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FACULTY OF LAW

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JOURNAL OF EASTERN-EUROPEAN CRIMINAL LAW
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III. VARIA

THE NEW EDITORIAL POLICY

In its third year, the Journal has managed to partially achieve its aim, *i.e.* to be a reflection of the changes that occurred at the level of the criminal law of Eastern-European countries in the post-communist era, as well as a means of dissemination of practical ideas and aspects related to the application of criminal law in this part of Europe.

In the four issues that have been edited so far, more than fifty authors have had their articles published here, complying with pre-determined topics, such as the evolution of criminal legislation in the post-communist era, the prevention and suppression of corruption, economic crime or organized crime.

Maintaining the Journal's format within the boundaries of such pre-established topics would limit the access of a greater number of authors to having the results of their current research and academic interest published in the magazine.

That is why, starting with the present issue, in addition to a pre-determined topic which is destined to give a certain coherence to the Journal's contents, a new section has been created, - "Varia" - dedicated to the outcome of the present research and concerns of the contributors.

Another section shall be dedicated to the criminal law of the European Union, to the manner in which European law is transposed into national legislation and the way this is perceived by the constitutional jurisdictions of the Member-States.

We thus wish to find out what are the opinions of legal practitioners, judges, prosecutors or lawyers, in order to spread the best practice when applying criminal law and safeguarding fundamental human rights, in this permanent opposition between the need for safety and freedom.

Our concerns aim at enlisting the Journal in additional databases, others than the ones in which the magazine is presently indexed, namely Social Science Research Network (SSRN), EBSCO and HeinOnline. Also, the site of the Journal – www. jeecl.uvt.ro – shall have a new format.

Furthermore, we would like the Journal to reach the university libraries, where it can be useful for undergraduate students, MA students and PhD students, since the harmonization of European law, as a *sine-qua-non* condition for an efficient cooperation in preventing and suppressing crime can be achieved only by making new generations assume and be aware of the European dimension of the law.

Future issue of the magazine will focus on "*Criminal Policies in Eastern Europe after 1990*".

THE BOARD OF EDITORS

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Prof. Dr. Dr. h.c. mult. Ulrich Sieber
Director at the Max Planck Institute for Foreign and International Criminal Law in Freiburg/Germany

LAUDATIO
***Magistri* ULRICH SIEBER**
et operum suorum

Honoured Members of the Presidium,
Distinguished Members of the Senate of the West University of Timişoara,
Dear esteemed guests,
Dear colleagues, dear students,
Honoured audience,
Highly esteemed Professor Ulrich Sieber,

We are extremely honoured to deliver the *Laudatio* Speech in honour of Professor Ulrich Sieber, one of the most renowned specialists in criminal law of Germany, a leading figure of the international academic world, on the occasion of his being awarded the honorary degree of *Doctor Honoris Causa Legum Scientiae*, the highest honorary award of the West University of Timişoara, upon proposal of the Faculty of Law.

Prof. Dr. Dr. h.c. mult. Ulrich Sieber is a director at the Max Planck Institute for Foreign and International Criminal Law in Freiburg/Germany and an honorary professor and faculty member at the law faculties of the University of Freiburg and the University of Munich, with the authorization to confer doctoral and post-doctoral degrees since 2004.

He is a visiting professor at the law departments of Peking University, Renmin University, Beijing Normal University and Wuhan University (People's Republic of China), as well as an honorary professor at the Universidad Tecnológica de los Andes (Cusco/Peru). In 1994, he was a visiting professor at the University of Tokyo.

He is the recipient of honorary doctorates from the National and Kapodistrian University of Athens/Greece, the National University of San Marcos (Lima/Peru), the National University of the Altiplano (Puno/Peru), the University of Pécs/Hungary, and from South-West University Neofit Rilski Blagoewgrad/Bulgaria.

Professor Sieber launched his academic career at the University of Freiburg, where he was a researcher and academic staff member from 1973 to 1987. In 1977, he was awarded a doctorate for his dissertation on computer crime and criminal law (*Computerkriminalität und Strafrecht*) and completed the bar exam. In addition to his academic work, he also worked as an attorney specializing in computer law from 1978 to 1987.

