body, forced or in conditions where there is no freely expressed will because of victim's age or her/his condition. What all offenses in this group have in common is the fact that there is no free will of a passive subject, either because this will "straws" by coercion (force or threat) or a condition of passive subject is used (powerlessness, the lack of psychological maturity due to minority, the relationship of subordination or dependence with the offender) which facilitate the offender to perform an action of sexual violation or another similar act.

Keywords: sex, sexual, sexual violation, characteristic, offense, actions

INTRODUCTION

The consequence of criminal offenses from Chapter XVIII is a violation of sexual freedom, but there are differences depending on the intensity of injuries on the protected good. Namely, in the form of subsidiary consequences, other consequences can be realized which is why the act gets more severe form. This would be the case in qualifying forms of criminal offenses of rape, sexual intercourse with a helpless person, sexual intercourse with a child and abuse of position. Also, when it comes to those acts qualifying circumstances may consist of severe body injury or death of passive subject. The perpetrator can be any person, and crime against sexual freedom can be conducted only with the intent.

Imprecisely defined incrimination in the new Penal Code has resulted in a number of problems, primarily the problem of demarcation with attempted criminal offense under Article 178, paragraph 1 and 2, Article 180, paragraph 1 and Article 181, paragraph 1 to 3 of the Criminal Code of RS. Furthermore, the problem is the demarcation of illicit sexual acts with the acts covered by the term "act equal to sexual violation" (depending on whether the act equal to sexual violation is interpreted restrictively or extensively). A particular problem

1 E-mail: sinisakaranovic1@gmail.com.

is the demarcation with similar actions performed in one of the situations referred to Article 178, paragraph 1 and 2, Article 179, paragraph 1, Article 180, paragraph 1 and Article 181, paragraph 1 to 3 of the Criminal Code of RS, but which are not punishable because they lack either a subjective or objective element. The issue is whether this crime includes the cases where the victim is coerced or induced to take an action that serves to achieve sexual satisfaction of the perpetrator.

SUBSTANTITIVE AND LEGAL NOTION OF CRIMINAL OFFENSE OF ILLICIT SEXUAL ACTS

With Article 182 of the Criminal Code of the Republic of Serbia the legislator incriminated illicit sexual activities as a criminal offense which brings the attack on the sexual freedom of the individual, in accordance with the common general object of this group of offenses. However, it is interesting that according to Lazarevic,[2] illegal sexual acts are typical crimes against sexual morality, or moral feelings of the people in terms of satisfying sexual drive and violation of sexual dignity. Hence it follows that the behaviour covered by this incrimination can be understood within the broader context of realizing of the real insult, humiliating and mockery of the passive subject.[3]

Historically, the sphere of legal protection of morality in terms of manifestation of sexuality passed through certain changes in most countries. Certain values remain unchanged. This especially applies to those goods in which, in the function of injury, there exists violence.[4]

Although the concept of illicit sexual acts or anachronistically named "indecent assault"[5] is a framework which is not legally expound, the crucial point of distinction of conducts covered by this term, in relation to insult, represents subjective attitude of the perpetrator, or intent. So, the vital element of this crime will be the fact that the specific conduct was undertaken with the aim of satisfying sexual drive or of the prurient intent.[6] Therefore, the actions carried out as a joke, no matter how tasteless, rough or rude they were, if made in the absence of indecent intentions as a subjective element of unlawfulness, according to Zlataric,[7] will not be understood in the context of this crime.

Besides subjective element, according to Stojanovic,[8] objective element of illicit sexual acts will also represent the objective meaning of the committed actions evaluated from the aspect of sexual morality. However, this physical aspect, as it is referred to by the aforementioned author, is rather unreliable since it is difficult to demarcate the illicit sexual acts from those actions that morality does not prohibit.[9] Evaluation of the realized behaviour in this regard will be led in accordance with the content, place and time of performing the given action, and according to people who were covered by these factors.[10]

2L. Lazarevic, *Comment of the Criminal Code,* Modern administration, Belgrade, 2006.
3 Z. Pavlovic, *Sexual abuse of children*,Faculty of Economics and Justice, Novi Sad, 2013, page 273
4*The crime of rape in the Yugoslav law*, Doctoral dissertation, Belgrade, 1984
5 Indecent acts were previously incriminated in criminal legislation as a criminal offense. More about in: D. J. Tahovic, *Criminal Law - special part*, Scientific Book, Belgrade, 1955, p. 176-178.
6 Z. Pavlovic, Indecent acts, Law - Theory and Practice, Faculty of Economy and Justice, Novi Sad, 15 (10), p. 38-43
7 B. Zlataric, *The Criminal Code in its practical application - a critical review of the case law,* National newspapers, Zagreb, 1958.
8 Z. Stojanovic, *Comment of the Criminal Code,* OfficialGazette, Belgrade, 2006
9 Z. Pavlovic, *Sexual abuse of children*,Faculty of Economics and Justice, Novi Sad, 2013, page 274
10 L. Lazarevic,*Comment of the Criminal Code*, Modern administration , Belgrade, 2006

As illicit sexual acts are often a prelude or "foreplay" for the performance of other criminal acts against sexual freedom, it is important to demarcate the offense from attempted second offense. Thus, according to the decision of the Appellate Court in Belgrade Kz. 1.5141/11, since March 8, 2012, it is pointed out that the intent of the perpetrator will represent the base of demarcation of this crime from other offenses of this chapter. In fact, the basis will be the demarcation of whether the intent of the accused covered only unlawful sexual activity or also the act of sexual violation.[11]

Although the literature most frequently mentions acts of hugging, kissing and touching gluteal or genital regions as illicit sexual acts, several issues are opened in this context. While the case law is largely in agreement about that the compulsion or inducing another person to perform any sexual acts on the body of the offender is considered as illicit sexual act, the question is whether it can be considered in the same way if the injured person is forced or indicated to perform sexual acts on her own body or on another person.

Following the claims of Stojanovic,[12] the dilemma between extensive or restrictive interpretation of the existing legislation is also noted in the context of the situation where the perpetrator, under the terms of Article 178 to 181, coerces or induces a victim to observe the sexual act which perpetrator makes over himself or with another person. According to this author, the fact that the perpetrator does not perform any physical action on the victim's body implies that it is not possible to talk about the offense of lewd acts. Although in practice there are conflicting opinions in this regard, when it comes to criminal law protection from sexual violence of the minors, the legislator resolved the problem by introducing a new incrimination under Article 185 which prohibits inducement or forcing a minor to witness a sexual act.[13]

In terms of qualifying circumstances the legislator has anticipated, in addition to the basic, three serious forms of this offense. Thus, paragraph 2 states that the execution of the illicit sexual acts under the terms of Article 180, paragraph 1 and Article 181, paragraph 3 of the Criminal Code of the Republic of Serbia will be considered as more severe form, or if the passive subject is a child or a minor entrusted to learning, upbringing, custody and care to one of the persons covered by the incrimination of Article 181, paragraph 3 of the Criminal Code of RS. Although this is logical considering the tendency of more stringent protection of the youngest from sexual violence, such a solution does not seem to include the possibility of a serious form if the offense is committed against a minor, or person older than 14 and younger than 18, outside the context of abusing of the relationship of dependence and trust. In that way the hypothetical situation in which an unknown person forcibly performs illicit sexual acts over a fifteen year old girl, would be equated with the situation in which the passive subject is an adult person, which is certainly unjustified. Of course, it is clear that this can be taken into consideration while determining the penalty, but speaking in nomotechnical sense, there is no explanation why this standard does not cover all the minors.[14]

Finally, according to paragraph 3 and 4 of the same Article, the more severe forms of this crime provide a situation in which the execution of actions resulted in serious bodily injury of the person against whom the offense was committed or if the offense was committed by several persons or in a particularly cruel or degrading manner; or the most serious form will be considered if the committed offense resulted in the death of a passive subject.[15]

11 Z. Pavlovic, *Sexual abuse of children*,Faculty of Economics and Justice, Novi Sad, 2013, page 275
12 Z. Stojanovic, *Comment of the Criminal Code,* OfficialGazette, Belgrade, 2006
13 *Ibidem*
14 Z. Pavlovic, *Sexual abuse of children*,Faculty of Economics and Justice, Novi Sad, 2013, page 276
15 *Ibidem*

Commenting on the segment of the prescribed sentence for the crime of illicit sexual acts, it can be noted that despite the detailed explication and stricter threatening penalties in relation to the previous legal definitions legislature adopts a rather questionable solutions. This primarily relates to the potential penalty for the basic form of this offense where in addition to a prison sentence of up to 3 years there is the possibility of alternative fines provided.

Additionally, committing of sexual acts against a child, and according to Article 182, paragraph 2 of the Criminal Code of RS the legislator has anticipated an imprisonment of 6 months to 5 years, achieving quite stricter protection of the youngest from sexual violence. However, if we take into consideration the above remarks to exclude all underage persons from the respective standards, we conclude that for the perpetration of indecent acts against a minor the perpetrator could be punished only by a fine, but it is certainly unjustified.[16]

Finally, for the gravest forms of this offense which are qualified with forthcoming consequence or with the manner of perpetration, in paragraph 3 the legislator anticipated an imprisonment of 2 to 12 years, while in case of the victim's death only the minimum legal sentence of 5 years is determined.[17]

ACT OF PERPETRATION OF ILLICIT SEXUAL ACTS

Guided by Article 182, paragraph 1 of the Criminal Code of RS the legislator explicates that the perpetrator of illicit sexual acts will be considered a person who under the terms of Article 178, paragraph 1 and 2, Article 179, paragraph 1 and Article 181, paragraph 1 and 2 (the Criminal Code of RS) commits some other sexual act, which sets illegal sexual acts in the accessorial position with the aforementioned crimes. Hence, it follows that illicit sexual acts can be performed by using force or by threatening with direct attack on the life and body of another person, where the perpetrator does not make sexual violation or an equal act, but some other sexual act. The same can be done to a helpless person, a person who has relationship of subordination or dependency with the perpetrator, a child or a juvenile who is entrusted to the offender for learning, upbringing, custody or care. An example of illicit sexual acts can be represented by a judgment of the District Court in Belgrade Kz.3212/ 06 dated November 9, 2006, when "by first instance verdict, the defendant was found guilty of having committed a criminal offense of illicit sexual acts, in accordance with Article 182, paragraph 1 in conjunction with Article 180, paragraph 1 of the Criminal Code RS because he made a sexual act against a child in the entrance of the building. After entering the lobby of the building, the defendant downed his sweatpants and underwear and showed his penis to the three minors, at the same time touching his genitals, and then approached to the victim and touched her all over her genitals through her clothes and said "Come, now you do it to me.""[18]

As the RS Criminal Code does not define what is meant by the concept of sexual acts, it is not defined by most of foreign jurisdictions.[19] One of the possible reasons for this situation is also, how Michel Foucault called it, "implanting depravity" in the behaviour of people in the sphere of sexuality in order to create mechanisms of supervision and control over them. This can be done through hysterectomy of women, children education, and socialization of procreative behaviour and psychiatric treatment of perverse pleasures.[20] The only thing that is indis-

16 Z. Pavlovic, *Sexual abuse of children*,Faculty of Economics and Justice, Novi Sad, 2013, page 276
17 *Ibidem*
18 Z. Pavlovic, *Sexual abuse of children*,Faculty of Economics and Justice, Novi Sad, 2013, page 274
19 *Ibidem*
20 About hysterectomy of women, children education, socialization of procreative behavior and psychiatric treatment of perverse pleasures see in: M. Foucault, *The Will to Knowledge - history of sexuality I*, Education, Belgrade, 1982, p. 118-119

putable, and there is agreement between both theory and jurisprudence, that illicit sexual acts do not include sexual violation or an equal act. The analysis of the legal provisions of Article 182 of the Criminal Code RS leads to the conclusion that the act of commission of this crime is multiple, depending on the offense to which the prohibited sexual acts appeal (after all so it was in the RS Criminal Code of 1877, as well as in Criminal Code of 1951, or even before that in the Criminal Code of the Kingdom of Yugoslavia in 1929). It is debatable whether the illicit sexual acts include any other activity that is carried out in one of the situations referred to in Article 178, paragraph 1 and 2, Article 179, paragraph 1, Article 180 paragraph 1 and Article 18, paragraph 1 to 3 of the Criminal Code of RS. It is mainly emphasized that illicit sexual acts are all those actions that are directed to the satisfaction of the sexual instinct, but not with sexual violation or an equal act when they are considered to be criminal offenses. This means that only the illicit sexual acts committed under certain conditions and circumstances are punishable, and the acts that affect the self-determination of another person in the sphere of sexual relations, or infringing sexual freedom of personality.

In view of the foregoing, it follows that the act of perpetration is realized through different activities, and illicit sexual acts exist when they are performed:[21]

- against a person, by force or by threat of the immediate attack upon the life or body of that person or a person close to her, or by threat to the person or to the person close to her, of discovering something that would be detrimental to their honour or reputation; or by threat of other serious harm (rape does not occur only illicit sexual acts do),

- towards a powerless person, where she is incapable to resist (powerlessness is not used for sexual violation or an equal act but for committing illicit sexual acts), towards a child, or a minor under fourteen years (there is no sexual violation or an equal act, only illicit sexual acts),

- against a person which is in relationship of subordination or dependency with the perpetrator (the abuse of this relationship is not done through sexual violation or an equal act, but only through illicit sexual activity), against a juvenile who is entrusted to the offender for learning, upbringing, custody or care (by abusing of trust sexual violation or an equal act are not committed but only illicit sexual acts).

In order to determine the concept of illicit sexual acts court practice also sets certain criteria, so that the existence of illicit sexual acts needs two elements: (1) the intention to induce or satisfy sexual drive and (2) violation of the existing norms of sexual morality.[22] According to that, for the existence of illicit sexual acts, it is necessary to fulfil the objective and subjective requirements.[23]

With the objective side, illicit sexual acts represent such actions that, according to the adopted social perception, roughly violate the sense of shame and morality in the sexual sphere. Such actions can exceed the limits of socially acceptable sexual behaviour, which is assessed by the place and time of performance, or persons involved, and especially by the content of behaviour. According to Foucault, such interpretations of acceptable and unacceptable sexual behaviour are disputable and can be brought into question.[24] The best example of the fact that anything can be included in such a vague concept of actions are the two following judgments. The judgment of the Fifth Municipal Court in Belgrade KZ. 1002/06 from October 24, 2007,

21 Z. Pavlovic, *Sexual abuse of children*,Faculty of Economics and Justice, Novi Sad, 2013, page 274

22 Z. Stojanovic, *The criteria for determining incrimination in the sphere of sexual relations, in general(doctoral thesis),* Ljubljana, 1981

23 M. Milovic, *The offense of illicit sexual acts ,* Glosarium, Belgrade, 2006.

24 According to Foucault through isolation, enhancing and ingrowth of peripheral branch of sexuality,relations of authorities to sex and pleasure are multiplying. This way they measure the body and permeate behavior, and reinforce sexuality, which is attached to some age, some place, some tendency, some kind of action. M. Foucault, *The History of Sexuality, the will for knowledge*, Education, Belgrade, 1982, p. 46

by which "the defendant was acquitted of the charges that he committed the criminal offense for which he is accused in the Indictment, for there is no evidence that, on the relevant day, the defendant committed a sexual act against the victim in a way that he went into the elevator with the victim and then when she tried to press the keyboard, he grabbed her and put her hand between her legs, her other hand on her back, lifted her up and put her into corner. Then he pulled her hair and after she began to resist and sprayed him with tear gas, she escaped from the crime scene." The verdict says that from the all the above evidence, the Court could not conclude whether the force used by the accused was actually implemented with the aim of performing a sexual act or something else, although the damaged said in the course of proceedings that she had impression that the defendant wanted to kill her, throw her down, rape or something else.[25]

On the other hand, by the judgment of the District Court in Belgrade Kz. 1552/6 from October 25, 2006, the defendant was found guilty of committing criminal offenses in concurrence, of illicit sexual acts and slight injuries.[26] The judgment states that the accused person on the relevant day saw the victim in the bus returning from school, caught her up after they went off the bus and committed a sexual act on the stairs nearby. He did it in a way that "he threw the victim down from back, strongly tied her arms, and then with the front part of his body nailed himself to the body of the victim, pressed the tip of the blade of the knife in her left leg, stabbed her and in that manner caused her slight injury."[27]

On the subjective side, it is necessary to indulge or induce sexual drive (libido), where it has to be about conscious sexual tendency. For example, certain touches on the body may not always be directed at inducing or satisfying the sexual drive, e.g. when a doctor examines a patient and on this occasion performs certain touches.[28] Some touches may represent a sign of friendship, joy, great mood or some other feeling of closeness to a person that is not based on sexual grounds. The issue is whether the notion of illicit sexual acts may consider such acts that serve to humiliate victim, intimidate, to provoke disgust or revulsion, or the acts committed out of curiosity or for experimental purposes. Not every intrusion or aggression towards a person need to be an illicit sexual act, if it is done in order to create a certain rapprochement and intimate atmosphere, and without the intention of immediate satisfaction or inducing sexual drive.[29]

Considering that illegal sexual acts are diverse by their characteristics, some of which may have an obvious sexual character, and some may be neutral, the problem is to determine when these two elements are achieved through specific actions that should represent criminal offense of illicit sexual acts. It is particularly difficult to determine the existence of objective elements, because there is no reliable criteria for delimitation of illegal acts in terms of sexual morality of those that morality does not prohibit. Act of committing may include a wide range of actions and behaviours, starting from the observation of the victim, hugging, kissing, touching various parts of the body, especially of the genital sphere, etc.

With them, in most cases, the full satisfaction of the sexual instinct is not achieved, but they are limited to inducing the sexual instinct and its satisfaction of less intensity than in sexual violation or an equal act.[30]

25 Z. Pavlovic, *Sexual abuse of children, Faculty of economy and justice, Novi Sad, 2013,* page 274
26 *Ibidem*
27 *Ibidem*
28 The pathology of the sexual intercourse is based on two elements which usually indicate the dangers that threaten individuals from sexual act: on her enormuos tension that arises from her will, and on the infinitely large expenditure of energy that exhausts. M. Foucault, *The History of Sexuality - taking care of yourself*, Education, Belgrade, 1988, p. 127
29 M. Milovic, *The offense of illicit sexual acts , Glosarium, Belgrade, 2006.*, page 102
30 M. Milovic, *The offense of illicit sexual acts , Glosarium, Belgrade, 2006.*, page 105

Keeping in mind the legal formulation of incrimination of illicit sexual acts, it is debatable whether this crime includes the cases where the victim is coerced or induced to take an action that serves to incite or satisfy the sexual drive. Therefore, there are three possible situations:[31]

1) that the victim performs some action over herself,

2) that the victim performs an action over the offender,

3) that the victim performs an action over the third person.

One might ask whether the existence of legal formulation of incrimination of illicit sexual acts and offenses which are associated allows it. If it is considered that perpetration of illicit sexual acts includes victim perpetrating action to herself, to the offender or to some other person additionally to perpetrating sexual acts by the perpetrator, then it would be extensive interpretation of incrimination. Eventually, it "could be a way out of necessity, only in some drastic cases in practice."[32] Seemingly, it would be justified to cover these cases with criminal zone, provided that these are situations from Article 178, paragraph 1 and 2, Article 179, paragraph 1, Article 180, paragraph 1 and Article 181, paragraph 1 of the Criminal Code of RS.

All three cases when the victim is forced or induced by the perpetrator to perform certain actions in order to satisfy his sexual drive, are reasonably treated in the same way. In this regard it should not be decisive whether during the course of these actions physical contact between the offender and the victim is realized.[33] However, there are opinions that only the case when the victim is forced or induced to commit illegal sexual activity over the perpetrator should be included in the criminal zone, while the other two cases (where the victim is forced or induced to perform illicit sexual act to herself or to a third person) should be left out. This opinion is groundless because in all three cases it is about using coercion or abusing of particular condition of the victim or the relationship with her in order to make her to take certain actions which will serve to satisfy the offender's sexual drive. But, in all three cases it is about performing the actions by the victim, which can hardly be subsumed under legal text: "Whoever, under the terms of Article…commits some other sexual act." If we subsume the listed contentious situations there, it would be too an extensive interpretation.[34]

However, because the formulation of incrimination of provisions of Article 182 expressly covers only the active form of illicit sexual acts, it implies that the offender performs illicit sexual acts on the victim's body. So it follows that satisfying sexual drive in illicit sexual acts is realized by acting on the victim's body.[35] This topic is very controversial in court practice and in theory. The gratification of sexual impulses can be achieved without touching the body of another person (the victim) and that this violates sexual morality. Therefore, it is a doubtful situation when the victim is coerced or induced to observe illicit sexual acts performed by the perpetrator on himself or on the third person's body. Jurisprudence and theories mostly take position that when the offender does not perform any physical action on the victim's body, there is no criminal offense of illegal sexual acts. There are also attitudes that for the crime of illicit sexual acts bodily contact with the victim is not necessary. The representatives of this view provide such wider interpretation of the notion of illicit sexual acts particularly in cases where the victim appears as a minor under the age of fourteen.