He earned a post-doctoral lecturing qualification under the supervision of Professor Klaus Tiedemann at the University of Freiburg in 1987 with a *Habilitation* on the relationship between substantive criminal law and criminal procedure. In the same year, he accepted a position as professor of criminal law, criminal procedure, and information law at the University of Bayreuth. In 1991, Ulrich Sieber became professor of criminal law, criminal procedure, information law, and legal informatics at the University of Würzburg, where he was dean of the law faculty from 1997 to 1998.

In April 2000, he accepted an appointment to succeed Professor Claus Roxin at the University of Munich. In October 2003, Professor Sieber was appointed director at the Max Planck Institute for Foreign and International Criminal Law in Freiburg, succeeding Professor Hans-Heinrich Jescheck and Professor Albin Eser. He is the initiator and spokesperson of the International Max Planck Research School for Comparative Criminal Law, a cooperative venture of the Max Planck Institute in Freiburg and the Law Faculty of the University of Freiburg.

In addition to his academic activities, Professor Sieber continues to be active as an expert consultant and advisor, especially in the areas of computer law, economic criminal law and international criminal law. In this capacity, he has served as a special advisor to two EC Commissioners with his expertise on issues of computer law and EC fraud. He has also served on the legal committee and several enquiry commissions of the German Parliament and has advised the German Federal Constitutional Court, the German Ministry of Justice, the German Ministry of Education, Science, Research, and Technology, and the German Federal Police Office. He has also advised the Council of Ministers and the Parliamentary Assembly of the Council of Europe, the European Commission, the Research Ministers of the G-8 nations (Carnegie Group), the Organisation for Economic Co-operation and Development, the United Nations, and the International Chamber of Commerce in Paris.

As an academic authority in criminal law, he has written expert opinions for and been a consultant to the International Criminal Tribunal for the former Yugoslavia as well as the Canadian Ministry of Justice, the U.S. Senate, the Privacy and Civil Liberties Oversight Board of the U.S. Government, and the National Police Agency of Japan.

In Germany, Professor Sieber is president and a founding member of the German Association for European Criminal Law (*Deutsche Vereinigung für Europäisches Strafrecht e.V.*), vice-president of the German section of the International Association of Penal Law (*Association Internationale de Droit Pénal,* AIDP), member of the board of the European Center of Law at the University of Würzburg, chairman of the Ethics Council of the Max Planck Society, member of the foundation board of the German Foundation for Law and Computer Science (DSRI), member of the scholarship council of the Minerva Foundation, advisory member of the directorate of the Centre for Security and Society of

the University of Freiburg, member of the advisory board of the German National Academy of Science (Leopoldina) and the German Research Foundation (DFG) for questions concerning the handling of security-relevant research, and member of the information safety commission of the Max Planck Society, as well as of the foundation board of the Olav Brennhovd Foundation.

Internationally, he is vice-president of the Scientific Committee of the International Association of Penal Law (AIDP), vice-president of the International Academy of Comparative Law (IACL), vice-president of the International Society of Social Defence and Humane Criminal Policy (ISSD), member of the board of directors of the International Institute of Higher Studies in Criminal Sciences (ISISC), German contact point for the European Criminal Law Academic Network (ECLAN), honorary member of the Japanese Association of Criminal Law Professors, and honorary member of the Ilustre Colegio de Abogados del Cusco.

Professor Sieber is editor of the *Strafrechtliche Forschungsberichte* [Reports on Research in Criminal Law] of the Max Planck Institute for Foreign and International Criminal Law (Duncker&Humbolt), of the European series *ius informationis* and *ius criminale* (Carl Heymmans Verlag) and of the series *Max Planck Research on International, European, and Comparative Criminal Law* (Oxford University Press). He is co-editor of the *Interdisziplinäre Forschungen aus Strafrecht und Kriminologie* [Interdisciplinary Research in Criminal Law and Criminology], of a collection of foreign criminal laws in German translation, and of the European series *ius europaeum* (Nomos Verlag). He is also co-editor of the *Zeitschrift für die gesamte Strafrechtswissenschaft (ZStW)* and of the *Auslandsrundschau der Zeitschrift für die gesamte Strafrechtswissenschaft* and the periodical *Multimedia und Recht,* and serves on the advisory council of the journal *Computer und Recht.*

Professor Sieber is at the same time editor-in-chief of the online publication *eucrim* and a member of the editorial boards of *Computer Law and Security Review*, of the *Series on International Criminal Law*, of the journal *Crime, Law and Social Change*, and of the *International Criminal Law Review*. He is a member of the editorial staff of the Russian journal *National Security* and a member of the advisory boards of the journal *European Journal of Crime, Criminal Law and Criminal Justice*, the journal *New Journal of European Criminal Law,* the journal *Money Laundering Control* and a member of the advisory committee of the journal *Peking University Law Journal*. He is also a member of the international scientific committee of the *Revista Penal*, of the scientific committee of the *Revista Penal México*, of the international scientific committee of the journal *Revue de science criminelle et de droit pénal comparé* (RSC), and of the scientific councils of the Serbian journal *Crimen - Journal for Criminal Justice* and the journal *Dreptul* (published by the Romanian Lawyers Association). He is a member of the honorary committee of the Romanian journal *Revista de Drept Penal* and serves on the scientific board of the *Journal of Eastern European Criminal Law* as well as on the board of the Greek online publication *Recht und Neue Technologien.*

The research program of Professor Sieber at the Max Planck Institute for Foreign and International Criminal Law in Freiburg is closely attuned to current changes in crime, criminal law, and criminal policy in today's global information and risk society. New challenges to criminal law and security law emerge with these changes. Contributors to the urgency of these challenges include the growing transnationality of crime, the increasing threat level, and the high degree of complexity. These factors are especially apparent in the areas of terrorism, organized crime, economic crime, and

cybercrime – all focuses of the research program. These developments have pushed traditional criminal law to its territorial and functional limits as regards the protection of society and the guarantees of individual freedoms. New questions arise, for example, as to the conceptual design of a transnationally effective criminal law, the role of criminal law in the context of the emerging preventive orientation towards security interests, and alternative systems of social control.

Against this background, the research program of the Department of Criminal Law at the Max Planck Institute for Foreign and International Criminal Law pursues three related, progressive research goals: (1) the analysis of empirical changes in delinquency and security risks in a society shaped by globalization, technological advances, and economic development; (2) the analysis and critical evaluation of the corresponding normative changes in present-day security law; and (3) the development of viable responses to the issues spawned by these changes.

The primary research methods used to achieve these aims include legal doctrine, international criminal law science, and comparative criminal law as well as methods of empirical social research and the inclusion of fundamental questions of legal theory, international law, European law, and human rights. In this way, a frame of reference for criminal justice in multi-level systems can be determined.

From the vantage point of comparative criminal law, Professor Sieber's publications deal, in particular, with issues relating to globalization, European criminal law, terrorism, organized crime, cybercrime, and information technology in law. Two of his books have been translated into Japanese; his "International Handbook on Computer Crime" has been published in French. Articles on issues of computer law and economic criminal law have been published in Chinese, Danish, English, French, Greek, Italian, Japanese, Korean, Persian, Portuguese, Polish, Spanish, and Turkish. Anthologies with authoritative articles have been published in Chinese, Japanese and in Korean.

The honorary degree that is today awarded to Professor Ulrich Sieber is a concrete successful example of the relationships that the West University of Timişoara has with academic institutions at international level, as well as a proof of the fact that science is a bonding instrument and becomes one of the most important elements to coagulate mankind. We are honoured that, by awarding this honorary degree, we can contribute to the strengthening of relations between our institutions and to a better mutual understanding. We are glad that we can thus honour the scientific contribution of an exceptional specialist, famous in Germany and in the international academic community.

Taking into account the above-mentioned, we consider that the proposal submitted by the Faculty of Law within the West University of Timişoara, as to the awarding of the honorary degree of *Doctor Honoris Causa Legum Scientiae,* is fully justified.

Distinguished Professor Ulrich Sieber,

We are glad that today you are in the middle of our academic community in order to receive this honorary title that the West University of Timişoara grants upon you in recognition of your special merits of developing a cooperation-based partnership between our institutions.