From the criminal-political aspect this view would be justified, and the question arises whether and under what circumstances certain forms of exhibitionism can be included into incrimination of illicit sexual acts. Exhibitionism as a form of a sexual behaviour, if conditions

31 M. Milovic, *The offense of illicit sexual acts , Glosarium, Belgrade, 2006.*, page 106
32 *Ibidem*
33 Z. Stojanovic, *The criteria for determining incrimination in the sphere of sexual relations, in general(doctoral thesis),* Ljubljana, 1981., page 339
34 M. Milovic, *The offense of illicit sexual acts , Glosarium, Belgrade, 2006.*, page 109
35 *Ibidem*

referred to in Article 178, paragraph 1 and 2, Article 179, paragraph 1, Article 180, paragraph 1 and Article 181, paragraph 1 to 3 of the Criminal Code of RS are not achieved, is not a criminal offense. This is not disputed, but it is debatable what if exhibitionistic act is made under the terms of any of these offenses. There are two opposite opinions. One is that the criminal offense of illicit sexual act can exist no matter if the act was performed as a form of exhibitionism, provided that it is one of the situations referred to in Article 178, paragraph 1 and 2, Article 179, paragraph 1, Article 180, paragraph 1 and Article 181, paragraph 1 to 3 of the Criminal Code of RS in which illicit sexual acts are incriminated.[36]

The second opinion, which normally prevails, is that the exhibitionism under any circumstances is not an illicit sexual act because it is necessary that this action is performed on the body or by touching the body of another person. Not even a wider understanding of notion of illicit sexual acts, which assumes that they exist when the body of a person is used to indulge the sexual drive of the offender and it is not always necessary to come to a physical contact, includes exhibitionistic actions in illicit sexual acts.[37] Considering that and having in mind the current incrimination of illicit sexual acts, however, exhibitionistic actions should not be included in the acts of perpetration, as it would in some way be extensive interpretation and expansion of criminal zone of this criminal offense. This opinion is largely represented in our doctrine also.[38]

CONSEQUENCES OF AN ACT

The object of criminal-law protection in the sphere of sexual relations may be compromised not only with sexual violence or equal actions (unnatural sexual acts), but also with a number of other seemingly mutually different actions. Like sexual violence and equal acts, these acts also attack sexual freedom of a person, exploit helpless persons and abuse certain relationships or children. By undertaking them, voluntarily and consciously entering of individuals into sexual relationships is jeopardized. Calling them illicit sexual acts (in our earlier criminal legislation was used term "indecent assault"), the Criminal Code of RS incriminates them through the provision of Article 182 in a way that puts them in connection with the offenses referred to in Articles 178 to 181. This means that they are punishable only if all the elements of some of these crimes exist, except that instead of sexual violation or an equal act, the act of perpetration is some other sexual act. In fact, the crime of illicit sexual acts contains several criminal acts in all ways identical to the acts of Articles 178 to 181, except that the act of perpetration is not sexual violation or an equal act, but some other act whereby the perpetrator expresses his sexual drive.[39]

Starting from the realistic concept of the crime, which was accepted in our theory, that the result of a criminal act is a produced change or condition in the outside world, it follows that consequences are shown as event, as well as committing to passive subject, or committing by passive subject to an offender. Thus visible changes in the external world cause further changes that are happening in the psychic sphere of the passive subject. Illegal sexual acts as the actual acts are realized by violation of human dignity of passive subject by virtue of his sexual integrity being attacked. Of course, this violation, as a rule, has lower intensity than in cases of crimes under Articles 178, paragraph 1 and 2, Article 179, paragraph 1, Article 180, paragraph 1 and Article 181, paragraph 1 to 3 of the Criminal Code of RS (except in pathological cases) because it is not a sexual violation or an equal act.[40] Regardless of weaker intensity of the injury in illicit

36 M. Milovic, *The offense of illicit sexual acts , Glosarium, Belgrade, 2006.*, page 110
37 Z. Stojanovic, O. Peric, *Criminal law - special part, Belgrade, 2000.*,page 179
38 M. Milovic, *The offense of illicit sexual acts , Glosarium, Belgrade, 2006.*, page 111
39 Z. Stojanovic, *Comment of the Criminal Code,Official Gazette , Belgrade, 2012.,* page 542
40 M. Milovic, *The offense of illicit sexual acts , Glosarium, Belgrade, 2006.*, page 113

sexual acts, that kind of violation entails anxiety of passive subject, sexual violation of his honour, humiliation, insult to his dignity (especially in the case of illicit sexual acts in conjunction with Article 178, paragraph 1 and 2 and Article 181 of the Criminal Code of RS).[41]

GUILT IN ILLICIT SEXUAL ACTS

The offense of illicit sexual acts can be made with an intent, in which both the doctrine and jurisprudence agree. From the content of the incrimination of illicit sexual acts, as formulated in the Criminal Code of Republic of Serbia: "Whoever, under the terms of Article 178, paragraph 1 and 2, Article 179, paragraph 1, Article 180, paragraph 1 and Article 181, paragraph 1 to 3 of the Criminal Code of RS commits some other sexual act, the required form of consciousness and the will of perpetrator cannot be immediately seen. The perpetrator must be aware that using of force and threat, or serious threat (in conjunction with Article 178, paragraph 1 and 2), abusing of person's powerlessness (in conjunction with Article 178, paragraph 1) if the victim is a child (in conjunction with Article 180, paragraph 1), or abusing of position (in conjunction with Article 181, paragraph 1 to 3) is committing illicit sexual acts in order to achieve ultimate goal - inducing or satisfying the sexual drive. External attitude of offender in fact expresses his inner subjective attitude, which means agreeing, desire, intent to perform illicit sexual act, and since he is aware that such behaviour has elements of the crime of illicit sexual acts, the form of guilt can be only premeditation. In addition to the essential characteristics, the awareness of the offender should also include all other features of these charges (that would imply these characteristics of the offenses to which illicit sexual acts are linked). That means the awareness and knowledge about anti-social character of his activities.[42]

Our jurisprudence generally states only that the perpetrator acted with direct intent, thereby not explaining this form of culpability. The courts are satisfied with partial paraphrase of Article 25 of the Criminal Code of RS "that the defendant was aware of his actions and that he wanted their perpetration, and that he acted with direct premeditation as a form of culpability".[43]

A particular problem in this crime is represented by its separation from the attempted criminal offense under Article 178 to 181 of the Criminal Code of RS. It is generally accepted that the criterion for separation is premeditation of the perpetrator.[44]

Certain difficulties are caused by the demarcation of illicit sexual acts with the acts that are covered by the actions that are equal to sexual violation in terms of the offenses referred to in Article 178 to 181 of the Criminal Code of RS.[45]

COMPLICITY IN ILLICIT SEXUAL ACTS

When it comes to the problem of complicity, the literature states that the joint realization of the offense of illicit sexual acts by several persons is not possible, because more persons cannot collectively do the crime of illicit sexual act, which is a condition for the existence of complicity according to Article 33 of the Criminal Code of the Republic of Serbia. Therefore, any person who commits or attempts to commit illicit sexual acts, sexual violation or an equal act, is the independent perpetrator of the respective criminal offense.[46]

41 *Ibidem*
42 M. Milovic, *The offense of illicit sexual acts , Glosarium, Belgrade, 2006.*, page 116
43 *Ibidem*
44 Z. Stojanovic, O. Peric, *Criminal law - special part*, Law book, Belgrade, 2011, page 96
45 Z. Stojanovic, *Comment of the Criminal Code,*Official Gazette, Belgrade, 2009., page 459
46 M. Milovic, *The offense of illicit sexual acts , Glosarium, Belgrade, 2006.*, page 157

OBJECT OF CRIME OF ILLICIT SEXUAL ACTS

It is important to determine the object of criminal offense because it is one of the elements of every crime. It is of great importance for determining the legal qualification by characterizing and individualizing certain criminal offenses.[47]

The objects of protection are certain goods that are protected by criminal law. In the widest sense, the object of protection of crimes against sexual freedom is not only the personality of an individual whose physical and sexual integrity was attacked, but also of the state or society.[48]

The object of criminal law protection in the sphere of sexual relations may be compromised not only with sexual violation or an equal actions (unnatural sexual acts), but also with a number of other seemingly mutually different actions. As sexual violation and equal actions, these actions attack on the sexual freedom of an individual, exploit helpless persons and abuse certain relations or children. Therefore, these actions jeopardize voluntarily and knowingly entering of individuals into sexual relationships. Calling them illegal sexual acts (in our earlier criminal legislation the term "indecent assault" was used), the Criminal Code RS incriminates them by the provision of Article 182 in a way that puts them in connection with the offenses referred to in Articles 178 to 181 of the Criminal Code of RS. This means that they are punishable only if all the elements of some of these crimes are realized, except that instead of sexual violation or an equal act, another sexual act is committed. In fact, the crime of illicit sexual act contains several criminal acts in all ways identical to the actions under Article 178 to 181, except that the act of perpetration is not sexual violation or an equal act, but some other act whereby the perpetrator expresses his sexual drive.[49]

Consequently, the object of protection of the offense of illicit sexual acts is sexual freedom, and individual's decision in sexual sense, according to current morality. This is a human good that is protected as an object of criminal law, which also includes sexual honour (as human good and value for the individual and society).

The object of action as the second object of the offense (together with the object of protection) includes material, physical object on which the criminal action is carried out. That object includes a person, so in this case the object of action is called passive subject.

Most commonly, as a subject or as a passive subject of the offenses against sexual freedom there appears a woman, "as much as sex as circumstance that we have in mind when determining the values protected by the criminal law, does not play nearly as visible role in another groups of crimes". This is probably due to the biological differences between the sexes, which are reflected in the fact that there are very few cases in which the victim is a man. This is also true when the criminal offense of illicit sexual acts is in question.[50]

Object of crime (passive subject) in illicit sexual acts can be any person who may be a passive subject of individual criminal cases under the Article 178, paragraph 1 and 2, Article 179, Paragraph 1, Article 180 paragraph 1 and Article 181, Paragraph 1 to 3 of the Criminal Code of RS.[51]

SUBJECT OF CRIME OF ILLICIT SEXUAL ACTS

The subject of the offense, in the most general sense, should consider a man (male person), who in a certain way and under certain conditions participates in the acts of perpetration (the perpetrator - a subject in the strict sense - the author) or in the acts of complicity (complicit).

47 *Ibidem*
48 *Ibidem*
49 Z. Stojanovic, *Comment of the Criminal Code,*Official Gazette, Belgrade, 2012., page 542
50 M. Milovic, *The offense of illicit sexual acts , Glosarium, Belgrade, 2006.*, page 120
51 *Ibidem*

The RS Criminal Code, as already noted for these offenses, does not require any special properties of the subject which are required in some other crimes (e.g., giving false testimony or violation of law by a judge). In this case, our legislators serve descriptive formulation "Who", which is the case with most crimes, and so that the offenses referred to in Chapter XVIII of the Criminal Code of RS.[52]

It is not disputed that a person who used mechanical or natural force can be considered a subject. Some offenses may be debatable whether the subject is also a person who used another person. However, the majority of crimes against sexual freedom find it unproblematic because it comes to the self-inflicted offenses.

These crimes so far mainly start from the fact that the perpetrator (subject) of the offense is male. Starting from the protective function of criminal law that, among other things, sexual freedom of a man is indivisible and assumes the same protection regardless of gender, it is not justified to make the difference in terms of participants in the sexual actions (especially the act of sexual violation and illicit sexual acts). However, we should keep in mind the existing physiological and psychological differences between the sexes, which cannot be ignored.[53]

In many countries legislations indirectly show that the subject (the perpetrator) of illicit sexual acts can be also a woman. In part this is the result of equal treatment of the sexes in criminal law. At the same time, this conception deviates from the traditional view that it is the woman who is "the weaker sex" and that only she is the one that is subordinated in sexual acts.[54]

The perpetrator of the offense of illicit sexual acts therefore may be any person corresponding to a criminal offense which illicit sexual acts are referred to. In this regard, the notion of the perpetrator cannot be uniquely determined because it depends under what conditions and to whom the illicit sexual acts are made.[55]

QUALIFIED FORMS OF ILLICIT SEXUAL ACTS

The offense of illicit sexual acts has three forms.

The first severe form of the act is there if the unlawful sexual activity (except sexual violation or another equal act) is made to a child up to 14 years of age. This offense is punishable by the imprisonment of six months to five years. Other more severe forms exist in the following cases: 1) if, due to taken actions, a serious bodily injury occurred to the person against whom the offense was committed; 2) if the offense was committed by several persons, and 3) if the offense is committed in a particularly cruel or humiliating manner. This offense is punishable by imprisonment from two to ten years. The third more severe type of the form exists if due to taken actions, there occurred the death of the person against whom the offense was committed.[56] In comparison with the death consequence that is in causal connection with the action taken in the basic act, on the side of the offender there is negligence. This offense is punishable by the imprisonment of at least five years.[57]

52 M. Milovic, *The offense of illicit sexual acts , Glosarium, Belgrade, 2006.*
53 M. Milovic, *The offense of illicit sexual acts , Glosarium, Belgrade, 2006.*, page 118
54 *Ibidem*
55 M. Milovic, *The offense of illicit sexual acts , Glosarium, Belgrade, 2006.*, page 119
56 V. Durdjic, D. Jovasevic, *Criminal law - special part,*Center for publications of Law faculty in Nis, Nis, 2012., page 87
57 *Ibidem*

EXTENDED CRIME IN ILLICIT SEXUAL ACTS

The criminal legislation of the Republic of Serbia finally regulated the issue of extended crime. It can be said that until now it was a creation of court practice and theory, and the same situation is in many foreign jurisdictions.

Extended criminal offense represents more of the same or the same type of crimes committed in the time correlation by the same perpetrator, which represents a whole due to the existence of at least two of the following conditions: the identity of the victim, the sameness of the object of action, the use of the same situation or the same permanent relationship, the unity of places or the areas of perpetration of the act or a unique intent of the perpetrator (Article 61, paragraph 1 of the Criminal Code of the Republic of Serbia).[58]

For criminal offenses against personal goods or actions that are of purely personal nature (especially sexual offenses) the construction of extended crime against different victims is not possible. This is indicated by legal rule provided in Article 61, paragraph 2, which states that the crimes directed against a person can be considered as extended criminal offenses only if they were committed against the same person. So in the crime of illicit sexual acts, which also protects the personality or personal right, the construction of an extended criminal act is not possible if the passive subject is not the same person, or if illicit sexual acts are committed against a number of different people.[59]

More illicit sexual acts performed in a short period of time and over the same passive subject, no matter whether they are made under different circumstances, represent one extended criminal offense.[60] In the case of repeated performance of illicit sexual acts against the same person by the same perpetrator the construction of extended crime is possible, if the offense is committed within one created situation. And if there are all conditions that connect more of the same criminal acts by life and logical assessment into a single criminal activity (as it is indicated in Article 61, paragraph 1 of the Criminal Code of RS).

In view of the foregoing, and having in mind the provisions of the law, it follows that the existence of extended crime in illicit sexual acts is possible, provided that there is the sameness of passive subject (victim) and certain time continuity (space between events) of operations which create the characteristics of this criminal act.[61]

VOLUNTARY ABANDONMENT OF PERPETRATION IN ILLICIT SEXUAL ACT

The concept of voluntariness is one of the fundamental elements of the institution of voluntary abandonment of perpetration of the crime. The question of establishing this concept is the central question that arises during the implementation of this concept. There are no universal criteria by which one might respond in each case whether the offender voluntarily abandons the perpetration of the crime or offense is not completed for other reasons that were beyond his will and power.[62] It is generally accepted that there was a voluntary abandonment if it occurred because of some completely internal reasons or motives. External circumstances are often transmitted into the inner motivation that guides the offender when deciding whether to give up action.[63]

58 M. Milovic, *The offense of illicit sexual acts , Glosarium, Belgrade, 2006.*, page 147-149
59 *Ibidem*
60 *Ibidem*
61 M. Milovic, *The offense of illicit sexual acts , Glosarium, Belgrade, 2006.*, page 147-149
62 More in: Z. Stojanovic,*Abandonment of commission of the crime and the issue of voluntariness,* Legallife, no. 1/1978, page 23-24
63 M. Milovic, *The offense of illicit sexual acts , Glosarium, Belgrade, 2006.*, page 151-154

Voluntary abandonment from the commission of the crime of illegal sexual acts will exist when using force, threatening, taking advantage of mental and physical incapacity for resistance or abusing of position of passive subject have started, but the offender on the basis of their own choices, aware that he could complete this criminal offense, gave up. The reasons for the abandonment are very different and can be a pity for the victim, victim's supplication or persuasion to spare, fear of punishment, etc. So, it is not disputed that the voluntary abandonment exists if the perpetrator refrained from committing illicit sexual acts because of the request or persuasion of victims, but it may be questionable whether the voluntary abandonment exists in a situation where the request or persuasion came from a third person. It could be accepted that a voluntary abandonment exists if the presence of a third person was not an obstacle to complete an illicit act of sexual acts, but her suggestion or persuasion motivated the offender to leave the completion of the offense. In this case, the notion of voluntarism should be extensively interpreted as if the theory holds that a voluntary abandonment exists if the perpetrator is encouraged by the victim for the act of perpetration, then it would not be reasonably to consider that there is voluntary abandonment just because it came from a third person.

The voluntary abandonment will not exist if the perpetrator gave up because he was under the delusion that there is some external circumstance which prevents him from completing the action (and there is no such circumstance) or because of predominant influence of external circumstances, due to which the offender was forced to withdraw from the completion of the offense whose enforcement has already begun (the arrival of a third person or persons, the sound of sirens of police cars, weather disasters - storms, downpours, etc.). Also, there is no voluntary abandonment if abandonment from the perpetration of illicit sexual acts is not definitive, because the temporary pause in committing actions in case of intent to complete the started work later, does not exclude the continuity of actions.

Otherwise, the application of this conception is specific for illicit sexual acts for reasons that cannot be applied to all situations. Some acts of perpetration have current character, e.g. pinching the breasts or buttocks, lifting skirts, grabbing genitalia and the like. As the current operation, it is very difficult or almost impossible to prove intent and execution as the moment of starting the work. On the other hand, there are some actions of perpetration where the voluntary abandonment is possible, for example masturbation of male sexual organ.[64]

CONCLUSION

According to the concepts of Michel Foucault, yet in the XIX century sexuality was important for several reasons, in particular the following: on the one hand, sexuality as a complete body behaviour depends on the disciplinary, individualizing control in the form of continuous surveillance; and on the other hand, sexuality is an integral element of biological processes, and causes consequences in wide biological processes that are not related to an individual's body, but that element.

In order for the present concluding observations not to repeat what has already been said, we will briefly point out the most important conclusions that we have reached working on this article.

First, the elaboration of the topic shows that positive criminal legislation of the Republic of Serbia uses the term illicit sexual act in all situations where it is needed to penalize any sexual activity except for sexual violation and act equal to it. However, many authors point out

64 *Ibidem*

that current incrimination of illicit sexual acts is not satisfactory because illicit sexual acts are interpreted in different ways, and that it should bear in mind the problems in terms of their application.

Furthermore, we could see that a particular problem in this crime is represented by the attempt of its delimitation as referred to in Articles 178 to 181 of the Criminal Code of RS. It is generally accepted that the criterion for delimitation is the intent of the perpetrator.

It also creates some difficulties for demarcation of illicit sexual acts with the acts that are covered by the actions equal to sexual violation in terms of the offenses referred to in Articles 178 to 181 of the Criminal Code of the Republic of Serbia.

REFERENCES

1. B. Zlataric, *The Criminal Code in its practical application - a critical review of the case law,* National newspapers, Zagreb, 1958.
2. D. J. Tahovic, *Criminal law - special part*, Scientific book, Belgrade, 1955, page 176-178.
3. L. Lazarevic, *Comment of the Criminal Code*, Modern administration , Belgrade, 2006.
4. M. Foucault, *The Will to Knowledge - history of sexuality I*, Education, Belgrade, 1982.
5. M. Foucault, *The Will to Knowledge - history of sexuality I,* Education, Belgrade, 1982.
6. M. Foucault, *History of Sexuality - taking care of yourself* , Education, Belgrade, 1988.
7. M. Milovic, *The offense of illicit sexual acts,* Glosarium, Belgrade, 2006.
8. N. Memedovic, *The crime of rape in the Yugoslav law*, Doctoral dissertation, Belgrade, 1984.
9. V. Durdjic, D. Jovasevic, *Criminal law - special part,* Center for publications of Law faculty in Nis, Nis, 2012.
10. Z. Pavlovic, *Sexual abuse of children*, Faculty of economy and justice, Novi Sad, 2013.
11. Z. Pavlovic, *Indecent assault*, Law - Theory and Practice, Faculty of economy and justice, Novi Sad, 15(10).
12. Z. Stojanovic, *Comment of the Criminal Code,* Official Gazette, Belgrade, 2006.
13. Z. Stojanovic*, Comment of the Criminal Code,* Official Gazette, Belgrade, 2012.
14. Z. Stojanovic, *Comment of the Criminal Code,* Official Gazette, Belgrade, 2009.
15. Z. Stojanovic, O. Peric, *Criminal law - special part,* Belgrade, 2000.
16. Z. Stojanovic, O. Peric, *Criminal law - special part,* Law book, Belgrade, 2011, page 96.
17. Z. Stojanovic, *The criteria for determining incrimination in the sphere of sexual relations, in general(doctoral thesis),* Ljubljana, 1981.
18. Z. Stojanovic, *Abandonment of commission of the crime and the issue of voluntariness,* Legal life, no. 1/1978.