The *Laudatio* Academic Board appointed to award the honorary degree of *Doctor Honoris Causa Legum Scientiae*

President,

Professor Marilen-Gabriel Pirtea, LL.D. – Rector of the West University of Timişoara

The paradigm shift in the global risk society: from criminal law to global security law – an analysis of the changing limits of crime control*

PROF. DR. ULRICH SIEBER

I. Introduction: New Threats, New Fears, and the Dogma of Security

Cases of international terrorism, organized crime, economic crime, and other forms of complex crime illustrate the significant impact of crime and the importance of crime control to society as a whole. Not only do these cases dominate public discussions, the media, and political discourse. They are also causing a fundamental paradigm shift in criminal policy in general and in the architecture of security law in particular – a development that goes largely unnoticed by the general public.

This paradigm shift is based, on the one hand, on objective changes such as the emergence of new threats and new types of complex crime, for example, terrorism, organized crime, and cybercrime. On the other hand, it is due also to changes in people's subjective levels of well-being: objective changes lead to greater fear of crime. In many countries, these feelings of insecurity and the resulting demands for stricter laws are embraced by populist politicians seeking (re-)election. Their policy of "governing through fear of crime" is reflected in the rise of extremist parties calling for protection against migrants and strangers and for increased security against crime.

The combination of these objective, subjective, and political factors has greatly influenced criminal policy in recent years: in many areas, crime control is no longer dominated by the traditional questions of culpability and punishment but rather by the issues of risk and dangerousness and by the future-oriented themes of prevention and security. This dogma of security as described has led to fundamental changes in existing approaches to social control and to the emergence of a new aim: providing security by means of early prevention.

This development can be seen both within and outside of criminal law, dissolving the limits between the legal regimes into a kind of overall "security law". This law is governed by a new architecture, which is no longer monopolized by criminal law but by a variety of different legal regimes such as intelligence law, police law, the laws of war, or civil law. The new architecture of security law goes hand in hand with a loss of legal guarantees within and, in particular, outside of criminal law.

The aim of this lecture is to describe and to understand these fundamental changes within the global risk society better. For this purpose, it will briefly analyse the contours and regimes of the emerging security law (part II), It will then deal especially with the accompanying process of decreasing legal guarantees (part III). Lastly, the summary (part IV) will recapitulate and explain this overall legal development in the global risk society in more detail and stress the need for future research on this topic.

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* Lecture at the West University of Timisoara, 30th March 2016.

II. The Emergence of Preventive Security Law

A. Preventive Criminal Law

The traditional concept of criminal law is changing in important areas from being a repressive, punitive instrument to being a primarily preventive tool designed to minimize dangers and risks. In the area of *substantive criminal law*, this new preventive approach is based on the protection of overall social interests (such as the "financial market") in advance of criminal activity against individuals as well as on the criminalization of early (often commonplace) preparatory acts that pose specific risks or are executed with the intent of committing a crime. An example of this development is the criminalization of the attempt to leave the country with the aim of receiving weapons training in a terrorist training camp located abroad, as was recently enacted in Germany.

A corresponding preventive aspect of criminal law can also be found in the field of *criminal procedure*: many clandestine powers for secret surveillance available in police law and intelligence law are now also used in criminal procedure or law enforcement. These powers represent the procedural equivalent to preparatory inchoate offenses in substantive criminal law as they facilitate the investigation of activities in this preparatory phase. Such powers are found not only in many legal orders but they also dominate the criminal policies of international organizations. They threaten the balance between security and liberty, a balance essential to democratic societies.

B. Non-Criminal Regimes of Security Law

Parallel and in addition to these changes *in* criminal law, there are similar changes **outside** of **criminal** law: criminal law-based policies for social control are yielding to security-based policies. Thus, police law, intelligence law, laws of war, civil law, and private law are taking over tasks that until recently were within the ambit of criminal law. In many cases, these alternative legal regimes may permit more intrusive interference with civil liberties compared to criminal law and may be subject to significantly less comprehensive legal guarantees.

- This can be seen, for instance, in the use of **intelligence law** for crime control purposes: Enquiries by intelligence agencies do not require the existence of a suspicion; in contrast, starting a criminal investigation requires such a suspicion in order to protect citizens against intrusion and an excessive search for crime.
- **Police law** in many countries is acquiring new and intrusive control instruments, among them those for confronting so-called "endangerers" (in Germany), for "control orders" that are similar to criminal law measures (*e.g.,* in England), and for "administrative detention" with few legal guarantees (such as in Israel).
- The **laws of war** are being construed (esp. in US law) to permit the targeted killing of alleged terrorists without proof of criminal activity and with no judicial oversight.
- So-called **"administrative sanctions"** can lead to the imposition of staggering fines in the course of procedures that offer minimal legal guarantees, as is illustrated by the EU Commission's powers in dealing with the cartel offenses in European competition law or the sanctions against banks and other companies imposed by the American Securities and Exchange Commission.

- **"Civil asset forfeiture"** and "non-conviction based confiscation" against suspected criminals and "unjustified enrichment" permit, in an increasing number of countries, the confiscation of assets. This approach is based on the less stringent civil law standard of "preponderance of the evidence" and do not require a criminal conviction.
- What is more, **private compliance programs** in many Western states lead to investigations by private companies, all in the absence of proper safeguards.

C. Additional Changes in the Global Information Society

The threat to the protection of individual liberty posed by the new "security law" is exacerbated by two additional changes that are caused by the shifts of global risk and information society:

As a consequence of today's **information society**, the use of *effective IT-based technical surveillance measures* and the collection, storage, and mining of massive amounts of personal data lead to new concepts of investigation and prevention that already go far beyond all previous visions of a surveillance ("Big-Brother") state. On this basis, new concepts of "predictive policing" might lead to the early identification of potential criminal activity in the future. As a consequence, the traditional conflict between liberty and security has, in this field, expanded to a conflict between privacy and crime control.

In addition, as a result of the **global society**, many legal orders have developed new models for *transnationally effective criminal law*. These new models lead to conflicts between the efficiency of transnational crime control, on the one side, and the protection of individual rights and of the sovereignty of the state involved in a conflict, on the other. This is the case, for example, with respect to the abandonment of traditional models of legal mutual assistance in favour of the direct recognition of foreign decisions, a development that gives precedent to security interests and weakens the protection of individuals. The same applies with regard to global strategies for new sanction regimes – such as the United Nations sanctions against terrorism. Transnational investigations in foreign countries lead to similar results (e.g., with an online investigative measure that, without recourse to mutual legal assistance, directly accesses foreign servers to investigate crime). In all of these models, existing legal guarantees for the protection of citizens are much weaker than in traditional law and may even be completely absent.

D. The Emerging Architecture and Characteristics of Security Law

The above analysis has shown that, in important areas of crime, criminal law is transforming from a repressive to a more preventive function. At the same time, criminal law is losing its monopoly on crime control, as it is amended (and sometimes replaced) by other legal regimes.

The combination of the traditional criminal law, the new preventive criminal law, and these non-penal legal regimes can be more efficient in preventing crime than traditional repressive criminal law is. They permit early arrests and lengthy "incarceration" of potential perpetrators (by preventive criminal law), the targeted killing of suspected terrorists (by laws of war), the comprehensive collection of mass data without any suspicion (by intelligence law), the confiscation of unexplained wealth

based on a preponderance of evidence (by civil law-based confiscation systems without conviction), efficient and quick procedures against illegal cartels or fraudulent companies (by so-called administrative sanctions), and the self-investigation of companies that are expected to present both the offender and the respective evidence on a silver platter (based on compliance regimes and sentencing guidelines).

However, the examples not only illustrate the advantages of these alternative systems of crime control when it comes to improving security. They also show that these systems have less legal guarantees for protecting the liberty of citizens concerned. Compared to the rules of traditional criminal law, the regimes described above might, for instance, over strain the instrument of criminal law and infringe the principle of culpability (in preventive criminal law), create a non-judicial death penalty (in the laws of war), neglect the limitation of criminal investigations in cases of suspicion (in intelligence law), infringe the criminal law standard of proof beyond reasonable doubt (in civil law-based confiscation), abolish a multitude of legal guarantees (in administrative sanction law), circumvent the interdiction of self-incrimination, and many other guarantees of criminal procedural law (in compliance regimes). All such activities would not be possible under traditional repressive criminal law. This illustrates that the advantage in security reached by these new regimes comes at the expense of liberty. Since the goal of criminal law (and similarly of the other legal regimes) encompasses both aims, security *and* liberty, evaluating this new development is difficult and must be done in a differentiating way.