UDC: 343.132
343.98

NEW TRENDS OF INVESTIGATIONS, THE DOMINANCE OF TECHNICAL EVIDENTIARY METHODS

Kornél Girhiny[1]
National University of Public Service, Faculty of Law Enforcement, Budapest

Abstract: During current investigations, our colleagues daily face challenges whose solution is urgent. The changing regulatory environment and the changing social systems generate new emergence of crimes. Considering these notions, certain tendencies should not be neglected. Therefore, I intend to appreciate the changing processes in its complexity. Along this idea some tendency cannot avoid our attention.

One of these phenomena is the tendency related to tactical production of evidence, according to which these methods frequently get secondary role in the production of evidence. The other phenomenon entwined with this is, the appreciation of technical productions of evidence, both in the investigation and in the production of evidence. During the past 150 years the tactical methods have lost their probative force. In parallel with this, the importance of technical evidence has grown.

This lecture does not contain the examination of investigation changing main points, but the new trend of investigations does. I would also like to speak about the issues of verification, especially the probative force of some procedural actions.

Keywords: investigation, evidence, criminalistics, proof, technical difficulty, tactical methods

HISTORICAL OVERVIEW

Naturally, every nation – even every region or institution – has its own methods in its jurisdiction. However, in today's turbulent world where the significance of geographical borders is eliminated and crime is gradually becoming international, prosecution bodies have to live up to new challenges. More and more legislations refuse to handle delinquencies merely on national level[2]. This paradigm shift has numerous visible and non-visible forms, some of which are based on rules, while others are based on non-written agreements creating tendencies in the field of national crimes.

This study aims to draw attention to these changes in tendencies and the benefits and drawbacks of them.

Nowadays we are facing the fact that methods used in criminal investigations[3]– which proved to be successful for several decades – are losing their effectiveness[4]. In the cases of

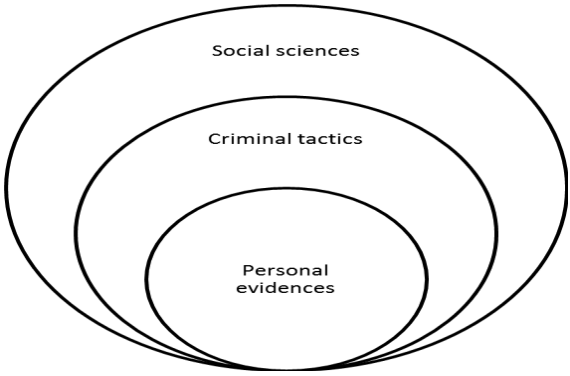
1 E-mail: girhiny.kornel@uni-nke.hu, Phone: +36-1-392-3500/19-292.
2 Dániel Szentkuti – Márton Szűts: Az Internet és a büntetőjogi felelősség egyes kérdései http://jesz.ajk.elte.hu/szentkuti15.html
3 Lakatos János: Kriminalisztika I. A kriminalisztika egyes elméleti kérdései, Budapest: RTF nyomda, 2012. 97 oldal
4 Bócz Endre (szerk): Kriminalisztika joghallgatóknak Budapest: Magyar Közlöny Lap- és Könyvkiadó nyomda 2008. 24-30 oldal

investigation, increasing number of previously unknown[5] physical evidence appears. This observation is supported by the tendency of the current judicatory practice neglecting the importance of personal sources of data, personal evidence.

It is widely known that categorization of criminalistics differ by schools. Therefore, I have divided criminalistics into three main parts: criminal techniques[6], criminal tactics[7] and criminal methods[8].

To understand the origin of the tendency it is recommended to examine the practice in use from a historical point of view. As it is familiar to all of us, criminalistics is a field of science which elaborates procedures, using results from other branches of science, in order to reveal, prove and prevent crime. Consequently, using a deductive approach, our goal is to answer the question: Why do we regard personal evidence to be of minor importance in the investigation procedure?

For a better understanding, see this chart[9] [10]:



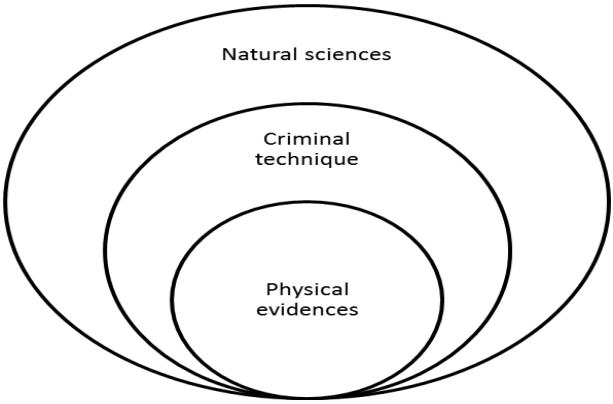
DEVELOPMENT OF THE PERSONAL EVIDENCE

The chart above clearly demonstrates that personal evidence relates to criminal tactics and that the development of social sciences contributes to a great extent to the evidence of criminal tactics. Obviously, the development of criminalistics itself had significant impact on the development of each method. Nevertheless, we need to take into consideration the difference in the way of adopting the results of criminalistics and the law in the procedures.

5 Elsősorban a számítástechnikai rendszerekben történő adatok megjelenési formáiról beszélhetünk, legyen az egy talajradar által rögzített képsor vagy akár egy képelemző program, és még sorolhatnám.
6 Lakatos János: Kriminalisztika I. A kriminalisztika egyes elméleti kérdései, Budapest: RTF nyomda, 2012. 45 oldal
7 Lakatos János: Kriminalisztika I. A kriminalisztika egyes elméleti kérdései, Budapest: RTF nyomda, 2012. 46 oldal
8 Lakatos János: Kriminalisztika I. A kriminalisztika egyes elméleti kérdései, Budapest: RTF nyomda, 2012. 47 oldal
9 In this paper personal evidence includes the confession of a witness and the charged person as parts of the objects of evidence; and interrogation on the spot, attempt of proving, recognition, inspection and confrontation as parts of the methods of evidence.
10 János Lakatos (2004) Kriminältaktika I, p. 12: "Criminal tactics elaborates scientifically based principles and recommendations for investigation procedures, execution of actions and measures of investigation and the collection and use of data and objects of proof taking into consideration provisions in force. Social sciences: philosophy, geography (socio geography), literature, law, economics, cultural anthropology, history of art, ethnography, linguistics, politics, psychology, social sciences, history, dolphinology, genealogy, library science, archival science, museology, numismatics, pedagogy, archeology, social work."

Since in this paper I do not wish to examine the international procedural actions, I merely note, that on continental basis the same procedural actions were formed under almost the same terminology.

Similar to the previous chart, we can easily categorize the physical evidences[11] [12]:



DEVELOPMENT OF THE TECHNICAL EVIDENCE

These two charts demonstrate the scientific basis of personal evidence and physical evidence. This is of high importance, since criminalistics can be a successful and effective part of the system of jurisdiction only if the methods applied are objective and authentic. The fact that the mere set of objective data can lead to success quite rarely gives ground for scepticism. I completely agree with the assumption that there is a lot more required to fight crime. Without the intuitive thinking of the investigator – the criminological thinking[13] – these are sheer data, information is created by stringing these data in a single thread by setting up possible versions; that is what it takes to become a real investigator. However, one cannot live without the other: intuitive thoughts without proof are useless, since courts pass judgments based on facts that are unquestionable.

Returning to the origin of this thought, since in this paper I do not detail the development of some of the sciences, I would like to sum up, that while social sciences produced insignificant development in relation to the methods of investigation in the past 100-150 years, the development of natural sciences showed a great leap. As a consequence, physical evidence enjoys dominance over personal evidence.

Moreover, the legislative body via the Hungarian criminal procedure law, the Law XIX of 1998 and "realistic view" limits the effectiveness of tactic-like evidence, since the measures of

11 The set of physical evidence is not listed in Law XIX of 1998. Instead it says: "Physical evidence is every object, which can be used for the provenance of the fact…"

12 János Lakatos (2012): Kriminalisztika I. A kriminalisztika egyes elméleti kérdései, p. 45. "Criminal technique elaborates technical measures and methods based on the relationships between criminalistics and natural sciences that can be used to reveal, prove and prevent crimes.Natural sciences: physics, chemistry, biology, geography, geology, meteorology, astronomy, medicine, agricultural science, genetics, technological sciences."

13 János Lakatos (2004) Kriminál taktika I, p. 10

provenance[14] and the procedures[15] are listed, while in the case of physical evidence[16] no such list exists. It may not be by chance that the criminal procedure law currently in force sets only one criterion in relation to objects of physical evidence: it shall be useful in the provenance.

Approaching the topic from the point of view of provenance, one cannot put aside the developments of modern criminalistics; contemporary criminologists are keen on researching the opportunities of investigation and provenance in today's information technological environment. Csaba Fenyvesi defines five milestones[17], all of which form part of measures of physical evidence.

In my opinion, the use of tables or diagrams to demonstrate the comparison of personal evidence and physical evidence is inadequate, since the number of technological physical evidence increases day by day. Therefore, I do not show such demonstration.

CONTEMPORARY PROBLEMS

On the other hand, I would like to point out the drawbacks of physical evidence. Since one cannot be completely aware of the newest technological inventions, the possibility of committing an error is high. In case of decisions based on material evidence the responsibility of the decision maker, the investigator and the prosecutor is huge. Investigators are in difficult situation in case of revealing the circumstances of the past. In today's highly innovative environment our knowledge can easily become obsolete in a day, and can mislead the decision maker who inevitably makes false judgments.

According to current procedures, it is not obligatory for the police, or the court to be aware of the newest technological innovations[18], though it consequently challenges the authenticity of the decision maker. The policeman, prosecutor or judge can involve experts if needed. However, I do not find it satisfactory, since in most of the cases the lack of expertise is not even realized. My suggestion, in coherence with the practice of several jurisdictions, is the training of officers, prosecutors and judges who above their professional expertise have wide knowledge of current technological innovations.

Another problem in numerous countries is the lack of specialization in education after completing post-graduate programs. The causes of these deficiencies are disputed, though the lack of resources, the inadequate strategy (if any), and the professionals' inability to compete with a constantly changing environment are certainly a few of them.

---

14 According to Law XIX of 1998, the measures of provenance are confession of the witness, expert opinion, physical evidence, warrant, confession of the accused.

15 According to Law XIX of 1998, the procedure of provenance are visitation, interrogation on the spot, attempt of proving, show for recognition, confrontation, audition of experts.

16 According to Law XIX of 1998, the physical evidence of provenance is every object, which can be used for the provenance of the fact, especially the object with clues, or material evidence created by crime, used in committing the crime or are objects of crime.

17 Fenyvesi Csaba: A kriminalisztika tendenciái. Budapest-Pécs, 2014. Dialóg Campus. 45. Oldal
"The five milestones containing three groups of physical evidence and two methods:
Identification by fingerprint (from 1900-1910)
Identification by blood (from 1920-1930)
Identification by neutron activation analysis (from 1930-1940)
Identification by DNA (from 1986)
Use of digital data in provenance (form 1990s)"

18 Author's Note: In Hungary, the general training takes place, so the training is not specific specialty; in some cases, it is short; but a few days of training is not typical, so getting to know the specifics of the field most often happens in practical work.

In this paper I do not intend to deal with the Hungarian expert system[19], though our system is rarely known in any other legislation. According to foreign practices, professionals work within the police organization knowing both general and specified tasks and therefore are able to give high quality service to investigators[20]. In addition, specialization is spreading across police organizations.

To sum up, it is time for us to review some of the general principles of prosecution and jurisdiction in certain cases of actions and judgments.

As I have previously mentioned, criminalistics obviously takes advantages of the progress of sciences. The interpretation, on the other hand, is not that obvious. In case of lack of knowledge, how can one fully comprehend the meaning of information? Certainly, experts support the whole procedure, though they may not have the right approach to a given question, provided they lack police experience.

The use of technical data in procedures without adequate evaluation[21] raises concerns. In most of the cases, digital data prove to be correct, but they fail to be useful in provenance. Therefore, in my opinion, they can only be regarded as data collecting activity[22].

Without the intention of generalizing, but being aware of the weaknesses of some investigators, I can say that in some cases concerning physical evidence, the adequate data analysis and evaluation is not complete. Moreover, we have not mentioned one of the most dangerous mistakes, the preservative adherence[23].

Some find these activities useless, stating that investigations are built on the same routines. However, I do not find this approach correct, since I agree with the statement saying there are no two cases alike. The proper data analysis and data evaluation is crucial from the recording of report to the accusation, thus mistakes concerning physical evidence can be avoided.

In recent cases involving mobile phones as physical evidence, a fundamental statement was concluded: information gained from a certain supply of data can only verify the location of the device, not of the person to whom it belongs.

With the rise of smart phones the range of problems has widened and changed. These devices can no longer be defined as simple mobile phones. These gadgets show more similarity with PCs than with phones. By now it can easily be imagined, that a person controls his wife's smart phone in Miskolc by his laptop in Budapest and sends harassing texts to himself in the name of his wife. Such text can be the basis for prosecution. Being aware of the nature of investigations, after the request of data in opposition to all physical evidence and the confession of the offended, without making any prejudices, they could serve as insufficient defence.

Taking into account these statements, I think that not only is the reorganization of professional fields crucial, but it is also inevitable in the near future for the successful accomplishment of such procedures. In my opinion , besides technological developments, the examination of specialization, the tracking of crimes and the elaboration of feedbacks based on the jury's judgments are also of high priority.

19 2005. évi XLVII. törvény az igazságügyi szakértői tevékenységről
20 Bócz Endre (szerk): Kriminalisztika joghallgatóknak Budapest: Magyar Közlöny Lap- és Könyvkiadó nyomda 2008. 75-85 oldal
21 Lakatos János (szerk.) : Kriminältaktika I. Budapest: Rejtjel kiadó 2004. 15. oldal
22 Lakatos János (szerk.) : Kriminältaktika I. Budapest: Rejtjel kiadó 2004. 52. oldal
23 Fenyvesi Csaba: A kriminalisztika tendenciái. Budapest-Pécs, 2014. Dialóg Campus. 183. oldal

TACTICAL PROOF

After having detailed the use of physical evidence, we may examine how the system of personal evidence can change in the future. As far as I am concerned, I do not expect significant changes in this field. I personally think that personal and physical evidence function complementary in the course of a successful procedure. In general, information, proof gained from personal evidence cannot or can only partially be replaced by using physical evidence and vice versa. With the progress of technology, personal evidence gains technological support, their deduction may be performed differently using different methods[24]. As mentioned in a previous paper[25] with regard to interrogation, irrespectively of the dominance of physical provenance, tactical methods are necessary and irreplaceable. Besides this duality and the fact that during the provenance evidence does not have a predefined decisive role, and that it is subjectively[26] judged by the prosecutor and the judge both separately and together, we can still recognize some dominance and we can conclude that decisive evidence is typically material. While in case of personal evidence subjectivity can never be fully eliminated, physical evidence is always objective. Consequently, the decision maker tends to rely on material evidence of objective nature, rather than on subjective evidence implying the possibility of imprecision and being unreal.

How can this information be linked to the tendencies of investigation? As it is known, during investigations evidence is to be fully collected and constantly evaluated separately and together. The range of the practical implementations of this idea has become significantly widened by modern age and by its developments.

Simultaneously, with the technological progress, devices have become widely used, which serve as a reliable source of data in the course of investigations. The question regarding this trend refers to the reason why prosecutors do not use these useful devices comprehensively. The answering of the question exceeds the scope of this paper, but supposedly financial aspects, the lack of knowledge and the work based on routine can play the role in the separate progress of technology and investigation. On the other hand, I am sure that sceptics comprising persons in key positions deny the justification of new devices and other priorities are defined instead of developments.

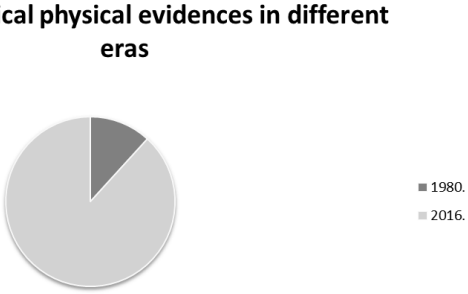
We are regularly informed that these developments put serious financial burden on the organization's budget. Therefore, developments depend on the organization's financial position as well. However, according to current laws, public order and security is not solely the task of the police. There are grounds for examining the possibility of sharing costs of development with co-organs, local governments. These intentions can already be observed in police organizations, but they are of insignificant relevance[27].

Since in the last couple of decades new methods and evidence have appeared continuously, it is recommended to have a look via some examples how the trends of typical physical evidence have changed.

24 Az 1998. évi XIX törvény 167.§
25 Girhiny Kornél: Új típusú kihallgatástaktikai módszerek Magyar Rendészet, Budapest XV. évfolyam, 2015/3. szám 49- 58 oldal
26 Az 1998. évi XIX törvény 78.§ (2), (3)
27 In contrast, many of the settlement agreement, known as a high level of co-operation with the police, so I do not want to generalize on this issue, but unfortunately it is a rare practice.

The ‘80s	From 2010
- Traces	- Traces
- Remains of cloths	- Remains of cloths
- Written documents	- Written documents
- Fingerprint identification	- Fingerprint identification
	- DNS identification
	- Picture analyzing programs
	- Reconstructing software
	- GPS systems
	- Sound, voice, picture recorders
	- Data of mobile phones (data of calls, texts, recordings etc.)
	- Data of PCs (IP addresses, mails, social media)
	- Computer databases
	- Drones
	- Area scanners
	- Ground radar
	- Other

Trends of typical physical evidence



Ratio of typical physical evidence in different eras

CONTRASTING

The picture above demonstrates that we are witnesses of a paradigm shift in objective investigations. Regarding the tools of police investigations and attempting to find similar trends between investigations and technological changes, we can say that we lag behind technological progress. Still following slowly the pace of technology, investigation seems to go through a transformation. Completing the formulas of procedures defined by the law, the comprehensive collection of evidence, we do not expect results from some obligatory elements. Besides the duality of this information, we do not see the direction of innovation, the concept or the strategy forming the paths of development. Hopefully, we are going to witness the widening of methods and tools aiming to detect crimes and in some aspects the transformation of the current system enhancing the effectiveness of prosecution.

Concerning challenges, we can already see that the spot of some crimes has changed. Some people live virtual lives. Computers, PCs, tablets, etc. can be tools or objects of crime[28]. Parallel to these methods of committing crimes, in my opinion, the spot of investigation at least partially has to change, especially if we seek to complete our task according to the best of our knowledge.

28 Laczi Beáta: A számítógépes környezetben elkövetett bűncselekmények nyomozásának és a nyomozás felügyeletének speciális kérdései, Magyar Jog, 2001. 12. szám, 728. o.

Regarding paradigm shifts we can say that criminalistics being affected by sciences formed by responsible experts has already gone through crucial changes. I regard it essential that criminalistics relies on a group of responsible professionals drawing the guidelines of development, the guidelines that lead further than the solution of today's problems.

CONCLUSION

To sum up, the range tools of investigation and provenance as a result of technological development has widened significantly. We can conclude that in the last 120 years the dominance of the development of technical evidence was typical, therefore physical evidence gained greater significance compared to personal evidence, both in investigation and provenance. The role of personal evidence is also weakened by the subjective nature of tactical procedures, which results in the lack of unquestionable certainty. However, we have to realize that these two methods can only be used together for comprehensive provenance, each completing the deficiency of the other.

With regard to the sequential order of evidence, we can say that no definitive order can be determined, since evidence may vary from investigation to investigation. The cliché that "there is no recipe for investigations" is familiar to us and I have to agree with this statement. Additionally, I remark that there is no recipe for a successful investigation either.

I would like to make a reference to the duality of physical evidence. Since I questioned the validity of material evidence, I would like to take a stand in this issue. If an investigator of adequate expertise and technological knowledge handles the evidence, he/she ought to be able to decide whether the object is evaluated as a collection of data or as evidence and measures that should be applied according to this role.

During the high quality data analysis, data evaluation the form and role of data in the course of investigation should clearly be defined. However, as long as underqualified colleagues take part in this procedure, mistakes, revealed or unrevealed, will inevitably be made.

At this point, the only help we can provide to our colleagues is to call their attention to the potential sources of error.

REFERENCES

1. Szentkuti Dániel - Szűts Márton: Az Internet és a büntetőjogi felelősség egyes kérdései http://jesz.ajk.elte.hu/szentkuti15.html
2. Lakatos János: Kriminalisztika I. A kriminalisztika egyes elméleti kérdései, Budapest: RTF nyomda, 2012.
3. Bócz Endre (szerk): Kriminalisztika joghallgatóknak Budapest: Magyar Közlöny Lap- és Könyvkiadó nyomda 2008.
4. Lakatos János (szerk.) : Kriminál taktika I. Budapest: Rejtjel kiadó 2004.
5. 1998. évi XIX törvény
6. Fenyvesi Csaba: A kriminalisztika tendenciái. Budapest-Pécs, 2014. Dialóg Campus.
7. 2005. évi XLVII. törvény az igazságügyi szakértői tevékenységről
8. Girhiny Kornél: Új típusú kihallgatástaktikai módszerek Magyar Rendészet, Budapest XV. évfolyam, 2015/3. szám 49- 58 oldal
9. Laczi Beáta: A számítógépes környezetben elkövetett bűncselekmények nyomozásának és a nyomozás felügyeletének speciális kérdései, Magyar Jog, 2001. 12. szám,

UDC: 341.48
343.85:343.341(4)

THE CRIMINAL JUSTICE RESPONSE TO TERRORISM – THE EUROPEAN LEVEL[1]

Ivana Bodrožić, Spec.[2]
Academy of Criminalistic and Police Studies, Belgrade

Abstract: Although the international level lacks a common definition of terrorism as a criminal offense, the European Union and the Council of Europe through their two most important documents established criminal and legal notion of terrorism and the most important concepts that are of importance to substantive criminal law, so that the member states, as well as candidate countries, may, in their national criminal justice systems start from a common criminal law definition of terrorism. The previously stated is the result of the recognition of the fact that only uniform criminal law legislation enables efficient countering terrorism, since it reduces to a minimum the perpetrators' ability to leave for a country where these criminal offences have not been defined at all, or have been defined in a narrower manner. This also facilitates the international legal assistance in criminal matters, and provides support to the national criminal justice systems, because in this very sensitive area, which implies striking a balance between the fundamental human rights and freedoms on the one hand, and the need to establish and maintain security, on the other hand, this ensures a unified stance on terrorism as a criminal law category, which does not undermine the concept of the constitutional order of a modern democratic state.

Keywords: criminal offence of terrorism, sectoral approach, Council of Europe, European Union, criminal law expansionism.

THE INTRODUCTION – THE FIRST ATTAMPTS OF A CRIMINAL LAW DEFINITION OF TERRORISM

Terrorism, as a legal term, was first used in the international legal community at the conferences organized by the International Association of Criminal Law. Through organization of several conferences, whose goal was the unification of the criminal law, this Association attempted to define terrorism and thus offer the definition of its legal concept, mainly perceived as an international criminal offence. At the Third International Conference for the Unification of the Criminal Law held in Brussels in June 1930, the first concept of the criminal offence of terrorism was introduced, whose content included several specific behaviours, which implied provoking general danger that threatened the people's life, health and property, by intentional causing of fires, explosions, floods, spreading of contagious diseases, etc.[3] The content of this

1 This paper is the result of the research project "Crime in Serbia and Instruments of State Response", carried out at the Academy of Criminalistic and Police Studies. The project leader is Dragana Kolarić, LLD.
2 E-mail: ivana.bodrozic@kpa.edu.rs. The author is a PhD candidate at the University of Belgrade Faculty of Law.
3 This was a presentation by Niko Gunzburg, entitled "Terrorism", where he gave his view of the terrorist activities, without emphasizing the specific objectives of these activities. According to: Д. Јаковљевић, *Тероризам са гледишта кривичног права,* Београд, 1997, p. 56.

criminal offence was amended at the subsequent conferences, which attempted to develop the concept of the criminal offence of terrorism *per se*, with its specific objective and subjective features.[4] This process went parallel with the process of defining the criminal offence of terrorism within the League of Nations, which represents a forerunner of the contemporary documents passed and adopted at the international level.

Terrorism was included in the international agenda way back in 1934, after the assassination of Yugoslav King Alexander I and the French Foreign Minister Louis Barthou, when the League of Nations made the first major step directed towards the criminalization of this plague, by discussing the draft Convention for the Prevention and Punishment of Terrorism. Although the Convention eventually was adopted in 1937, it has never entered into force, due to the fact that terrorism has not been sufficiently precisely defined, as well as due to the beginning of the Second World War, two years later.[5]

For the further development and defining of terrorism as a criminal offence, the first three Articles of the Convention are of great importance. The Article 1 stipulates the duty of states to refrain from assisting the terrorist activities, which are directed against another state, as well as the duty to prevent the terrorist criminal offences, which means criminal acts directed against a state, undertaken with the aim of creating a state of terror within a specific group of persons.

The Article 2 of the Convention uses the method of listing, itemizing of acts which, if the general conditions are met, constitute the criminal offence of terrorism. These are: 1) a wilful acts directed against life, bodily integrity, health or freedom of heads of states, persons exercising the prerogatives of the head of the state, their natural of designated successor, spouse of the previously mentioned persons, persons performing public functions or persons holding public positions, when the act was committed against the function or the position they hold; 2) a wilful destruction of or damage to public property or property intended for public purpose, which is owned or belongs to another High Contracting Party; 3) a wilful act which endangers human lives by creating a general danger; 4) an attempt to commit a criminal offence provided for in the previously listed provisions of this Article; 5) the production, obtaining, possession and supplying of weapons, ammunition, explosive devices or harmful substances aimed at commission, in any country, of a criminal offence stipulated by this Article.

The Article 3 of the Convention prescribes the duty for the contracting states to, in their national criminal legislations, make punishable those behaviours, which may be labelled as accompanying criminal offences of terrorism, which consist of the attempt, organization, agreement on, incitement or assistance in the activities mentioned in the Article 2 of the Convention.

Even though the Convention has never entered into force, it represents an important legal source, which attempted to define the criminal offence of terrorism in accordance with the then situation, which was characterized by the casuistic approach to the determination of the *actus reus* of a criminal offence, with emphasizing mandatory specific elements of a criminal offence, which must be met in order for a certain action to be understood as the criminal of-

4 As a result of all six international conferences, the objective characteristics of terrorism as a criminal offense were classified, related to the object of protection, the object of action, as well as the action and the consequence and subjective features, which imply a premeditation and a specific political objective. The characteristics of a passive subject were also emphasized, which implied: heads of states, their spouses, persons exercising the prerogatives of the head of the state, heirs to the throne, members of the Government, persons enjoying diplomatic immunity and members of the constituent, legislative and judicial bodies, public state agencies and other persons that would be the victims of danger or state of terror, according to: Д. Јаковљевић, *op. cit.,* p. 62.

5 The Conference dedicated to terrorism was held in Geneva in 1937, where thirty-five countries took part. During the course of the Conference, the Convention for the Creation of an International Criminal Court for the trial of the perpetrators of terrorist acts was adopted.

fence of terrorism. *Actus reus* must be directed against a state with a view to inducing fear, and passive subjects are particular persons, a group of persons or the general public.[6]

This way of defining the criminal offense of terrorism has been insufficiently precise, and the problem was the provision prohibiting the manufacture of arms, ammunition and explosives, since it was unclear whether it was to ban any or only unlawful manufacture of arms, which represented the problem for the arms-manufacturing countries.

The aforementioned Convention was ratified by only one country, and thus it has never entered into force, and somewhat later the League of Nations dissolved, so the further work on defining terrorism has continued under the auspices of the United Nations, as a universal international organization, whose predecessor was the League of Nations itself.

THE SECTORAL APPROACH TO DEFINING CRIMINAL OFFENCES OF TERRORISM IN THE UNITED NATIONS'S DOCUMENTS

By recognising the importance and complexity of the challenges and threats of terrorism to global security, the United Nations (UN), through decades-long activity sought to develop the efficient and preventive-oriented legal mechanisms, which include a criminal law element, based on respect for fundamental human rights and freedoms and the rule of law principle. The idea of the need for an efficient criminal law response to terrorism implied the adoption and implementation of a series of documents aimed at preventing terrorist acts.

To develop the effective legal mechanisms for the prevention and punishment of terrorist activities, at the same time taking into account all the difficulties characteristic for the defining of this term, the UN opted for the so-called sectoral approach to identifying acts that can be labelled as terrorist ones, instead of the adoption of one general anti-terrorist convention.[7]

The sectoral approach to defining terrorism hence does not determine the concept of terrorism, but defines individual terrorist acts as punishable, thus avoiding the creation of a single definition. Starting from 1963, the legal framework for the prevention of terrorist acts was created within the UN, which implies dozens of conventions and protocols, which in a partial, thematic way criminalize almost all possible kinds of terrorist activities. These universal legal instruments are based on the condemnation of terrorism as a threat to the international peace and security.

The signing of the previously mentioned document creates an obligation for the signatory states to stipulate certain criminal offences and sanctions in their national criminal law legislations[8], with a view to developing efficient mechanisms available to countries in their effort

6 More on the general conditions required for the existence of the criminal offence of terrorism, according to the Convention for the Prevention and Punishment of Terrorism, see in: Д. Јаковљевић, *op. cit.,* pp. 73–77.

7 The activities of this organization are characterized by the fact that the attempts to define terrorism usually followed after a big terrorist incident, which resulted in responses to specific terrorist attacks, rather than in adopting a common definition of the criminal offence of terrorism. On partial regulations of specific forms in which terrorism appears, as an easier way to achieve compromise and same coverage of all phenomenal forms of terrorism through adequate, sectoral conventions, and one general convention, read more in: Г. Капетановић, "Међународни тероризам и Уједињене нације", *Архив за правне и друштвене науке,* 1-2/1980, pp. 59–60.

8 On the dominant importance of the national criminal justice systems, despite the high degree of social danger that certain types of terrorism pose to the international community as a whole, see more in: К. Томашевски, "Проблем тероризма пред Организацијом уједињених нација", *Архив за правне и друштвене науке,* 1-2/1980, pp. 74–75.

to prevent and punish criminal offences related to terrorism.[9]

The goal of the sectoral conventions is to harmonize criminal legislations of national states, which will, through the synchronized criminalization of terrorist behaviour, minimize the possibility of perpetrators of these crimes to avoid justice and facilitate the international cooperation of state bodies responsible for preventing and combating terrorism, and respect for the principle of *aut dedere aut iudicare.*[10]

The documents adopted by the UN pertaining to terrorism are as follows:

1. Convention on Offences and Certain Other Acts Committed on Board Aircraft was signed on 14 September 1963 in Tokyo, and entered into force on 4 December 1969;

2. Convention for the Suppression of Unlawful Seizure of Aircraft was signed on 16 December 1970 in the Hague, and entered into force on 14 October 1971;

3. Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation was signed on 23 September 1971 in Montreal, and entered into force on 26 January 1973;

4. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents was signed on 14 December 1973 in New York, and entered into force on 20 February 1977;

5. International Convention against the Taking of Hostages was signed on 17 December 1979 in New York, and entered into force on 3 June 1983;

6. Convention on the Physical Protection of Nuclear Material was signed on 26 October 1979 in Vienna, and entered into force on 8 February 1987;

7. Amendments to the Convention on the Physical Protection of Nuclear Material were signed on 8 July 2005 in Vienna;

8. Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation was signed on 24 February 1988 in Montreal;

9. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation was signed on 10 March 1988 in Rome, and entered into force on 1 March 1992;

10. Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation was signed on 14 October 2005 in London;

11. Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf was signed on 10 March 1988 in Rome, and entered into force on 1 March 1992;

12. Protocol to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf was signed on 14 October 2005 in London;

13. Convention on the Marking of Plastic Explosives for the Purpose of Detection was signed on 1 March 1991 in Montreal, and entered into force on 21 June 1998;

9 On the importance of a uniform definition of terrorism, even if only through a sectoral approach in its prevention and combating, see more in: S. Sucharitkul, "Terrorism as an International Crime: Questions of Responsibility and Complicity", in: *19 Israel Y. of Int. Law,* 1989, pp. 247–258.

10 More on the concept of terrorism as a political act see: M. CH. Bassiouni, E.M.Wise, *Aut dedere aut Judicare: The Duty to Extradite or Prosecute in International Law,* Dordrecht,1995; Б. Срдановић, *Међународни тероризам, политички деликт, екстрадиција,* Београд, 2002; M. De Feo: "Political Offence Concept in Regional and International Conventions Relating to Terrorism", in Giuseppe Nesi (ed.), *International Cooperation in Counter-Terrorism – The United Nations and Regional Organizations in the Fight Against Terrorism,* Burlington, 2013, pp. 113–121.

14. International Convention for the Suppression of Terrorist Bombings was signed on 15 December 1997 in New York, and entered into force on 23 May 2001;

15. International Convention for the Suppression of the Financing of Terrorism was signed on 9 December 1999 in New York, and entered into force on 10 April 2002;

16. International Convention for the Suppression of Acts of Nuclear Terrorism was signed on 13 April 2005 in New York, and entered into force on 7 July 2007.

THE CRIMINAL JUSTICE RESPONSE TO TERRORISM – THE EUROPEAN COUNCIL LEVEL

The Council of Europe was founded on 5 May 1949, as the first organization of European states after the end of the World War II, with a goal to "achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress".[11] This organization's main concerns are the development and protection of human rights and ensuring respect for the rule of law. In this regard, this regional organization passed more than 170 conventions which substantially affect the legal systems of the Council of Europe member states.[12]

Terrorism stands out as one of the major issues to which the attention has been paid within the Council of Europe. According to the documents of this organization pertaining to countering terrorism, the following are highlighted as its most important functions: the development of legal measures against terrorism, the protection of the fundamental values, human rights, democracy and the rule of law and addressing the causes of terrorism.

In the process of creation of the Council of Europe's legal measures against terrorism, an important function was performed by the two intergovernmental expert committees, namely: the Multidisciplinary Group on International Action against Terrorism – GMT, which was founded in 2001, and the Committee of Experts on Terrorism of the Council of Europe – CODEXTER, which was founded in 2003 to replace the previously mentioned GMT.[13]

Both committees based their work on the implementation and improvement of the European Convention on Suppression of Terrorism ETS No. 90 of 1977, which was ratified by the Republic of Serbia– "The Official Gazette of the Federal Republic of Yugoslavia – International Treaties", № 10/01.

As the results of the GMT's work in the field of the development of legal solutions against terrorism, the first Protocol amending the European Convention on the Suppression of Terrorism of 1977 should be emphasized, which was adopted in 2003, and pertained to the expanding the catalogue of incriminations with revoked status of political criminal offence and politically motivated criminal offence, simplification of procedures relating to the changes and amendments to the Convention, limitation of the possibility of refusal of extradition based on the states' aloofness in relation to the provisions of the Convention, as well as to pos-

11 Б. Кривокапић, *Лексикон међународног права,* Београд, 1998, p. 437.

12 The most important documents are the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and the additional protocols, the European Social Charter of 18 October 1961, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment of 26 November 1987, and the Framework Convention for the Protection of National Minorities of 1 February 1995.

13 On the most important Council of Europe's instruments and documents and on the need to support the basic values that constitute the common heritage of the European continent in the context of efficient countering terrorism, see more in: *Borba protiv terorizma – Aktivnosti Saveta Evrope u pravnoj oblasti,* Beograd, 2007; *Borba protiv terorizma –Standardi Saveta Evrope,* Beograd, 2007.

sibilities for refusal of extradition of offenders to those countries in which for the previously mentioned criminal offences a death penalty or life imprisonment is stipulated.[14]

In 2003 the GMT was transformed into CODEXTER, within the intensified activities of the Council of Europe in the field of combating terrorism, with the aim of more successful coordination of all activities previously undertaken within the GMT. The most important result of CODEXTER's work is the creation and adoption of new legal instruments for countering terrorism, of which the most important is the Council of Europe Convention on the Prevention of Terrorism, CETS No. 196, which was adopted in Warsaw on 16 May 2005, and entered into force on 1 June 2007. Its main goal is to enhance the efforts of member states in preventing terrorism, through criminalization of certain behaviours as criminal offences and strengthening preventive measures at national and international level.[15]

Raising the level of efficiency in countering and suppressing terrorism is designated as a priority task of the said Convention, which represents the improvement of the previously applicable legal instruments. It obliges member states to criminalize certain behaviours as criminal offences of terrorism in their national criminal justice systems, and in this sense it is the bearer of the expansionist tendencies in the area of criminal law countering terrorism. This is because it criminalizes, as illegal behaviours, the preparatory activities and the creation of an abstract danger to the protected objects, as well as because it stipulates specific actions that could be seen as acts of complicity, in the form of act of commission. The previously said is justified by a high degree of social danger from terrorist behaviours and the need to strengthen the general preventive function of the criminal justice response in this area through the increased repressiveness.

In connection with the aforementioned, the Convention envisages as punishable public provocation to commit criminal offence of terrorism, and recruitment and training for terrorism. In the Article 5, public provocation to commit a terrorist offence is defined as the distribution or otherwise making messages available to the public, with the intent to incite the commission of a terrorist offence, when such actions represent a danger that one or more such terrorist offences may be committed. The assumed kind of guilt is the direct premeditation, which is determined by the specific intent, which as a subjective specific element of a criminal offence intensifies the element of the will in the premeditation, directing it towards commission of a certain goal, while the element of unlawfulness represents a constitutive characteristic of *actus reus* of the criminal offence of public provocation to commit criminal offence of terrorism, which implies that it also must be included in the premeditation of the offender.

Another criminal offence which represents a peculiarity of this Convention is provided for in the Article 6 and refers to the recruitment for terrorism, which implies soliciting another person to commit a terrorist offence or participate in its commission, to join an association or group for the purpose of contributing them in the commission of one or more criminal offences of terrorism. This criminal offence also stipulates the intention of a person recruited to commit and contribute to the commission of a criminal offence of terrorism, or to join an association or group for that purpose.

According to the Article 7 of the Convention, training for terrorism is envisaged as a criminal offense which consists in providing instructions in the making or use of explosives, firearms or other weapons or harmful or hazardous substances, or in other specific methods or techniques, for the purpose of committing or contributing to the commission of criminal

14 About the changes and amendments to the Convention on the Prevention of Terrorism of 1977 see more in: С. Мијалковић, М. Бајагић, *Организовани криминал и тероризам,* Београд, 2012, p. 485.
15 С. Мијалковић, М. Бајагић, *op. cit.,* p. 483; Д. Коларић, "Тероризам – међународни документи, савремена законска решења и Кривични законик Републике Србије", in: Тероризам и људске слободе, Тара, 2010, p. 411; Д. Коларић, "Кривично дело тероризма – упоредноправни аспекти", *НБП,* 2/2011, p. 60.

offences of terrorism, being aware that the skills taught to a person will be used for this purpose.[16] The terms "weapons", "explosives" and "other harmful or hazardous substances" were not defined in the provisions of the Convention, thus when interpreting these expressions, the Article 1, item 3 of the International Convention for the Suppression of Terrorist Bombings must be consulted. According to the said Article, explosive or other lethal device means an explosive or incendiary weapon or device that is designed, or has the capability, to cause death, heavily bodily injury or substantial material damage; or a weapon or device that is designed, or has the capability, to cause death, heavily bodily injury or substantial material damage through the release, dissemination or impact of toxic chemicals, biological agents or toxins or similar substances, or radiation or radioactive material.[17]

All the above mentioned criminal offences are characterized by a specific intent, which in each concrete case must be proved; however, for the existence of a criminal offence, it is not necessary for the criminal offence of terrorism (to which a person was publically incited, recruited or trained) to be committed.

THE CRIMINAL JUSTICE RESPONSE TO TERRORISM – THE EUROPEAN UNION LEVEL

The political and economic linking of the countries of Europe, with the idea of creating a supranational organization of states characterized by partial renunciation of national sovereignty of its members, was formalized through the Treaty on European Union (EU), signed in Maastricht on 7 February 1992. With this Treaty, the European Union has become an indispensable factor in the political life of Europe, and its main pillar. With a specific shape, which resembles a temple, whose pillars constitute the European Communities, Common Foreign and Security Policy and Police and Judicial Cooperation in Criminal Matters, the EU represents a supranational organization of states which has built *acquis communautaire* as a common set of legal regulations covering the applicable treaties and other legal documents, which constitute the legal system of the member states, but also a basic condition, whose complete acceptance is an obligation for all potential candidates for admission to full membership in the EU.

The third pillar of cooperation includes the strengthening of cooperation between the police, judicial and customs authorities in countering transnational organized crime and the strengthening of the competencies of the European Police Office (Europol) and the European Union's Judicial Cooperation Unit (Eurojust). The main objectives of the third pillar of cooperation are achieving a high level of security and the fight against racism and intolerance towards strangers, **terrorism**, human trafficking, criminal offences involving children as passive subjects, drugs and arms trade, corruption and fraud.

All the above mentioned indicates the importance given to terrorism within the EU, which is the reason why the documents of this supranational organization are extremely important for all legislations on this continent.

16 С. Мијалковић, М. Бајагић, *op. cit.,* p. 484.
17 Д. Коларић, "Тероризам – међународни документи, савремена законска решења и Кривични законик Републике Србије", in: *Тероризам и људске слободе,* Тара, 2010, p. 412; Д. Коларић, "Кривично дело тероризма – упоредноправни аспекти", *НБП,* 2/2011, p. 61; Д. Коларић, "Нова концепција кривичних дела тероризма у Кривичном законику Републике Србије", *Crimen* (IV), 1/2013, p. 55.

The EU's activity in the field of preventing and combating terrorism as a criminal offense has not started recently.[18] The formation of the TREVI Group (Group for Fighting Terrorism, Radicalism, Extremism and International Violence) in 1975 marked the beginning of an institutionalized activity aimed at exchanging information on terrorist activities, improving air traffic safety, as well as issues related to nuclear materials and other problematic issues. The listed issues from the scope of this forum for cooperation of police forces were later broadened to include other serious criminal offences, and after the Treaty of Maastricht, they were incorporated into the framework of the third pillar of cooperation.