Up until now, we lack – besides a comprehensive empirical analysis – such an evaluation of the new regimes of security law: The shift to prevention is being critically discussed only with respect to preventive criminal law and many legal scholars reject this change fundamentally. Therefore, the criminal law community is largely oblivious to the increasing shift towards non-criminal regimes for crime control due to its dogmatic focus on the traditional penal law. This insularity brings with it a serious risk: While criminal law might uphold its dogmatic principles and guarantees, these principles could be undermined by changing the legal regimes for crime control or by using a sanction regime with a false non-criminal label (such as possibly "*administrative* sanction law" or "*civil law*-based confiscation"). In some countries this development is already under way.

For these reasons, criminal lawyers should neither prematurely reject nor close their eyes to the development of these non-criminal systems for social control. On the contrary, we must actively participate in the construction of the emerging new legal architecture. Criminal lawyers possess not only a general knowledge of crime control. They also have the necessary experience and understanding to grasp the potential for abuse inherent in crime control since the history of criminal law is, to a large extent, a history of its abuses. For this reason, criminal lawyers must always be aware that criminal law has two equivalent aims: providing security *and* protecting freedom.

Since the practical advantages of applying the new legal regimes are obvious, we should deal especially with the necessary safeguards against abuses of crime control in the emerging security law. The following part of this analysis therefore deals with the question of how far the guarantees of criminal law are changing and could or should be upheld if crime is tackled by preventive criminal law and non-criminal legal regimes.

III. Legal Limits for the New Architecture of Security Law

Legal limits to an otherwise boundless security law can be derived primarily from national *constitutional law* and from international human rights guarantees, such as the European Convention for Human Rights, the EU Charter of Fundamental Rights, the Geneva Conventions and Additional Protocols, as well as other international conventions. In addition, limits of law can also be based on general principles of legal doctrine, especially the dogmatics of criminal law *(Strafrechtsdogmatik)*. Some of the respective fundamental principles are recognized by all and some only by a number of scholars. These dogmatic principles are non-binding for the legislature, but can be advocated as best practices for good legislation. However, these differentiations between constitutional law and dogmatic principles are blurring: A specific guarantee can be based on constitutional law in one country and be justified as a dogmatic principle in another legal order; in addition, some of these principles might have a chance to develop into future constitutional law at a later stage; in some cases it is unclear if a guarantee has constitutional or only a dogmatic justification. Thus, the legal sources of limits to the emerging security law may vary between different legal orders, are time-dependent, and often controversially disputed.

For this reason, an internationally viable concept for the limits of security law should not be based on legal sources, but be structured according to factual questions.

These concern:

A. the definition of criminal law, its specific guarantees with respect to preventive criminal law, and the possible recognition of a "light criminal law" with attenuated guarantees, as well as

B. the development of special safeguards for other (non-criminal) legal regimes with specific foundations, applications, and exceptions.

A. Defining Criminal Law and Its Limits

Criminal law has developed specific guarantees for protecting civil liberties since the Enlightenment. Due to this long historical development and the dominance of criminal law-based guarantees, the following concept on the limits of security law starts with three fundamental questions: (1) Does criminal law have specific features which differentiate it from the other regimes of security law and which can justify and define the range of specific guarantees applicable to criminal law? (2) Which limits exist or can be developed based on the range of these guarantees in order to guard against a too far-reaching preventive criminal law? (3) Can these limits for criminal law be reduced by creating a "light criminal law" (*e.g.* an "administrative sanction law") with more lenient penalties and attenuated guarantees compared to traditional criminal law?

1. The Definition of Criminal Law and the Justification of Specific "Penal" Guarantees

The severity of criminal sanctions alone cannot be viewed as a specific feature of criminal law and as a special justification of its guarantees, since grave consequences – including the deprivation of liberty – can also be found in other regimes of (esp. public) law. For this reason, the main particularity of the legal consequences of criminal law lies in the combination of a sanction with ethical blame (e.g., connected with the criminal

label provided by the legislature, which defines crimes esp. by specific names for "criminal" sanctions). In addition, sanctions of criminal law go beyond the restitution of illegal enrichment and beyond measures necessary for the technical prevention of future acts (e.g., by police law) or other specific legal purposes (such as taxation). What distinguishes criminal sanctions from the preventive measures of German police law, from the confiscation measures for re-establishing the *status quo ante*, and from the other measures listed above is its imposition of the legal detriment with the goal of deterring the perpetrator and/or the general public.