Numerous legal instruments were adopted by the Council of the EU[19], however, for the purpose of this paper, the most important one is the Council Framework Decision on Combating Terrorism, 2002/475/JHA, adopted on 13 June 2002. In this legal document, the need for the unification of the provisions of the national criminal justice systems, for a more efficient fight against terrorism, became evident.[20] Its basic goal is to, in a unique manner, define terrorism as a criminal law category, to harmonize the penal policy related to the criminal offences of terrorism, and to introduce, in addition to liability of natural persons, the liability of legal persons for criminal offences of terrorism.[21]

18 One should not link it to the attacks on the United States (USA) on 11 September 2001, although since then, and especially after bombings in Madrid in 2004, the EU leaders have begun enhanced cooperation with a view to adopting a common definition of terrorism, harmonizing the catalogues of criminalization in national legislations, unifying penal policy, determining the list of terrorist organizations, creating a common arrest warrant and strengthening cooperation between the police and judicial institutions of the EU. Read more in: Т. Лукић, "Европа и борба против тероризма", *in: Зборник радова Правног факултета у Новом Саду,* 1-2/2008, pp. 591–595.

19 It was founded in 1974 and meets three to four times a year. It consists of the heads of states and governments of member states as well as the President of the European Commission, whose jurisdiction in the field of substantive criminal law provisions at the EU level have been largely extended compared to the founding treaties of Maastricht, Amsterdam and Nice, Article 83 of the last reform treaty, the Treaty of Lisbon of 2009. This Article implies that the European Council, through the ordinary legislative procedure for adoption of directives, can set minimum rules concerning the definition of criminal offenses and corresponding sanctions in the area of particularly serious crimes with a cross-border element, which are **terrorism**, trafficking in human beings, sexual exploitation of women and children, illicit drug and arms trafficking, money laundering, corruption, counterfeiting money, computer crime and organised crime. Based on the Article 83, a member state which considers that a draft directive may affect the basic aspects of its criminal justice system, can suspend the ordinary procedure of adoption of that directive (the so-called "emergency break mechanism") and refer to the European Council in order to resolve disputed legal issue, on which the Council decides by consensus. This mechanism should not be equated with the right of veto, but should be understood as a strengthened right of a state to choose between the interests and basic principles of their own system of criminal law policies and those at the European level. In the absence of consensus, if at least nine states wish to continue the process of harmonization, they may do so through the enhanced mutual cooperation in the area concerned (Article 83, paragraph 2). More about the Treaty of Lisbon, its basic postulates, protection of human rights and freedoms and the place and role of criminal law provisions in the protection of fundamental freedoms and rights read in: D. Ashiagbor, N., Countouris, I. Lianos, *The European Union After the Treaty of Lisabon* , Cambridge, 2012, p. 70 fn. 82.

20 At the EU level, the need for the adoption of a uniform ratification instrument related to terrorism was also discussed in a number of previously passed documents of the EU Council: the Council Decision instructing Europol to deal with crimes committed or likely to be committed in the course of terrorist activities of 1998, Council recommendation on cooperation in combating the financing of terrorist groups of 1999, Council Common Position on combating terrorism of 2001, Council Common Position on the application of specific measures to combat terrorism of 2001, Council Regulation on specific restrictive measures directed against certain persons and entities with a view to combating terrorism of 2001, as well as the Council Decision establishing the list of persons and groups suspected of being involved in terrorism, also of 2001.

21 Read more in: Т. Лукић, "Борба против тероризма на нивоу Европске уније и међународна сарадња", *in: Зборник радова Правног факултета у Новом Саду,* 1/2006, pp. 265–269.

In the introductory section of this Decision, it is emphasized that the European Union is founded on the universal values of human dignity, liberty, equality and solidarity, respect for human rights and fundamental freedoms, the principle of democracy and the principle of the rule of law.[22] Taking into account the realization that countering terrorism implies certain deviations from the fundamental human rights and freedoms, especially in relation to some derogatory provisions, the question arises on how to strike a balance between the Framework Decision's provisions and the fundamental freedoms and rights of individuals. This is what led the creators of this Decision to emphasize in its preamble that no provision of the Decision may be interpreted as to reduce or restrict fundamental rights.[23]

The Framework Decision contains 13 Articles, and it, in a unique manner and for the entire territory of the EU, defines terrorism and related criminal offences, which is aimed at harmonizing national legislations of member states.

In addition to the basic criminal offence of terrorism, the provisions of the Framework Decision also define other criminal offences relating to terrorism, terrorist group, complicity or attempt to commit a criminal offense of terrorism.

In the Article 1, the criminal offence of terrorism, or terrorist act, is defined as an act that, given its nature and context, may seriously damage a country or an international organisation where committed with the aim of: seriously intimidating a population, compelling a government or international organization to perform or abstain from performing an act, seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation. The commission of a terrorist act implies the commission of some of the classic criminal offenses, together with the existence of intent, as a differential category, which gives to the said offense the terrorist qualification. Thus, the criminal offence of terrorism is committed through:

1. attacks on life, bodily integrity or freedom of another person;
2. kidnapping or hostage taking;
3. destruction to state or public facilities, transport systems, infrastructure, including information systems, fixed platforms located on the continental shelf;
4. hijacking of aircraft, ships or other means of public or goods transport;
5. production, possession, acquisition, transport, supply or use of nuclear, biological, chemical or other weapons, explosives or nuclear or radioactive material or devices, or research into, and development of, nuclear, biological and chemical weapons;
6. release of dangerous substances or causing fires, floods or explosions that may endanger human life;
7. interfering with or disrupting the supply of water, power or other fundamental natural resource that may endanger human life;
8. threatening to commit any of the previously listed acts.[24]

Besides the definition of the criminal offence of terrorism, other significant provisions are the Article 2, which defines a terrorist group, and Article 3, which lists criminal offences linked to terrorism.

According to the Article 2, a terrorist group is defined as a structured group consisting of more than two persons, established over a period of time and acting in concert to commit

22 Д. Коларић, "Нова концепција кривичних дела тероризма у Кривичном законику Републике Србије", *Crimen (IV),* 1/2013, p. 51.
23 Т. Лукић, "Борба против тероризма на нивоу Европске уније и основна људска права и слободе", *in: Зборник радова Правног факултета у Новом Саду,* 2/2006, p. 451.
24 See Article 1 of the Council of Europe Framework Decision on Combating Terrorism.

criminal offence of terrorism. Structured group means a group that is not randomly formed for the commission of a criminal offence and that does not need to have a developed structure, continuity of its membership nor formally defined roles for its members. It is important to emphasize that there is a difference between directing a terrorist group and participating in the activities of a terrorist group.[25]

The catalogue of criminal offenses linked to terrorism first included aggravated theft, forgery of documents and extortion, and was later amended by criminal offenses of public incitement to commit terrorist offenses, recruitment and training for terrorism, which was done with the Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism.

In terms of the previously mentioned changes, public incitement to commit terrorist offences is determined as the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of the criminal offence of terrorism, without it being relevant whether the offence will be committed or not.

Recruitment for terrorism implies soliciting other persons to commit one of the offences provided for by the Article 1 of the Framework Decision.

Training for terrorism encompasses providing instruction in the making or use of explosives, firearms or other weapons or harmful or hazardous substances, or in other specific methods or techniques, for the purpose of committing one of the offences listed in Article 1 of the Framework Decision.

In the Article 4 of the Framework Decision, member states are ordered to make punishable inciting, aiding and attempting to commit a terrorist offence.[26]

The part of the Framework Decision that refers to the harmonization of penal provisions of national criminal justice systems is contained in the Article 5 and Article 6. Namely, the Framework Decision introduces a unique system of penalties, which are required to be effective, proportionate to the gravity of the committed offense, and dissuasive. They are classified into three different categories. The first category implies directing a terrorist group and it is envisaged that the sentence must not be less than fifteen years imprisonment. Participating in a terrorist group is the second category, and the sentence must not be less than eight years imprisonment, while the other criminal offences linked to terrorism are punishable by sentences which are heavier than those for regular forms of such offences. In connection with the meting out a sentence, the Framework Decision contains provisions that stipulate the possibility of reducing a penalty in case of providing information which the authorities would not otherwise have been able to obtain, as well as in case of preventing or mitigating the consequences of the terrorist offence, and in case of identifying or bringing to justice the other offenders and preventing commission of further criminal offences.

When it comes to the liability of legal person, in addition to the usual liability of a natural person, it is stipulated that a legal person will be held liable when a criminal offence of terrorism was committed for the benefit of the legal person, or when a legal person is responsible for failing to exercise control or supervision, which led to the commission of the criminal offence. These provisions of the Framework Decision are only one of many legal bases that have influenced the legislator in the Republic of Serbia to, since 2008, provide for legal persons as subjects of criminal offences and abandon the maxim *societas delinquere non potest.*

25 Д. Коларић, *op. cit.,* p. 52.
26 Т. Лукић, "Борба против тероризма на нивоу Европске уније и међународна сарадња", *in: Зборник радова Правног факултета у Новом Саду,* 1/2006, p. 268.

INSTEAD OF A CONCLUSION – ABOUT THE EUROPEAN APPROACH TO DEFINING CRIMINAL OFFENCES OF TERRORISM

The presented understandings of terrorism as a criminal law category at the level of international organizations on the European continent are a reflection of the need to prevent terrorism through a common, harmonized response. Even though there is a lack of a common definition of terrorism as a criminal offence at the international level, the European Union and the Council of Europe, through their two most important documents have established the criminal law concept of terrorism and the most important concepts of importance to the substantive criminal law, so that the member states, as well as candidate countries for full membership can, in their national criminal justice systems, start from a common criminal law definition of terrorism. The above stated is the result of the recognition of the fact that only a uniform criminal law legislation enables efficient countering terrorism, since it reduces to a minimum the perpetrators' possibility to leave for a country where these criminal offences have not been defined at all, or have been defined in a more narrow manner. This also facilitates the international legal assistance in criminal matters, and provides support to the national criminal justice systems, because in this very sensitive area, which implies striking a balance between the fundamental human rights and freedoms on the one hand, and the need to establish and maintain security, on the other hand, ensures a unified stance on terrorism as a criminal law category, which does not undermine the concept of the constitutional order of a modern democratic state.

Although the criminalization of terrorism within the system of the EU's legal regulations is characterized by an emphasized expansionism and increased criminal law repression and *dura lex sed lex*, it represents a better model than systemic lack of law, that it to say, the state's giving up of legal norms aimed at countering terrorism and declaring war on terrorism, by the use of military force.[27] The different approach in which a state conceives its response to a terrorist threat – whether a response is seen as a military or legal one, outlines the difference between the European and North American concept of the fight against terrorism. Despite the fact that some European countries, such as Germany, Great Britain, Italy and Spain, are seeking the answer to terrorism in the development of anti-terrorist legislation, this approach too can be subjected to numerous objections regarding the violation of fundamental freedoms and rights, especially procedural guarantees of the presumption of innocence and the right to a fair trial.[28] In the literature, one can also find opinions which the concept of terrorism and the way in which it should be defined see in filling the gap between the war and the criminal offence and defining the terrorism as a separate, special dimension of criminal offence, some

27 According to Pail Wilkinson, there are three possible responses of a democratic state to terrorism: the use of politics and democracy, the use of law enforcement and criminal legislation system, and the use of the military. By considering and combining the elements of these three approaches, Wilkinson has set up the key elements of the "hard-line approach" in combating terrorism, of which the crucial, in the context of this paper and the role of the criminal justice system of norms, are: the need to avoid excessive and general repression, limitation of the government and competent state authorities by the law, limited duration of *lex specialis*, revoking a special status for terrorist in relation to other perpetrators of criminal offences, and their prosecution not for their beliefs, but for violations of fundamental human rights of citizens, and the development of measures for countering terrorist propaganda. See more in: P. Wilkinson, *Terorizam protiv demokracije,* Zagreb, 2002, pp. 110–111.

28 As five basic characteristics of counterterrorism legislation at European level, E. Van Sliedregt lists: criminalization in the preliminary stage, before any terrorist act has occurred, broadening of police and prosecutorial powers, broadening the time of police detention, introduction of quasi-criminal measures, such as house arrest, and introduction of a set of derogatory regulations concerning the rights of the accused and personal data protection. According to: E. Van Sliedregt, "European Approaches to fighting Terrorism", *Duke Journal of Comparative and International Law,* Vol. 20, 3/2010, p. 424–425.

sort of a super-crime, which should not be defined as a classical criminal offence, but rather separate the basic, not in every case necessary elements which contain some characteristics of warfare.[29]

At the European level, the accepted mechanisms of the criminal law protection from terrorism are largely of preventive-oriented nature, with the emphasis on the right to safety, which represents one of the rights from the corpus of fundamental human right.[30] The protection of the democratic society from terrorism and the protection of the individual rights must be balanced, and the practice of the European Court of Human Rights, deriving from court judgments relating to the legality of national legislations' response to terrorism, represents the basis for the development and adjustment of the criminal law provisions in order to prevent possible abuses in the criminal legislation.[31]

REFERENCES

1. Ashiagbor D., Countouris N., Lianos I.: *The European Union after the Treaty of Lisbon*, Cambridge, 2012.
2. Bassiouni M. CH., Wise E. M.: *Aut dedere aut Judicare: The Duty to Extradite or Prosecute in International Law,* Dordrecht, 1995.
3. *Borba protiv terorizma – Aktivnosti Saveta Evrope u pravnoj oblasti,* Beograd, 2007.
4. *Borba protiv terorizma – Standardi Saveta Evrope,* Beograd, 2007.
5. Van Sliedregt E.: European Approaches to fighting Terrorism", *Duke Journal of Comparative and International Law,* Vol. 20, 3/2010.
6. Wilkinson P.: *Terorizam protiv demokracije,* Zagreb, 2002.
7. De Feo M.: "Political Offence Concept in Regional and International Conventions Relating to Terrorism", in Giuseppe Nesi (ed.), *International Cooperation in Counter-Terrorism – The United Nations and Regional Organizations in the Fight Against Terrorism,* Burlington, 2013.
8. Јаковљевић Д.: *Тероризам са гледишта кривичног права,* Београд, 1997.
9. Јанковић Д.: "Међународни стандарди у борби против тероризма", *Међународни проблеми,* 4/2010.
10. Капетановић Г.: "Међународни тероризам и Уједињене нације", *Архив за правне и друштвене науке,* 1-2/1980.
11. Коларић Д.: "Тероризам – међународни документи, савремена законска решења и Кривични законик Републике Србије", in: *Тероризам и људске слободе,* Тара, 2010.

29 About the unnecessary defining of specific characteristics of the criminal offence of terrorism in national criminal legislations, and the idea that it might be understood as a super-crime with at least eight factors, which do not have to be all fulfilled in any particular case, see more in: G. Fletcher, "The Indefinable Concept of Terrorism", *Journal of International Criminal Justice,* Vol. 4, 5/2006, pp. 894, 899.

30 We consider that in the field of these new laws of the third and fourth generation, it is necessary to be extremely selective when it comes to criminal law protection, because in such cases, the assessment of the legitimacy of such right is crucial. M. Vešović emphasizes that the rights of the new generation require "great understanding and patience". Quoted according to: З. Стојановић, "Стање и тенденције у кривичном законодавству у области заштите људских права", in: *Права човека,* 1–2/2002, p. 91, fn. 13.

31 Even though in the protection of society from terrorism, as a serious form of crime, measures that could undermine or even destroy democracy are often adopted, the Court underlined the key role of a strict interpretation of the restriction of individual freedom and the absolute prohibition of torture, inhuman or degrading treatment or punishment. About the three key foundations underpinning the Council of Europe's activities in the fight against terrorism (strengthening legal action against terrorism, safeguarding fundamental values and addressing causes of terrorism) read more in: Д. Јанковић: "Међународни стандарди у борби против тероризма", *Међународни проблеми,* 4/2010, pp. 602–628.

12. Коларић Д.: "Кривично дело тероризма – упоредноправни аспекти", *НБП,* 2/2011.
13. Коларић Д.: "Нова концепција кривичних дела тероризма у Кривичном законику Републике Србије", *Crimen (*IV), 1/2013.
14. Кривокапић Б.: *Лексикон међународног права,* Београд, 1998.
15. Лукић Т.: "Борба против тероризма на нивоу ЕУ", in: *Зборник радова Правног факултета у Новом Саду,* 1/2006.
16. Лукић Т.: "Борба против тероризма на нивоу ЕУ и основна људска права и слободе", in: *Зборник радова Правног факултета у Новом Саду,* 2/2006.
17. Лукић Т.: "Европа и борба против тероризма – јачање сарадње између правосудних и полицијских органа", in: *Зборник радова Правног факултета у Новом Саду,* 1-2/2008.
18. Мијалковић С., Бајагић М.: *Организовани криминал и тероризам,* Београд, 2012.
19. Срдановић Б.: *Међународни тероризам, политички деликт, екстрадиција,* Београд, 2002.
20. Стојановић З.: "Стање и тенденције у кривичном законодавству у области заштите људских права", *Права човека,* 1-2/2002.
21. Suchartikul S.: "Terrorism as an International Crime: Questions of Responsibility and Comlicity", in: *19 Israel Y. of Int. Law,* 1989.
22. Томашевски К.: "Проблем тероризма пред Организацијом уједињених нација", *Архив за правне и друштвене науке,* 1-2/1980.
23. Fletcher G.: "The Indefinable Concept of Terrorism", *Journal of International Criminal Justice,* Vol.4, 5/2006.

UDC: 343.85:343.352(497.11)
340.137:343.352(497.11:4-672EU)

THE INFLUENCE OF THE EUROPEAN UNION ON DESIGNING OF ANTI-CORRUPTION POLICY IN THE REPUBLIC OF SERBIA[1]

Tijana Perić Diligenski, LLM[2]
Institute for Political Studies, Belgrade

Abstract: In this article the author explains the influence of the European Union on the designing of the normative and institutional framework of anti-corruption policy in the political system of the Republic of Serbia. The EU accession process is an important anti-corruption agent in the Republic of Serbia, which through its political, economic and normative mechanisms of influence increases the costs of corruption, promoting it as a high-risk activity.

Political pressures of the European Union are directed to building a stable political institutions of the Republic of Serbia and respecting the rule of law, which are the requirements associated with the ability of the state to prevent and sanction the misuse of ethics in political arena. Political pressures are also directed to the professionalization of the bureaucracy and the depolitization of the judiciary which is a significant pillar for the fight against corruption.

The economic channels of EU influence are reflected through the provision of financial assistance to Serbia, as a candidate country. This assistance will depend on the success that Serbia will achieve in fulfilling the requirements for membership. The author notes that this is the most important mechanism of policy of conditionality because the political elite and middle class in Serbian transition environment in the long term expect that membership in the EU will ensure economic prosperity.

The EU normative pressures are reflected in the strengthening of anti-corruption legislation and alignment with EU standards, as well as through the adoption of regulations relating to transparent financing of political parties and political activities, conflicts of interest of state officials, money laundering, offshore ownership, control reports on the income and assets of public officials, witness protection and special investigation techniques that are an indispensable link in the chain of anti-corruption measures.

Keywords: *Anti-corruption, European Union, Serbia, policy of conditionality*

INTRODUCTORY REMARK

As modern surveys show, developed nations in the European Union are also suffering from negative effects of corruption. *Exempli causa*, in Norway and Sweden regarded as corruption-free states, state owned companies were involved in bribe taking and corruption

1 This paper represents the result of research within the project No. 179009, financed by the Ministry for Education, Science and Technological Development of the Republic of Serbia.
2 E-mail: peric.tijana@yahoo.com.

scandals. In Germany, former Chancellor Helmut Kohl and his Christian Democratic party were found to be involved in malpractices and they were penalized for receiving illegal campaign funding. Nor the south of Europe is exception - according to the report of the state auditor, cases of corruption in Italy have increased by more than 200 percent since 2008. Similarly, in France, public officials have gone on trial accused of taking bribes when President Jacques Chirac was the mayor of Paris.[3]

The case of Bulgaria illustrates that European Union is not corruption-free area. As statistics shows, Bulgaria has the worst control of corruption in the EU, next to Romania. In 2008, pre-accession funds dedicated towards transitioning Bulgaria to full membership were frozen by the EU, due to misuse of resources by government officials, which was a turning point for a sustainable partnership between Bulgaria and this supra-national entity.[4] It is important to note that the abuse of transitional funds represents a major financial strain and form of corruption on the EU and its members. Bulgaria as a member of the EU nowadays has weak institutional capacity with absence of political will for serious reforms, which resulted in a free-rider situation, whereby the country consumes more public resources then it provides.[5]

Mac Donald and Muhammad Tariq Majeed in their co-author paper have noted that corruption became fact in the European Union, which was strengthened by financial and social-economic crisis. The abovementioned authors emphasized that corruption is not equally presented in all sectors of this supra-national organization. Developed European economies sometimes are not able to transfer anti-corruption norms in neighbouring countries (for example, France shares a border with Switzerland and Germany, but the incidence of corruption is relatively lower in France). Mac Donald and Majeed mapped judiciary as the most important institution in the fight against corruption and they emphasized that the lack of sanctioning and mild penal policy are significant causes of frequent corruption in the European Union.[6]

The basic literature on corruption in political context offers (although descriptive) graduation degree of corruption in developed democratic countries over the globe: "rather corrupt" countries (Spain, Greece, Italy), "somewhat corrupt" (Germany, USA, Japan) and "the least corrupt" (Sweden, Ireland, Norway, United Kingdom).[7]Political corruption as form of political pathology is also presented at the EU level. Despite the democratic elections, chosen politicians are not always agents of voters, because holders of elected positions often have the power to change the laws and to intervene in the judicial process.