Based on this concept, specific guarantees of criminal law can indeed be justified in light of the combination of these severe factors of blame, detriment, and the "use" of the perpetrator to deter others (a mechanism that can be called into question with respect to its operability and the legitimacy of "using" the perpetrator to deter others). In addition, these special guarantees of criminal law historically originated in reaction to specific abuses and risks of criminal law which continue to exist in many legal orders. Such special guarantees safeguarding against typical abuses of criminal law include, for example, the principle of *"nullum crimen sine lege parlamentaria",* the rejection of an analogous application of criminal statutes, the principle *"ne bis in idem",* or the necessary proof beyond reasonable doubt.

The characteristic features of this definition of criminal law and the scope of its guarantees can be found in slightly different variations in the concepts of criminal law and criminal sanctions as developed by constitutional courts and human rights courts. For example, the respective Engel criteria of the European Court of Human Rights define criminal sanctions by (1) the classification of the measure in national law, (2) the nature of the offence (esp. its aim and purpose), and (3) the degree of severity of the penalty risked (with no minimum requirement for criminal sanctions). If sanctions are not characterized by the legislature as criminal, the ECtHR does not judge them to be criminal as long as they only re-establish the *status quo ante* or are focused on future prevention. This means that the confiscation of the proceeds of crime or of dangerous instruments used to commit crimes, as well as other purely preventive measures do not fall under the concept and the guarantees of criminal law if the legislature does not label these instruments as criminal and does not attach any ethical blame. Thus, based on the ECtHR definition of crime, the legislator can exclude the legal consequences of police law, intelligence law, the laws of war, and civil asset confiscation from an application of the criminal law guarantees if he defines these legal consequences properly. As a consequence, purely compensatory and purely preventive regimes have to be restricted by their own guarantees and limits.

Contrary to these legal regimes, the preventive criminal law discussed above is unquestionably part of criminal law since it combines ethical blame (through its designation and classification by the legislature) with grave legal consequences going far beyond restitution and direct ("technical") prevention and instead aims to deter the perpetrator and the general public from further acts.

2. The Specific Limitations for Preventive Criminal Law

The above-mentioned alignment of preventive criminal law leads to the question of whether constitutional law or dogmatic principles of criminal law are able to effectively limit a preventive criminal law that has become excessive. This question becomes relevant, for example, if the legislature decides to criminalize purely subjective criminal

ideas or everyday actions performed with criminal purpose. An example of the latter is a recently-enacted German statute criminalizing the collection of assets with the intention to finance terrorist acts. In the hearing of the expert commission of the German parliament, I argued that this extension of criminal law comes quite close to criminalizing pure thoughts and contradicts the principles of criminal law and possibly also the constitutionally protected principle of culpability.

In German law, the principle of culpability is not mentioned in the text of the Constitution, but is recognized by the Federal Constitutional Court as a special constitutionally protected principle. The Federal Constitutional Court requires that the penalty must be proportionate to the gravity of a criminal act and the perpetrator's degree of fault: Culpability is thus both "one of the legitimizing reasons for, as well as the outer limit to imposing and enforcing a prison sentence." The basis for punishment lies in the offender being guilty of "reproachable wrongdoing". Thus, culpability for an action must be derived from a combination of both objective wrongdoing and personal fault. For this reason, one can argue that the respective statutes of preparatory criminal law are only legitimate if they are not only based on *subjective intentions* of the perpetrator but also require *indicative objective elements* of crime.

In a similar way, it is possible to develop limits against other types of "inchoate offences", "abstract endangerment statutes", or other types of preventive criminal law. Under German law, for example, limits for statutes designed to safeguard vague social interests (like the public peace) can be based on the constitutional requirement of a legitimate aim and a proportional means of protection, or (less binding but more specific) the dogmatic requirement that criminal statutes should only protect precisely defined legal interests. These examples illustrate that constitutional law and legal doctrine are capable of developing at least some adequate limits for preventive criminal law.