Some authors who direct research attention to corruption in the European Union, such as Carolyn Warner consider that the European anti-corruption convention is only a "dead letter without teeth", which is usually illustrated by the examples of Slovakia (which was criticized by the EU due to the lack of sophisticated laws against abuse of power and corruption, but this country was allowed to join the European Union in spite of high levels of corruption), Romania and Bulgaria (to which European Union was guaranteed membership since 2007, although the anti-corruption efforts in these countries have had limited success).[8]

3 See: Ronald Mac Donald, Muhammad Tariq Majeed, "Causes of Corruption in European Countries: History, Law, and Political Stability", paper presented on the conference First German ECSA Young Researcher Conference, February 21-23. 2011, Berlin, p. 2
4 See: Steven Gawthorpe, "Unstable Membership: Bulgaria, Corruption and Policy of the European Union", *New Voices in Public Policy*, Volume IV, George Mason University, 2010, p. 2
5 *Ibid* ,p. 7
6 See: *Ibid*., p. 5, 9
7 See: Martin J. Bull, James Newel, *Corruption in Contemporary Politics,* Palgrave Macmillan, 2003, Gordonsvile
8 Carolyn M. Warner, *The best system money can buy Corruption in the EU*, Cornell University Press, NY, 2007, p. 22

Ergo, corruption is present on all meridians and in all political systems, although this form of political pathology in some countries is only incident while in others, particularly in post communist states, as a rule, it represents model and logic of functioning political institutions.

THE EU ACCESSION PROCESS OF SERBIA AND ANTI-CORRUPTION POLICY

After the collapse of the communist regimes in the post-Yu area and the start of democratic transition, the political elites of those countries as well as civil society organizations declared their desire to join the European Union. Post communist republics of ex-Yugoslavia geographically, historically and culturally belong to Europe, so it was logically to follow EU mainstream end matrix of all post-communist states in this part of world who became members of EU after the communist authoritarian past.

The European Union accession process of post-communist states was conditioned with obligation to introduce and implement significant changes required by the EU. Tatiana Kostadinova noticed that international integration may have constraining effect on corruption which is reflected through economic and normative channels. Kostadinova elaborated that economic EU pressures are dealt with rational motivations on the part of political actors who chose to avoid corruption activities in order to maximize benefits. It means that costs of corruption rise in transitional interactions while decreasing the number of those who prefer corruption exchanges. According to Kostadinova, the normative EU influence assumes that the engagement in international organizations has a socializing effect by diffusing anti-corruption ideas and norms.[9]

Corruption perceptions indexes (hereinafter CPI)show trend that Serbia (as well as other post-Yu republics Croatia, Macedonia, Montenegro, Slovenia) has the most lowest perception of corruption and significant anti-corruption results as a candidate country at the stage of starting negotiations. Compliance with the EU requirements for transparent and clear policy seems to increase as soon as the membership becomes certain and that is after the beginning of accession negotiations. From that moment, candidate states show greater willingness to adopt and implement anti-corruption policies. In parallel, candidate states get a clear signal from Brussels that progress in the EU integration process will be fairly rewarded and that any failure will be recognized and sanctioned.

Four key stages in the EU accession process relevant for affirmation of our hypothesis are: signing of Stabilisation and Association Agreement (hereinafter SAA), granting membership application, granting candidacy and signing of Accession Agreement. On April 29 2008, the Stabilization and Association Agreement between the European Union and Serbia was signed (the EU adopted the decision not to implement the Interim Trade Agreement-TPA signed along with the SAA). In 2008, CPI score of Serbia was 3.4 and a year after signing SAA, Serbia was better ranking in CPI – 3.5.

Other relevant date was March 1, 2012 when the European Council granted Serbia the membership candidate status. That year, Serbia was ranked on 80th place out of 174 states. The positive trend continued in 2013, when Serbia was ranked on 72th place out of 177states. On January 21 2014, the First Intergovernmental Conference which marked the formal start of Serbia's negotiations to join the EU was held in Brussels. That year, Serbia was ranked on 78th place out of 175 states. On December 14 2015, the Second Intergovernmental Con-

9 See: Tatiana Kostadinova, *Political Corruption in Eastern Europe*, *Politics After Communism*, Lynne Rienner Publishers, London, 2012, p. 36

ference which marked the opening of Chapter 32 on financial control and Chapter 35 on normalization of Belgrade-Pristina ties was held in Brussels.[10] In 2015, Serbia was ranked on 71th place out of 168 states, which is the best result since Serbia was included in measuring corruption methodology of Transparency International.[11]

Quantitative indicators are very useful for our research, but they are not sufficient to explain the quality and political will for anti-corruption reforms in Serbia. According to our opinion, the *paradigm of rational choice institutionalism* is the key concept for explanation the influence of the European Union on designing of anti-corruption policy in the Republic of Serbia. We consider that the European Union policy of conditionality in Serbia will be effective only if the offer for membership is certain and if costs of harmonization with the EU political requirements (criteria) are not too high for the ruling political elite. Therefore, anti-corruption success (or *track record* according to the European Commission terminology) is explained by the calculation of the political elite to gain the benefits arising from the accession process. Political actors, NGOs, civil society organizations have incentives to seize the opportunities arising from the EU membership and to prevent the high costs of non accession (which is reflected in the negative assessments in the reports of European authorities, delaying of the EU accession process, the inability to use the EU funds etc.).

Calculations of key state and non-state actors in domain of fight against corruption could be defined as political will, a category which encompasses political consensus building on key anti-corruption reforms. According to some scholars, "political will argument" is the main ingredient in a successful fight against corruption, which is through the EU external pressures during the pre-accession period, in the form of accession requirements constantly high. After accession, the external pressure slowly declines and consequently the political will disappears.[12]

We emphasize that key political actors in Serbia will seek to prevent corrupt activities in exchange for maximizing the benefits, thus increasing the costs of corruption in the EU integration process and reducing the number of those willing to corrupt action in the political sphere. The literature points out the attitudes which explain the EU efforts for clean and fair policy in potential candidate states, through socialization hypothesis, which emphasizes that process of persuasion and social learning, rather than calculations for membership benefits is crucial for promoting EU anti-corruption policy. As Kostadinova noticed, "if the socialization argument is correct, the intensity of the fight against corruption should be preserved after EU accession". [13]

Candidate countries for the EU membership are obliged to replace domestic policy with the EU's agenda in some areas. Membership in the EU has plethora of benefits of inclusion and the high costs of exclusion, while policy should accommodate the EU's goals. Some authors enumerate negative effects of the EU accession process, such as partial renouncement of sovereignty, shifting policy priorities, exposure to cultural homogeneity and compliance with a supra-national entity.[14]

10 http://www.seio.gov.rs/serbia-and-eu/history.60.html
11 See results: http://www.transparency.org/research/cpi/overview
12 See: Dan Dionise, Francesco Checchi, "Corruption and Anti-Corruption Agencies in Eastern Europe and the CIS: a Practitioners Experience, p. 2 (http://www.pogar.org/publications/agfd/GfDII/corruption/AmmanConference08/fransesco%20checchi-en.pdf)
13 Kostadinova, *Op. cit.*, p. 162
14 See: Jesus Crespo-Cuaresma, JarkoFidrmuc, and Maria Antoinette Silgoner, "On the Road: The Path of Bulgaria, Croatia, and Romania to the EU and the Euro", *Taylor & Francis LTD.* Vol. 57. Europe-Asia Studies, 2005, p. 843-858

ANATOMY OF ANTI-CORRUPTION IN THE REPUBLIC OF SERBIA THROUGH THE PRISM OF ACTION PLAN FOR CHAPTER 23

The promise for the EU membership was a powerful driving force for Serbia to design institutions for combating corruption (institutional framework) and to establish relevant anti-corruption legislation framework. Exogenous political forces reflected through the EU, determined designing of anti-corruption environment in the Republic of Serbia.

Anatomy of anti-corruption in Serbia has its final form in Action plan for Chapter 23[15] (Judiciary and Fundamental Rights), subchapter *Fight against corruption*. In short, Action plan for Chapter 23 recognized two key areas relevant for combating corruption. The first area refers to the prevention of corruption and the most important bodies representing institutional framework in this matter are: Anti-Corruption Council, Anti-Corruption Agency, Commissioner for Information of Public Importance and Personal Data Protection (the Commissioner) and State Audit Institution. The key issues in the field of prevention of corruption involve: conflicts of interest, financing political activities, access to information of public importance, public procurement, protection of whistleblowers, professionalization and integrity of public administration. The second area covers the repression of corruption, whose institutional apparatus consists of: police (detection of corruption offenses), public prosecutors (prosecution of corruption), and courts (sanctioning corruption). Furthermore, it is important to emphasize that Action plan for Chapter 23 is a living document, which may be updated in methodological, but not in essential sense.

The European Commission's requirements defined in Action plan, *inter alia*: ensure legal alignment with the EU *Acquis* including the definitions of active and passive corruption with the UN Convention against Corruption (UNCAC); ensure an effective implementation of the legislation on the control of political party financing and the financing of electoral campaigns, in particular by issuing effective sanctions in cases of failures to report and proven irregularities; improve the legal and administrative framework to prevent and deal with conflicts of interest; improve the free access to information rules and their practical implementation, *inter alia*, with regard to information on privatization deals, public procurement, public expenditures or donations from abroad to political parties, include information considered 'sensitive'; depolitization of public administration; ensure protection of whistleblowers; adopt specific measures to prevent and sanction corruption in privatization deals and more broadly to address private sector corruption and improve the transparency and accountability of state-owned and state controlled companies; promote anti-corruption activities in other particularly vulnerable areas, such as health, taxation, education, police, customs and the local administration, ensure that civil society is involved in the anticorruption agenda, etc.

The abovementioned Action plan is more obliged for Serbia than national Action plan for implementation National Anti-Corruption Strategy (2013-2018), because the European Commission will monitor its implementation. It means that Action plan is not a wish list but the most important strategic document in Serbia, in which all positive results and realised activities will be rewarded and every failure will be sanctioned in Brussels. The Republic of Serbia is obliged to accept the EU *acquis* with respect to Chapter 23 and Serbia will have implemented any outstanding *acquis* by the date of accession, subject to the outcome of the negotiations under Chapter 23. Opening of the key Chapters 23 and 24 (Justice, Freedom and Security) is expected during this year and it largely depends on political criteria, i.e. on the progress which will be achieved in the normalisation of Belgrade-Pristina relations.

15 Available on: http://www.mpravde.gov.rs/files/Action%20plan%20Ch%2023%20Third%20draft%20-%20final1.pdf

Evaluation by the European Commission on the achieved results *(track record*) in area of fight against corruption addressed in Progress Report for Serbia (2015) is far from excellent. The European Commission stated that some progress has been achieved in the past year, especially in implementing existing legislation and adopting a new law on the whistleblower protection. However, corruption remains widespread and strong political impetus has yet to translate into sustained results. When it comes to the repression of corruption, the European Commission considers that Serbia should pay particular attention to establishing a track record on investigations, indictments and final convictions in high level corruption cases, on creating a robust system to coordinate and monitor implementation of the national anticorruption strategy and action plan, ensuring that all key institutions have adequate capacity and resources to fulfil their remits effectively. Progress Report especially underlines that it is important to urgently amend and implement the economic and corruption crimes section of the Criminal Code (in particular Article 234 on abuse of position of a responsible person) with a view to providing a credible and predictable criminal law framework.

In the domain of prevention of corruption it is important to swiftly adopt a new Law on the Anti-Corruption Agency, which will strengthen its role as a key institution in a more effective fight against corruption as well as to strengthen the role of Anti-Corruption Council which remained active in exposing and analysing cases of systemic corruption, in its advisory role to the government of Serbia, which does not follow up on its recommendations. The Anti-Corruption Council remains under-resourced and the appointment of new Council members has been pending since 2013. Progress Report recognizes an urgent need to ensure better working arrangements between the Ministry of Justice and other institutions and bodies involved in combating corruption (this applies primarily to relations with the Anti-Corruption Agency). According to this evaluation, in the area of political corruption Serbia should develop more robust legal provisions and ensure that deterrent sanctions are applied to proven infringements of the law on financing political activities, conflicts of interest and declaration and verification of assets of public officials. The institutional capacity of the Commissioner for Free Access to Information of Public Importance and Personal Data Protection needs to be further increased to ensure effective monitoring and adequate follow-up to the increasing number of requests for access to public information.[16]

Under the political pressure of the European Union, the Republic of Serbia has ratified all major international instruments in the fight against corruption. Generally, laws and regulations are partially aligned with accepted international standards. To identify deficiencies in the legislative solutions, the representatives of the Republic of Serbia are actively involved in the compatibility assessment conducted by European and international organizations, such as the evaluation by the Group of States against Corruption (GRECO) and the UN Office on Drugs and Crime.

Plan to align the internal legal system with the EU *acquis* for the period 2014-2018, has been determined in the National Program for the Adoption of the EU *Acquis* (NPAA).[17]One of the most important international normative tools, the UN Convention against Corruption (UNCAC) Merida 2003 is ratified by the Law on Ratification of the UN Convention against Corruption. [18]Article 20 of this Convention recommends the Member States to consider introducing a criminal offence "illicit enrichment" if it is in accordance with the Constitution and the fundamental principles of the national legal system.[19] The criminal legislation of the Republic of Serbia still does not provide the alleged offence, given that it may be contrary to the fundamental principles of criminal law and the principles of individual responsibility of the offender.

16 http://ec.europa.eu/enlargement/pdf/key_documents/2015/20151110_report_serbia.pdf
17 http://www.seio.gov.rs/upload/documents/nacionalna_dokumenta/npaa/npaa_2014_2018.pdf
18 Official Gazette of Serbia and Montenegro– International Treaties, no. 15/2005
19 https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf

The UN Convention against Transnational Organized Crime and its Additional Protocols, Palermo December 2000 are implemented domestically through a series of provisions of the Criminal Code, but also in other regulations and policy/sector action plans for areas particularly vulnerable for corrupt practice, such as public procurement. The Council of Europe Criminal Law Convention on Corruption, opened to signature on 27 January 1999 is ratified by the Law on Ratification of the Criminal Law Convention on Corruption as well as by the Law on Ratification of Additional Protocol to the Criminal Law Convention on Corruption.[20] The Council of Europe Civil Law Convention on corruption, opened to signature on 4 November 1999 is ratified by the Law on Ratification of the Civil Law Convention on Corruption.[21] The Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime is ratified by the Law on Ratification of the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime.[22]

The legal basis for the protection of the financial interests of the EU, envisaged by the Convention of 26 July 1995 on the protection of the European Communities' Financial Interests JO C 316 of 27 November 1995, with the First and Second Protocol to the Convention in the legal system of the Republic of Serbia is ensured through the inclusion of the EU financial assistance into the category of public revenues, which constitute the budget of the Republic of Serbia, which is used to finance the constitutional competencies of the Republic of Serbia. Articles 14 and 23 of the Budget System Law[23] introduce the EU financial assistance into the legal system of the Republic of Serbia. All relevant regulations through which the misuse of the budget of the Republic of Serbia is sanctioned are equally applicable to the EU financial assistance and assure the minimum protection of the financial interest of the EU which is equal to the protection that is ensured for the national budget.

The Criminal Code of the Republic of Serbia [24]contains articles which clearly comply in content with the definitions included in the articles of the Convention on Protection of the European Communities' financial interests and its protocols. In addition to the Criminal Code, there are regulations set out in relevant national regulations related to the protection of the financial interests of the European Union specifying the individual work and supplementing the general provisions contained in the Criminal Code.

The legislation of the Republic of Serbia is aligned with OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, of 17 December 1997 through various laws.[25]

---

20 Official Gazette of FRY – International Treaties, no. 18/2005 and Official Gazette of RS – International Treaties, no. 102/2007.

21 Official Gazette of RS – International Treaties, no. 102/2007

22 Official Gazette of FRY – International Treaties, no.7/2002; 18/2005

23 Official Gazette of the Republic of Serbia, No. 54/2009, 73/2010, 101/2010, 101/2011, 93/2012, 62/2013, 63/2013 – corr. , 108/2013, 142/2014, 68/2015 – other law and 103/2015

24 Official Gazette of the Republic of Serbia, No. 85/05, 88/05 – corr., 107/05 – corr., 72/09, 111/09, 121/12, 104/13 and 108/14

25 Articles 103-108 of Criminal Code, Law on tax on profit of legal persons (Official Gazette of RS, no. 25/2001, 80/2002, 80/2002 -.Law 43/2003, 84/2004, 18/2010, 101/2011, 119/2012, 47/2013, 108/2013, 68/2014 - other law and 142/2014) Law on Tax Procedure and Tax Administration (Official Gazette of RS, Nos. 80/02, 84/02 - correction, 23/03 - correction, 70/03, 55/04, 61/05, 85/05 -.Law, 62/06 – other law, 61/07, 20/09, 72/09 - other law, 53/10, 101/11, 2/12 - correction, 93/12, 47/13, 108/13, 68/14, 105 / 14), Law on Accounting and Auditing (Off. Gazette of RS, no. 46/2006, 111/2009, 99/2011 - other Law and 62/2013 - other Law), Banking Law (Off. Gazette of RS, no. 107/2005, 91/2010 and 14/2015), as well as through tax-related criminal offenses provided by the CC. Article 9 of the Convention is implemented through the Law on mutual legal assistance in criminal matters (Off. Gazette of RS, no. 20/2009). Article 10 of the Convention relating to the extradition procedure provided for by the Act on Mutual Legal Assistance in Criminal Matters (Art. 18-37).

CONCLUSION

The European Union accession instruments ("carrots and sticks") are of significant importance for creating political will for combating corruption in the transitional post-communist political system of the Republic of Serbia. Calls from the European Union to fulfil obligations and sanction malfeasance are design to prevail over calculations of domestic actors who are interested in rent seeking arrangements. Political, normative and economic pressures of the European Union create incentives for political elite for adopting anti-corruption reforms and for strengthening institutional, administrative and normative capacities in the fight against corruption. Anti-corruption capacities of Serbia at this stage of accession are still weak and anti-corruption is often declarative and short term, without serious results. In line with logic of this paper, we think that anti-corruption efforts to a large degree will depend on the results which will be achieved in the implementation of activities prescribed by Action plan for Chapter 23. This strategic document put fight against corruption in the broader context of governance reforms. By opening of this key Chapter, anti-corruption policy will be under the watchful eyes of the European Commission, which will continuously evaluate the implementation status of activities and propose principles for improving the fight against corruption in Serbia.

REFERENCES

1. Crespo-Cuaresma Jesus, JarkoFidrmuc, and Maria Antoinette Silgoner, "On the Road: The Path of Bulgaria, Cratia, and Romania to the EU and the Euro", *Taylor & Francis LTD.* Vol. 57. Europe-Asia Studies, 2005
2. Dionise Dan , Francesco Checchi, "Corruption and Anti-Corruption Agencies in Eastern Europe and the CIS: a Practitioner Experience", (http://www.pogar.org/publications/agfd/GfDII/corruption/AmmanConference 08/ fransesco%20checchi-en.pdf), accessed 20 January 2016
3. GawthorpeSteven, "Unstable Membership: Bulgaria, Corruption and Policy of the European Union", *New Voices In Public Policy*, Volume IV, George Mason University, 2010
4. J. Bull Martin, James Newel, *Corruption in Contemporary Politics,* Palgrave Macmillan, Gordonsvile, 2003
5. Kostadinova Tatiana, *Political Corruption in Eastern Europe*, *Politics After Communism*, Lynne Rienner Publishers, London, 2012
6. Mac Donald Ronald, Muhammad Tariq Majeed, "Causes of Corruption in European Countries: History, Law, and Political Stability", paper presented on the conference First German ECSA Young Researcher Conference, February 21-23., Berlin, 2011
7. Warner,Carolyn M. , *The best system money can buy Corruption in the EU*, Cornell University Press, NY, 2007
8. Action plan for Chapter 23, available on http://www.mpravde.gov.rs/ files/Action%20 plan%20Ch%20 23%20Third%20draft%20-%20final1.pdf,accessed 6 February 2016
9. http://ec.europa.eu/enlargement/pdf/key_documents/2015/20151110_report_serbia.pdf, accessed 1 February 2016
10. http://www.seio.gov.rs/upload/documents/nacionalna_dokumenta/npaa/npaa_2014_2018.pdf, accessed 5 February 2016
11. https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf, accessed 3 February 2016
12. http://www.seio.gov.rs/serbia-and-eu/history.60.html, accessed 21 January 2016
13. http://www.transparency.org/research/cpi/overview,accessed 25 January 2016

UDC: 343.431(497.6)

NORMATIVE DEFINITION OF THE CRIMINAL OFFENCE OF HUMAN TRAFFICKING IN THE CRIMINAL LEGISLATION OF BOSNIA AND HERZEGOVINA

Dražan Bojić, MA[1]
Ministry of the Interior of the Republic of Srpska

Abstract: In the field of international relations and on the global level, human trafficking represents a global security threat. Multi-disciplinary and multi-sector approaches are applied when fighting against this phenomenon, and one of important segments of this fight is the prosecution of human traffickers.

The topic of this scientific paper is the chronology of signing and adopting international legal norms in Bosnia and Herzegovina related to the phenomenon of human trafficking and harmonization of the criminal legislation at state level in Bosnia and Herzegovina with the ratified international legal norms, i.e. final application of the Criminal Code in the cases of human trafficking. The paper is also focused on the process and dynamics of the ratification, i.e. the implementation of the international legal norms regarding human trafficking through the national criminal legislation at all levels in Bosnia and Herzegovina.

Finally, based on the analysed situation, the author points to the justified fear of possibly causing negative implications in countering human trafficking as a result of non-synchronized and insufficiently harmonized implementation of the international legal framework with the national criminal legislation, since, in addition to common causes, such situation may become an additional factor contributing to the existence and spreading of this phenomenon.

Keywords: human trafficking, Criminal Code, criminal prosecution, harmonization of laws, implementation of laws, international legal framework.

INTRODUCTION

One of the recognized transnational security threats is the *phenomenon of human trafficking*. It has been recognized as a global phenomenon and it is a very dangerous form of organized crime, being one of the three most profitable criminal activities, after drug trafficking and arms trafficking. It functions on the principle of supply and demand. On the one hand, unemployment, poverty, social exclusion, wars, political instability, domestic violence or discrimination affect people, so they search for better life conditions or struggle for their own existence by looking for a job, continuing their studies, or building a new life in a different

1 Head of the Department for special operational affairs at the Republic of Srpska Ministry of the Interior, the Republic of Srpska, Bosnia and Herzegovina. PhD student at the Faculty of Political Sciences, International and European studies, University of Belgrade, Serbia. draskobojic@yahoo.com; drazan.bojic@mup.vladars.net.

city or country. On the other hand, in the times of globalization, in well-developed countries, there is an increasing demand for cheap products, labour and services. Incited by economic inequalities, high level of unemployment and/or bad social situation in the countries they come from, persons that belong to socially vulnerable categories are often attracted to the possibility of having better future, but they are often deceived by the promises of well-paid jobs in economically stable countries. As a consequence, some of these persons may be drawn into situations of being dependent on or submissive to someone, and even exposed to serious physical and psychological violence for the purpose of exploitation through prostitution, forced labour, giving their organs or other similar forced activities.

The approach of global struggle against this phenomenon is through the application of the 4P paradigm - prevention, protection, prosecution, partnerships. For successful prosecution of human traffickers in a country, an adequate harmonization of national criminal laws with the international legal framework regarding the phenomenon of human trafficking as a transnational security threat is crucial. Therefore, the topic of the analysis in this paper is the chronology and dynamics of signing and ratifying the international legal framework regulating the phenomenon of human trafficking, and its implementation in the criminal legislation of BIH.

The author of the paper points to the specific structure of BIH, in which there are legislative, court and executive authorities on several levels, with the focus on the existence of numerous criminal legislations and their application in the cases of human trafficking. The paper is also focused on the timeliness of signing and ratifying international documents, as well as dynamics and harmonization of criminal laws within a country which are not on the satisfactory level, and how all these factors may lead to both internal and external negative implications.

CONCEPTUAL DEFINITION OF HUMAN TRAFFICKING

Theories in the field of security science commonly discuss the issue of human trafficking in the context of organized crime. However, the nature of this phenomenon is very complex. Every country in the region has its own laws in which human trafficking, through exploitation phenomena, is defined as criminal offence for which a sanction/punishment is prescribed.

Regarding the history of the definition of human trafficking, one could say that there were differences between theory and practice because certain scientific fields and theories had their own original approaches to determining the definition of human trafficking which, as a result had a wider scope. On the other hand, at the international level, legal norms have been adopted (conventions, protocols, etc.) which directly define the phenomenon of human trafficking the humanity is already facing. Therefore, definitions in theory may be understood as more general observation of human trafficking, whereas the definitions implemented in practice present more narrow view and implementation.

Namely, in security science, there is an unspoken rule that security categories are defined in two ways. One way happens when the theory of security science accepts a legal definition or a definition of a notion from a different field of science and then evaluates it by confirming or criticizing it. The other way is when the theory of security uses its own methodology and category apparatus, based on its own knowledge and the knowledge of similar scientific fields, to define a phenomenon for its own needs[2].

Considering determining the definition of human trafficking, professor Saša Mijalković starts from the idea that starting premises have to be based on the fact that it is a phenome-

2 Mijalković S, Trgovina ljudima, BeoSing-Beograd, Belgrade, 2005, p. 44.

non of endangering safety which causes certain negative consequences; then, he continues to explain that human trafficking is based on slavery; that the aim is exploitation of people; and finally, that it has to include all forms of exploitation which do not have to be listed exhaustively[3]. Taking into account these premises, Prof. Mijalković claims that human trafficking should be defined as[4]:

'*a complex phenomenon of endangering security based on slavery and exploitation, i.e. treating human beings as if they were goods or things, with the aim of exploiting their labour force, knowledge and skills, bodily and sexual integrity and identity for fulfilling personal or other people's urges, health or emotional needs, or acquiring direct or indirect material gain for themselves or somebody else, by endangering state security at the level of foreign affairs and internal stability, the society in the field of public security, and an individual by breaking human rights.*'

Taking into account the topic of this paper, the definition of human trafficking to be used is the one from international legal documents. When human trafficking was initially to be defined for the purposes of criminal codes as a criminal offence, in most cases, the Palermo Convention[5] definition was used as the basis, since it was the first document dealing with human trafficking in a modern way, and which, despite all its deficiencies, provided a comprehensive definition of the phenomenon.

According to paragraph 3 (in subparagraph a), human trafficking shall mean recruiting, transport, transfer, accommodating or accepting persons by threatening them, forcing them or using other forms of force, including abduction, deceit or fraud, abuse of power or the state of powerlessness, giving or receiving money or benefits in order to obtain the consent of a person to be controlled for the purposes of exploitation. Exploitation shall include, at least, prostitution or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or removing organs.

The same Article (subparagraph b), provides that the consent of the victim of human trafficking to the intended exploitation shall be irrelevant if any of the means listed in the first subparagraph was used.

Recruitment, transport, transfer, providing accommodation or accepting a child (a person younger than 18 years of age) with the aim of exploitation shall be considered as 'human trafficking' even if it includes none of the means listed in the first subparagraph of the Article 3.

Although the adopted definition provided special protection for persons younger than 18 years old, and although it focused on different forms of exploitation and recognized different means (manners of denying victims their freedom to make decisions and choices) and manners of participating in trafficking in men and women, both on national and international level, evident restrictions were among the causes to adopt the *Council of Europe Convention on Action against Trafficking in Human Beings,* and Article 4 of the Convention states the following[6]:

3 It justified to say that this approach to definition included a part of the definition from 'Palermo protocol' and had already announced what was later defined in the *Council of Europe Convention on Action against Trafficking in Human Beings*, particularly in the part regarding exhaustive listing of types of exploitation.

4 Mijalković S., Trgovina ljudima, BeoSing-Beograd, Belgrade, 2005, p. 45.

5 The Protocol was adopted in Palermo in 2000, as the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children*, which amends the *UN Convention against Transnational organized crime*, adopted by UN General Assembly on 15 November 2000.

6 *Council of Europe Convention on Action against Trafficking in Human Beings* was adopted by the Council of Europe in Warsaw on 16 May 2005. It was ratified by the decision of the Presidency of Bosnia and Herzegovina on 26th session held on 12 November 2007, in Sarajevo, published in Official Gazette of Bosnia and Herzegovina no. 14/07. In the Amendments to the Criminal Code of Bosnia and Herzegovina (Official Gazette of BIH no. 8/10) in Article 69, the amendment to the definition of a criminal offence 'Human trafficking' was realized, and thus the harmonization with the Convention.

a) "Trafficking in human beings" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

b) The consent of a victim of "trafficking in human beings" to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;

c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in human beings" even if this does not involve any of the means set forth in subparagraph (a) of this article;

d) "Child" shall mean any person under eighteen years of age;

e) "Victim" shall mean any natural person who is subject to trafficking in human beings as defined in this article.

From the content of the definition above, it is obvious that prior to the adoption of the Convention, all deficiencies and restrictions of the definition of human trafficking from the Palermo Protocol had been recognized. In addition, the Convention of the Council of Europe recognized some new forms of human trafficking and possibilities to incriminate certain activities committed by human traffickers and their accomplices through various forms of human trafficking which were not previously precisely defined as indictable. Also, more consistent protection of victims of human trafficking is clearly visible.

By signing the Convention, the member states accepted to implement it to all forms of human trafficking, on both national and international level, regardless of whether or not it is connected to organized crime[7]. Related to that, in the following section of the paper, the chronology and dynamics of implementation of the ratified international legal norms, such as the Convention and every other relevant international document, in the national legislation of Bosnia and Herzegovina is going to be analysed.

HUMAN TRAFFICKING IN BOSNIA AND HERZEGOVINA

In Bosnia and Herzegovina, first serious cases of human trafficking appeared after the civil war, in late 1990s. In that period, there was an increasing number of night clubs in which foreign female citizens were found to be involved in prostitution. They mostly came illegally from Ukraine, Moldova, Romania, Russia and other countries of Eastern Europe. In addition, Bosnia and Herzegovina used to be a post-conflict country, with population suffering the consequences of war and vulnerable in other ways as well, which was previously recognized as a good environment for human trafficking.

Information from the relevant reports and the 'Action plan for fighting against human trafficking in Bosnia and Herzegovina 2016-2019', it is evident that the issue of human trafficking as a phenomenon was for the first time recognized in 1999, and since then, there are official statistics on the number of recognized victims of human trafficking[8]. Until 2004,

7 Article 2 of the *Council of Europe Convention on Action against Trafficking in Human Beings.*
8 On the other hand, in the criminal legislation of Bosnia and Herzegovina, this phenomenon is defined in the Criminal Code of BIH, Article 186, adopted in November 2003. Until then, some cases of human

BIH was primarily as transit country and then destination country for the victims of human trafficking who came from countries of Eastern Europe. In 2004, BIH also became a country where the victims came from, not only women and little girls, but also men and boys, who were recruited for the purpose of sexual or labour exploitation in the countries of Western Europe, other countries in the region, and especially in the countries that belong to the well-known 'Balkan route'. Additionally, BIH started facing with the issue that its own citizens were being recruited for sexual and labour exploitation in other parts of the country.

In the past, the issue of children living and begging on streets had not been recognized as human trafficking. It is for this reason that there were no serious interventions by the competent authorities and services, although there were sporadic reports, articles and comments on children and their all-day work on streets[9]. Activities regarding countering human trafficking in the country, including police work focused on this issue, investigations, charges and trials, as well as legal reform made some changes in the patterns of human trafficking, but there is still a lot to be done. Nowadays, Bosnia and Herzegovina is the country of origin, transit and final destination for men, women and children who are victims of human trafficking for the purpose of sexual abuse and forced labour. Victims coming from BIH are exploited in the sector of civil engineering and other sectors all over Europe. Foreign victims (women) suffer sexual exploitation in Bosnia and Herzegovina.[10]

For example, from 2003 to 2007, the total number of 300 victims of human trafficking was identified in BIH; 195 of them were foreign citizens and 105 of them were the citizens of Bosnia and Herzegovina. Out of the total number of victims, 64 were minors, 44 of which minors who are citizens of Bosnia and Herzegovina. It is important to note that, as far as 20 minor victims are concerned, it cannot be confirmed that they all come from abroad, because, in the materials used in the investigation process, there was no information about the country of origin for these minor victims. Out of all identified victims of human trafficking, only one victim was male, and he is a foreign citizen (Serbia). Most of the victims were trafficked for the purpose of sexual exploitation, whereas a smaller part was trafficked for the purpose of forced labour and beggary.[11] Furthermore, between 2008 and 2010, in BIH, 153 potential victims of human trafficking were identified[12]: 83 of them were adults and 68 were minors.[13]

In 2012, according to the report of State Department on countering human trafficking, BIH was downgraded from level 1 to level 2, because the government of BIH did not completely follow the minimal standards for elimination of human trafficking in accordance with the US Victims of Trafficking and Violence Protection Act of 2000, which may lead to certain sanctions implemented by the US towards BIH in addition to humanitarian sanctions. The report criticized the inactivity of BIH authorities regarding adoption and harmonization of the recommended relevant laws, as well as insufficient criminal prosecution of human traffickers and financing organizations and institutions involved in prevention and protection of vic-

trafficking were recognized and recorded as cases of illegal immigration, and some were treated as minor offences of prostitution.

9 'Action plan of fighting against human trafficking in Bosnia and Herzegovina from 2016 to 2019', Council of Ministers of Bosnia and Herzegovina, Sarajevo, 2016, p. 3.

10 Ministry of Security of BIH, *Report on Human Trafficking in BIH for 2015*, Sarajevo, 2016, p.1. For more information, please visit: http://www.msb.gov.ba/anti_trafficking/dokumenti/godisnji_izvjestaj/default.aspx?id=12910&langTag=bs-BA

11 Bojić D., *Mjesto i uloga Bosne i Hercegovine u borbi protiv trgovine ljudima kao bezbjednosne prijetnje* – Master thesis, Faculty of Political Sciences in Belgrade, Belgrade, 2008, p.66-67

12 In 2009, 46 victims of human trafficking were identified, and in 2010, 37 victims of human trafficking were identified. U.S. Department of State, *2011 TIP Report: Bosnia and Herzegovina*, 2011. Internet: http://bosnian.sarajevo.usembassy.gov/trgovina-ljudima-2011.html (10 January 2016)

13 Ministry of the Security of BIH, *Reports on the situation of human trafficking from 2008 to 2010*. Internet: http://www.msb.gov.ba/anti_trafficking/dokumenti/godisnji_izvjestaj/Archive.aspx?langTag=bsBA&template_id=104&pageIndex=1 (26 December 2015)

tims of human trafficking, all of which resulted in spreading of human trafficking in different forms (prostitution, beggary, forced labour, slavery, etc.)[14]. In 2014, BIH was downgraded to the lowest level, i.e. level 2 of the monitoring list, as a result of the state's inefficiency in countering that phenomenon. In recommendations that followed, special emphasis was placed on incomplete harmonization of all criminal legislations in BIH with international legal norms, as well as non-incrimination of all forms of human trafficking within the already existing normative definition of the criminal offence of human trafficking.[15]

Therefore, based on this relevant information, it is evident that, on the territory of BIH, the phenomenon of human trafficking remains because there are several conditions supporting it (an after-war country, geographic position, etc.). However, the criminal prosecution of human traffickers, as one of the ways of fighting against that phenomenon, is partially impossible to implement due to different normative definition of the criminal offence of human trafficking at all levels in the state (state, entity and the level of Brčko District). In practice, it means that, there is a possibility that, for example, when a case of human trafficking is identified in the Federation of BIH, there may be a wrong qualification of the criminal offence. As consequence, human traffickers may not be properly punished and victims may not be adequately protected. On the other hand, for the commission of the same criminal offence in the other part of the country, human traffickers would be adequately punished based on proving the real essence of the criminal offence of human trafficking, and victims would receive complete protection. In other words, the perpetrators of the same criminal offence are punished differently in different parts of the country.

It is exactly for the reasons mention above, regarding the complex prosecution of traffickers and court practice itself that the analysis of the normative definition of the criminal offence of human trafficking in the national criminal legislation and its harmonization with the adopted international legal framework seems completely justified. Bosnia and Herzegovina has signed and ratified most of the international legal documents (conventions, protocols), but in further activities, the paper shall focus only on the international documents whose implementation is realized through criminal legislation of BIH in the context of human trafficking.

By adopting the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, which amends the Convention of the United Nations against Transnational Organized Crime, the purpose of the Convention was normatively accepted as well, recognized through improving cooperation, preventing and efficiently fighting against transnational organized crime especially regarding human trafficking, particularly children trafficking. After ratifying these international legal norms, parts of these documents were implemented, and for the first time in BIH, a more concrete definition of the criminal offence 'Human trafficking' was adopted. As a result, in BIH Criminal Code[16] (state level), Article 186, the criminal offence was defined within the following provisions:

1. Whoever, by means of use of force or threat of use of force or other forms of coercion, of abduction, of fraud or deception, of the abuse of power or of a position of vulnerability, or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, recruits, transports, harbours or receives a person, for the purpose of exploitation shall be punished by imprisonment for a term between one and ten years.

14 U.S. Department of State, *2013 TIP Report: Bosnia and Herzegovina, 2013*. Internet: http://www.state.gov/j/tip/rls/tiprpt/countries/2013/215404.htm (17 January 2016)
15 State Departments Reports, *Trafficking in Persons Report: Bosnia and Herzegovina*, Washington, 2015. Internet: http://sarajevo.usembassy.gov/tip-2014a.html. (23 January 2016)
16 Criminal Code of Bosnia and Herzegovina, published in Official Gazette of BIH, no, 3/03, Sarajevo, 2003.

2. Whoever recruits, transports, transfers, harbours or receives a child or a juvenile for the purpose of the exploitation referred to in paragraph 1 of this Article, shall be punished by imprisonment for a term not less than five years.

3. Whoever organises or directs at any level the group of people for the purpose of perpetration of the criminal offences referred to in paragraphs 1 and 2 of this Article, shall be punished by imprisonment for a term not less than ten years or long-term imprisonment.

4. Whoever commits the criminal offence defined by this Article, paragraphs 1 to 3 out of negligence, shall be punished by imprisonment for a term not less than six months and not longer than 10 years.

5. Exploitation from paragraph 1 of this Article especially includes human trafficking for the purpose of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or similar status, servitude or the removal of organs for the purpose of transplantation.

It is important to note that, in addition to the criminal offence mentioned above, three additional criminal offences were defined and adopted, which by their nature represent a part of human trafficking phenomenon. These are the following criminal offences: *Establishment of Slavery and Transport of Slaves* – Article 185 of the Criminal Code of BIH, *International Procuring in Prostitution* – Article 187 of the Criminal Code of BIH, and *Unlawful Withholding of Identity Papers* – Article 188 of the Criminal Code of BIH.

When time dimension of adopting the Convention and the Protocol by UN mentioned above and them being signed and ratified by BIH, one can conclude that timeliness of signing and implementation of those international documents is not on a satisfactory level. However, it is more important that the essence of criminal offence of human trafficking was defined by the Criminal Code of BIH, which used to be vague, or used to be recognized and defined in several individual criminal offences or some of those segments were even omitted.

Namely, Article 186, point 2, of the Criminal Code of BIH says that 'Whoever commits the criminal offence from point 1 of this Article against a minor shall be punished by imprisonment for a term not less than five years. A provision set this way has the character of implicit definition when determining status of human trafficking victims, because in Article 3, point d) of the Palermo Protocol explicitly states: 'Child shall mean every person younger than 18 years old'. Therefore, it is justified to consider that this part of the Protocol was not completely integrated in the Criminal Code of BIH. Establishing concretely and concisely the age of the victim of human trafficking in the normative definition of the criminal offence of human trafficking is a safe and strong legal basis to primarily provide protection for the victims of human trafficking, and then to prosecute human traffickers.

As mentioned before, the Palermo Protocol defines that the consent of the victim of human trafficking to be exploited as defined in point a) of the paragraph 3 shall be irrelevant when any of the means listed in point a) is used. This means that the Palermo Protocol provides that the victim's consent to be exploited, achieved by blackmails, threats, force, etc. shall not have the influence on the existence of the criminal offence. In Article 186, however, there is no such provision at all, which provides legal space to question the status of a victim of human trafficking.

Also, the practice showed that the cases of human trafficking mostly, but not always, have the characteristics of organized crime. This means that human trafficking is realized through multiple segments (force, transport, seizing documents, exploitation, etc.), which points to the fact that, in order to conduct the criminal prosecution of human traffickers properly, it is necessary to provide complete normative definition of human trafficking. As mentioned earlier in the text, in Article 188 of the Criminal Code of BIH, the criminal offence of '*Unlawful*

Withholding of Identity Papers' is defined as a separate criminal offence of human trafficking. Withholding or seizing identity papers is a part of the criminal offence in almost all cases of human trafficking, which, by its nature, should represent one of the provisions of the criminal offence of human trafficking, and this would contribute to improving the realization of criminal prosecution of all human traffickers. On the other hand, in cases of criminal offence defined this way, human traffickers have legal space to evade the element of being organized when committing the criminal offence, and to be prosecuted for the less serious criminal offence, punishment for which would also be mild. These flaws, however, were supposed to be removed through new legal reforms.

The last point considers the flaws of the definition of the notion of *work exploitation* in the Criminal Code of BIH. The court practice of processing criminal offences of human trafficking for the purpose of work exploitation is very low - the number of cases is small, mostly because of the issues of qualifying the criminal offence and grey zones which are often present in these cases and which are taken into account when making a decision whether it is a case of human trafficking for the purpose of work exploitation, or simply bad work conditions and underpaid labour, which finally becomes one of minor offences in the field of labour rights.

As mentioned earlier in the paper, the European Convention introduced many new solutions in the normative sense. BIH signed, ratified and amended the Criminal Code of BIH based on the Convention. The Convention is an agreement focusing mainly on the protection of victims of human trafficking and guaranteeing their rights. Additionally, the aims of the Convention are the following: human trafficking prevention, human trafficking victims' protection, prosecution of human traffickers, and promotion of coordination of the activities of Member States and international cooperation. The Convention refers to all forms of human trafficking, regardless of whether they occurred within a state or cross-border, regardless of whether they are connected to organized crime, all victims of human trafficking (women, men, children), all forms of exploitation (sexual, forced labour or services, slavery, enslavement, removing organs, etc.).

After the amendments were made to the definition of the criminal offence of human trafficking in the Criminal Code of BIH based on the Convention, it is safe to say that all the flaws and vague definitions in this field in the Criminal Code of BIH discussed above were finally removed. The definition of the criminal offence of human trafficking was extended in Article 69 of the Criminal Code of BIH as follows:

In point 1), it is defined that: 'Whoever, by means of use of force or threat of use of force or other forms of coercion, of abduction, of fraud or deception, of the abuse of power or of a position of vulnerability, or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, recruits, transports, transfers, harbours or receipts a person, for the purpose of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or similar status, servitude or the removal of organs or of the other type of exploitation, shall be punished by imprisonment for a term not shorter than 3 years'. Compared to the previous definition of human trafficking in the Criminal Code of BIH, this provision defines more types of exploitation, which is definitely an improvement.

In point 2) it is said that 'Whoever recruits, transports, transfers, harbours or receipts **a person younger than 18 years of age** for the purpose of the exploitation referred to in paragraph 1 of this Article, shall be punished by imprisonment for a term not less than five years.' By adopting this provision, for the first time at the state level of BIH, the age of victims of human trafficking was precisely defined, as defined by the Palermo Protocol which states that 'a child is every person younger than 18 years old'.[17]

17 In addition, the Convention of the Council of Europe on Fighting against Human Trafficking, in Chapter I, Article 4, point e) defines 'victim' as every physical person who became an object of human

In point 3) it is said that: 'If the criminal offense referred to in Paragraphs (1) and (2) of this Article is committed by an official person while executing official duty, the perpetrator shall be punished by imprisonment for a term of at least five years'. This provision recognizes corruption elements that may appear in human trafficking (police, guardians, teachers, etc.), which, until then, was not incriminated at the state level in the provisions of the criminal offence of human trafficking.

Point 4) includes a provision which the previous normative definition of the criminal offence also lacked, as mentioned earlier in the paper. The provision relates to withholding and forging personal documents, as follows: 'Whoever counterfeits, procures or issues travel or identification document, or uses, holds, seizes, alters, damages or destroys travel or identification documents of another person with the purpose of facilitating international trafficking in human beings, shall be punished by imprisonment for a term between one and five years.'

Point 6) states that: 'Whoever uses the services of a victim of international trafficking in human beings shall be punished by imprisonment for a term of between six months and five years.' This provision is very significant for amending and extending the definition of the criminal offence of human trafficking. Namely, in practice, the police and prosecutor's offices used to have major obstacles in the prosecution because the users of sexual services were not recognized in the normative definition of human trafficking, and, as consequence, they were freed from criminal prosecution in exchange for their testimonies or cooperation in the investigation.

Point 9) states that: 'Consent of the victim of international trafficking in human beings to the exploitation bears no relevance to the existence of the criminal offense of international trafficking in human beings'. Finally, this provision from the Palermo Protocol introduces to the essence of the criminal offence defined by the Criminal Code of BIH what was missing in the definition of human trafficking until that moment.

However, the ratification of the Convention was not timely – 5 years from the moment the Convention was adopted until the amendments to the Criminal Code of BIH were made. Since the adoption of international legal framework into the home criminal legislation had not been timely performed, the prosecution of perpetrators was made more difficult and full protection of human trafficking victims and rightful punishing of human traffickers was impossible.

Regarding the incrimination of human trafficking in criminal codes at the levels of entities and Brčko District of BIH, the situation is more complicated than at the state level. Namely, until recently, the full definition of human trafficking as a criminal offence was not at all recognized in the criminal laws of both entities and Brčko District of BIH. In particular, in their criminal laws, only criminal offences related to one form of exploitation were incriminated – criminal offences related to sexual exploitation (prostitution). Other forms of exploitation were not mentioned in criminal laws on these levels, unlike in the Criminal Code of BIH from 2003, where they were mentioned, but vaguely defined.

In the *Republic of Srpska Criminal Code*[18], Article 198, the criminal offence 'Human trafficking for the purpose of prostitution' was defined. In addition to the fact that none of the other forms of exploitation was mentioned, this definition of the criminal offence also had a flaw which made police activities and prosecution of perpetrators more difficult. To start with, this Article recognizes only one form of human trafficking, that is, sexual exploitation through prostitution. However, even this definition of criminal offence had implementation obstacles when proving the guilt and during criminal prosecution.

trafficking as defined by the Article.

18 The Republic of Srpska Criminal Code, Official Gazette of the Republic of Srpska, no. 49/03.

For example, point 1) provides that: 'Whoever, in order to achieve material gain, entices, incites or lures another into prostitution or whoever, in any way, enables turning a person over to another for the exercise of prostitution or whoever, in any way, takes part in organizing or managing prostitution, shall be punished by imprisonment for a term of between six months and five years.' From the mere context of the provision, it is obvious that **material gain** represents the main condition for proving the existence of the criminal offence which in practice is difficult to prove. In most cases of human trafficking, there are elements of the perpetrators being organized, which further prove the existence of criminal network hiding its illegal proceeds and directing them in highly sophisticated manners.

Furthermore, in point 4) of the same Article, it is said that: 'If the criminal offences from previous points were committed against a child or a juvenile, the perpetrator shall be punished by imprisonment from one to twelve years.' This point represents an implicit context as well, similar to the one related to the provisions of the Criminal Code of BIH from 2003. Since this provision defined longer imprisonment, the charged human traffickers and their defence often had legal space to question the meaning of the term 'child', because the term was simply not integrated in the term of 'victim of human trafficking' even though there was basis for it, since the Palermo Protocol was signed and ratified at the time. In the Protocol, the meaning of the term 'child' was included in the context of human trafficking. Therefore, what was questionable was the age of 'a child or a minor'.

However, after a long period, in 2013, the definition of human trafficking as a criminal offence was finally adopted in the Republic of Srpska along with all the relevant segments of the essence of human trafficking, as adopted from the so-called Palermo Protocol, that is, the Council of Europe Convention on Action against Human Trafficking[19]. In addition to the criminal offence of human trafficking, separate criminal offences regarding organization elements and human trafficking of a minor were also defined[20]. This means that the Criminal Code of the Republic of Srpska, in the part regarding normative definition of the criminal offence of human trafficking, is completely harmonized with the Criminal Code of BIH from 2010.

In the *Criminal Code of the Federation of BIH*, the situation regarding human trafficking never changed. Namely, in 2003, the Criminal Code of the Federation of BIH was adopted which, in Article 210, defined the criminal offence 'Incitement to Prostitution'[21]. Therefore, it is obvious that the nature of this offence also relates to only one form of human trafficking, as it was in the case of the Criminal Code of the Republic of Srpska until 2013, so only sexual exploitation through prostitution was incriminated, whereas other forms were omitted. In the Federation of BIH, none of the provisions of the Palermo Protocol have been implemented, which points to the fact that police and prosecuting authorities there do not have enough legal basis to fight against human trafficking in accordance with the Criminal Code of that entity.

In Brčko District of BIH, the situation is rather similar to that in the Republic of Srpska regarding the criminal offence of human trafficking. In 2003, in the Criminal Code of Brčko District of BIH, only the criminal offence relating to sexual exploitation in the form of prostitution was defined[22]. After that, in 2013, the definition of that criminal offence was amended so it started referring to all other forms of human trafficking, and organized human traffick-

19 Article 29 of the Law on amendments to the Republic of Srpska Criminal Code, Official Gazette of the Republic of Srpska, no. 67/13, Banja Luka, 2013.
20 In the same Article, criminal offences of 'Minor trafficking' and 'Organizing a group or a criminal association for the purpose of committing criminal offences of human trafficking and minor trafficking'.
21 Criminal Code of the Federation of BIH, Official Gazette of the Federation of BIH, no. 36/03, Sarajevo, 2003.
22 Criminal offence 'Incitement to prostitution' Article 207 of the Criminal Code of Brčko District of BIH, Official Gazette of Brčko District, no. 10/03, Brčko, 2003.

ing was especially defined and incriminated[23]. By adopting these amendments, in Brčko District of BIH, the implementation of the provisions from international legal norms regarding human trafficking that were signed and ratified was completed. As a result, the normative definition of the criminal offence of human trafficking as well as harmonization in Brčko District is identical to the one in the Republic of Srpska.

NORMATIVE HARMONIZATION OF HUMAN TRAFFICKING IN THE CRIMINAL LEGISLATION OF BOSNIA AND HERZEGOVINA

Before finally observing the harmonization of the criminal legislation in Bosnia and Herzegovina with the international legal obligations assumed regarding human trafficking, it is necessary to present the state structure of Bosnia and Herzegovina. BIH consists of two entities (the Republic of Srpska and the Federation of BIH) and Brčko District of BIH. Additionally, there are 10 cantons within the entity of the Federation of BIH. What is important to note is that legislative, court, and executive authorities exist at the state level (in the form of joint institution), at the level of both entities, at the level of Brčko District of BIH, and at the level of each canton within the Federation of BIH. At all these levels, there is the total number of 15 police agencies/institutions. This situation points to the fact that, in BIH, there is a large number of administration units representing an obstacle for harmonization and synchronization of state criminal legislation and for making it identical on the territory of the whole state. It is also an obstacle to the final goal of achieving the best possible norms covering struggle against human trafficking, especially when it is necessary to ratify, implement or harmonize the international legal acts regarding human trafficking on the whole territory of the state.

Considering all of the above, it is evident that on the whole territory of BIH, harmonization and implementation of all criminal legislations with the adopted international legal norms has not been completely performed. In the starting phase, from 2003, the criminal offence of human trafficking was defined at the state level, and a longer period was necessary for it to spread to all other necessary provisions. On the other hand, at the entity and Brčko District levels, the situation in terms of criminal legislation is more complex, because until 2013, there was no adequate legal basis for fighting against human trafficking in all its forms, except in the Federation of BIH, where there still has been no reform of the Criminal Code. These flaws of criminal law on all levels in the state caused great problems in police and prosecutor's office proceedings in cases of human trafficking. Namely, on the state level, the Criminal Code enabled the prosecution of human traffickers up to a point, but prosecutor's offices and courts on state level have limited capacities and act in cooperation with state security agencies. In situations when entity authorities would try prosecuting human trafficking in cooperation with a prosecutor's office on a state level, that is, to transfer the case to them due to flaws of criminal codes on entity level, many factors would appear that slow down or make the case proceedings impossible (the factor of time, harmonization of the legal qualification of a criminal offence, transfer and providing a status for the victim of human trafficking, etc.). Also, what remains a mystery are other forms of exploitation through human trafficking that existed in the parts of the state in which those types of exploitation were not defined by the criminal code.

It appears that this situation led to negative internal implications in BIH regarding the implementation of the policy of fighting against human trafficking, because numerous cases

23 After the Article 2017, the Article 207a 'Human trafficking' and Article 207b 'Organized human trafficking' were added, Criminal Code of Brčko District of BIH – consolidated text, Official Gazette of Brčko District of BIH, no. 33/13, Brčko, 2013.

were recorded of human trafficking in which victims were not adequately protected and perpetrators were not properly punished.

For example, in the past, certain events were recorded on the territory of the Republic of Srpska which endangered the security of the citizens of the Republic of Srpska, which by their essence and characteristics could be defined and prosecuted as the criminal offences of human trafficking in forms other than prostitution. However, what occurred in those cases was that the Republic of Srpska Ministry of the Interior was not engaged in the planning and organization of the investigation. When it is engaged, the investigation activities are based on criminal offences which do not include human trafficking. This may lead to the fact that, in those situations, if it really is a case of human trafficking, the perpetrators may be acquitted by being treated as perpetrators of other criminal offences for which lower punishments are prescribed than for human trafficking. Should this become a practice, on the one hand, there is a possibility that human traffickers would be silently 'encouraged' to continue committing the criminal offence. On the other hand, potential and already identified victims may lose their trust in the competent institutions in the Republic of Srpska, and thus become unwilling to cooperate with the police officers of the Republic of Srpska Ministry of the Interior, and finally become victims again.

Furthermore, there is information that police officers are accomplices in organizing and perpetrating the criminal offence of prostitution, based on testimonies of persons who used to provide sexual services and who had the status of witnesses and victims in public trials at competent courts, as well as based on other transparent court documents[24]. At the same time, however, it is necessary to have in mind the *legal presumption of innocence*, but such information and situations should remain the subject of the Ministry of the Interior's and prosecutors offices' activities.

Also, there are records of a case in which a civil servant from a social work center abused office against a minor boy by using and abusing him sexually on several occasions together with two accomplices. The perpetrator was sentenced to 6 years in prison, but for committing a criminal offence against sexual integrity. His first accomplice was sentenced to 1 year in prison, and the second accomplice has not been sentenced yet in a separate procedure[25]. It is important to consider this case because it is obvious that the suspects were prosecuted for committing less serious criminal offences defined by the Republic of Srpska Criminal Code, even though the characteristics of the case, at least those presented until that moment, point to the fact that this is a case of human trafficking for the purpose of sexual exploitation of a child and exploitation for child pornography. In addition, it should be emphasized that, in the description of the criminal offence of human trafficking, harmonized with the Council of Europe Convention on the Action against Trafficking in Human Beings, for the commission of the criminal offence by an official person as a perpetrator or an accomplice, there is more severe punishment. If this case had been treated as human trafficking, its epilogue would be more positive from the perspective of doing the justice. In that case, all three suspects would be charged with human trafficking, punishments threatening them would be more severe, and the minor would get the status of a victim of human trafficking and then go through the process of rehabilitation, re-socialization and re-integration organized by the competent institutions for the victims of human trafficking[26].

24 See more at: http://www.nezavisne.com/novosti/hronika/Inspektor-Kos-mora-biti-pod-istragom-189753.html (26 January 2016).
25 See more at: http://www.novosti.rs/vesti/planeta.300.html:417067-Banjaluka-Sest-godina-pedofilu--socijalnom-radniku (17 January 2016.)
26 Bojić D., Efikasnost Ministarstva unutrašnjih poslova Republike Srpske u borbi protiv trgovine ljudima, Bezbjednost, policija, građani – magazine issued by the Republic of Srpska Ministry of the Interior, no. 3-4/13, Banja Luka, pp. 186-188.

These are just a few examples of pointing to the fact that human trafficking does exist but that it has not been processed as such.

CONCLUSION

Based on all the information presented in the paper, one can conclude that the implementation of the adopted international legal framework has been partially realized in BIH, but still insufficiently. The cause of this is untimeliness of the implementation from the moment of signing and ratifying international agreements, which resulted in non-compliant criminal codes on all levels in BIH. Such situation in the field of criminal legislation of the country, i.e., normative definition of human trafficking, leads to negative internal and external political implications. Internally, the competent institutions and the Government do not implement a completely successful policy of combating human trafficking in accordance with the existing recommendations of the relevant international supranational factors and the adopted obligations from the international legal acts, which results in not providing complete protection to the victims of human trafficking and unjust prosecution and sanctioning human traffickers, and finally, the fact that human trafficking remains a security threat.

On the international level, upon observing the importance of global management in solving human trafficking as transnational organized crime, norms and principles based on international laws on human rights are applied to human trafficking, so states may consider themselves responsible for the phenomenon of human trafficking[27]. In situations when policy of a state regarding human trafficking is not on a satisfactory level, which includes a non-functional criminal legislation aspect of the state, the phenomenon of human trafficking spreads to other countries in the region, and then it becomes an international issue. Under such circumstances, the state may have a negative trend and reputation in international relations, which in practice is also verified through relevant reports and guidelines provided by international and supranational factors[28].

In future, Bosnia and Herzegovina is obliged to finish the implementation of international legal acts in its criminal codes on all levels regarding human trafficking. Thus, all normative provisions are going to be harmonized so as to ensure the identical and synchronized legal basis, and thus more efficient fight against human trafficking. Another reason for this to be realized is that this country has recently gone through a civil war and upon its cessation there remained a large vulnerable population and damaged social structure, which is a good basis for development and spreading of human trafficking, according to theory and practice.

REFERENCES

1. Gallagher T. Annet, *The International Law of Human Trafficking*, Cambridge University Press, New York, 2010.
2. Action plan of fighting against human trafficking in Bosnia and Herzegovina from 2016 to 2019, Council of Ministers of Bosnia and Herzegovina, Sarajevo, 2016.
3. Bojić D., *Mjesto i uloga Bosne i Hercegovine u borbi protiv trgovine ljudima kao bezbjednosne prijetnje* –Master teza, Fakultet političkih nauka u Beogradu, Beograd, 2008.

27 Tom Obokata defines 4 responsibilities and obligations of a state. Tom Obokata, Trafficking of Human Beings from a Human Rights Perspective, Martinus Nijhoff Publishers, Boston, 2006, p.147.
28 Reports and recommendations of international organizations on the situation in BIH regarding human trafficking. See in: *Action plan for fighting against human trafficking in BIH from 2016 to 2019*, Council of Ministers of BIH, Sarajevo, 2016, pp.4-14.

4. Bojić D., *Efikasnost Ministarstva unutrašnjih poslova Republike Srpske u borbi protiv trgovine ljudima*, Bezbjednost, policija, građani – magazine issued by the Republic of Srpska Ministry of the Interior, no. 3-4/13, Banja Luka, str. 186-188.
5. Bojić D., *Trafficking in the Western Balkans as a security threat and a factor slowing European integration*, in: Dragan R. Simić, Ur., The integration of the Western Balkans in the global security network, The Association for the Study of the United States in Serbia, Čigoja press, Belgrade, 2011, p. 351-373.
6. Criminal Code of Bosnia and Herzegovina, published in Official Gazette of BIH, no, 3/03, Sarajevo, 2003.
7. The Republic of Srpska Criminal Code, Official Gazette of the Republic of Srpska, no. 49/03, Banja Luka, 2003.
8. Criminal Code of the Federation of BIH, Official Gazette of the Federation of BIH, no. 36/03, Sarajevo, 2003.
9. Criminal Code of Brčko District of BIH, Official Gazette of Brčko District, no. 10/03, Brčko, 2003.
10. Criminal Code of Brčko District of BIH – consolidated text, Official Gazette of Brčko District of BIH, no. 33/13, Brčko, 2013.
11. UN Convention against Transnational organized crime, adopted by UN General Assembly on 15 November 2000, based on the Decision on the ratification of the UN Convention against transnational organized crime (Official Gazette of BIH – International agreements, no.3/02), Sarajevo, 2002.
12. The Council of Europe adopted the *Convention on Action against Trafficking in Human Beings* on 16 May in Warsaw, based on the Decision on the ratification of the Convention, Official Gazette of BIH, no.14/07, Sarajevo, 2007.
13. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, Valid based on the Decision on the ratification of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children , with which the UN Convention against transnational organized crime was amended (Official Gazette of BIH – International agreements, no. 3/02), Sarajevo, 2002.
14. Mijalković S., *Teorijsko određenje pojma trgovine ljudima*, Nauka, bezbednost, policija – Journal of the Police Academy in Belgrade, no. 2-3, Belgrad, 2004.
15. Mijalković S., *Trgovina ljudima,* BeoSing-Beograd, Belgrade, 2005.
16. Obokata T., *Trafficking of Human Beings from a Human Rights Perspective*, Martinus Nijhoff Publishers, Boston, 2006.
17. Amendment to the Criminal Code of BIH (Official Gazette of BIH no. 8/10), Sarajevo, 2010.
18. Amendment to the Criminal Code of Republic of Srpska (Official Gazette of Republic of Srpska no. 67/13), Banja Luka, 2013.
19. http://www.nezavisne.com/novosti/hronika/Inspektor-Kos-mora-biti-pod-istragom-189753.html.
20. http://www.novosti.rs/vesti/planeta.300.html:417067-Banjaluka-Sest-godina-pedofilu-socijalnom-radniku
21. http://www.msb.gov.ba/anti_trafficking/dokumenti/godisnji_izvjestaj/Archive.aspx?langTag=bsBA&template_id=104&pageIndex=1
22. http://www.state.gov/j/tip/rls/tiprpt/countries/2013/215404.htm

CIP - Каталогизација у публикацији

Народна библиотека Србије, Београд

343.85(082)
343.9(082)
351.74/.75(082)

MEĐUNARODNI naučni skup "Dani Arčibalda Rajsa" (2016 ; Beograd)

Thematic Conference Proceedings of International Significance. Vol. 1 / International Scientific Conference "Archibald Reiss Days", Belgrade, 10-11 March 2016 ; [organized by] Academy of Criminalistic and Police Studies ; [editors Đorđe Đorđević ... et al.] = Tematski zbornik radova međunarodnog značaja. Tom 1 / Međunarodni naučni skup "Dani Arčibalda Rajsa", Beograd, 10-11. mart 2016. ; [organizator] Kriminalističko-policijska akademija ; [urednici Đorđe Đorđević ... et al.]. - Belgrade : Academy of Criminalistic and Police Studies = Beograd : Kriminalističko-policijska akademija, 2016 (Belgrade = Beograd : Pekograf). - XII, 558 str. : ilustr. ; 24 cm

Tiraž 200. - Preface: str. VIII. - Napomene i bibliografske reference uz tekst. - Bibliografija uz svaki rad.

ISBN 978-86-7020-356-3

ISBN 978-86-7020-190-3 (za izdavačku celinu)

1. Up. stv. nasl. 2. Kriminalističko-policijska akademija (Beograd)

a) Криминалитет - Сузбијање - Зборници b) Криминалистика - Зборници c) Полиција - Зборници

COBISS.SR-ID 226081548