3. Recognition of a "Light Criminal Law" with Attenuated Guarantees

According to the Engel criteria of the ECtHR described above, the scope of criminal law with its specific guarantees encompasses not only the traditional core criminal law but also the regimes of so-called administrative criminal law, administrative sanction law, and the law of regulatory offences (e.g., the German *Ordnungswidrigkeitenrecht*). In the context of administrative criminal law, the Court stresses that "there is nothing in the Convention to suggest that the *criminal nature* of an offence, within the meaning of the Engel criteria, necessarily requires a *certain degree of seriousness*" (emphasis added). It reiterates that "the *lack of seriousness of the penalty* at stake cannot deprive an offence of its inherently *criminal character*" (emphasis added). Thus, as far as administrative offences are concerned, there is no requirement in the jurisprudence of the ECtHR of a certain minimal degree of ethical blame, a factor that traditionally forms the basis of criminal culpability in national penal law regimes. The ECtHR deals with minor offences in a more flexible manner and extends its application of Article 6 of the Convention to include such cases if the nature of the administrative offence in question protects values or interests of society that are "*usually protected by criminal law*" and if "the aim of administrative sanctions is to *punish* offenders and to *deter* them from reoffending" (emphasis added). In these cases, the sanctions are imposed "on the basis of the gravity of the impugned conduct, and not of the harm caused".

Within these administrative offences, the ECtHR distinguishes between two types: the first category comprises so-called *minor* or *petty crimes*, which have often been removed from the core criminal law in the course of decriminalization due to the minimal nature of wrongdoing involved and in order to unburden the prosecution office (e.g., with respect to the above-mentioned traffic offences). The second category consists of administrative offences whose prosecution is conducted by a special supervisory authority within its general competence for the overall regulation of a particular field, such as agriculture or financial markets.

This broad concept for the guarantees of "criminal law" and "criminal fines" leads to the question of whether the limits of criminal law – which were historically developed for core criminal law – can be softened for legal regimes that dispense with terms of imprisonment and limit their sanctions to monetary fines or other alternative sanctions for cases of minor wrongdoing. Such attenuation is accepted by the ECtHR to a certain degree: The Court has accepted the fact that the two categories of administrative offence are both prosecuted *and* adjudicated in the first instance by the same administrative body. However: "decisions taken by administrative authorities which do not themselves satisfy the guarantees of Article 6 § 1 of the Convention must be subject to subsequent control by a judicial body that has full jurisdiction". Yet, even in the subsequent judicial proceedings, procedural tools such as conducting proceedings in writing, fast-track procedures, and the limitation of evidence in order "to deal quickly and efficiently with *petty offences*" are not *per se* impermissible, provided the procedure still satisfies the main purpose of Article 6 of the Convention, namely, to "guarantee the right of an accused to *participate effectively in his criminal trial*". Other guarantees of the ECHR might also be attenuated for "offences of a minor character." This can apply with regard to the right of appeal to a superior court (Art. 4 of Protocol No. 7). There is also an exception with regard to the principle of *ne bis in idem* (Art. 4 of Protocol No. 7) if a criminal sanction and a "regulatory offence" differ in their essential elements.

However, even for minor administrative offenses, the Court does not accept wide-reaching limitations, for example, with respect to the right to be informed of the accusations and to prepare for defence, to have an oral hearing, to ask for exonerating witnesses or experts, to use the services of a translator free of charge, to receive reasons for the verdict as well as with respect to the principle of the finality of judgments. The same holds true with respect to the principle of *nulla poena sine lege* (Art. 7). In all cases, the Court addresses the individual complaints and procedures as a whole.

This illustrates that the ECtHR compensates to a certain degree its broad and rigid concept of "criminal law" and "criminal sanctions" by applying flexible legal consequences with respect to the relevant guarantees. However, this flexible application of these guarantees was developed chiefly for petty offences. In addition, in various decisions the Court has declared that the degree of some procedural guarantees depends, *inter alia*, on "what is at stake". The Court also stressed that there "are clearly 'criminal charges' of differing weight" and it justified the need for a public hearing with regard to the "financial severity" and the "significant degree of stigma" of the penalties and with regard to the loss of the "professional honor and reputation of the persons concerned." This modulation of the level of guarantees according to the gravity of the intrusion is justified especially by the principle of proportionality: the more serious an intrusion in civil liberties is, the higher the level of procedural safeguards must be.

As a consequence, the system of protective guarantees does not jeopardize a decriminalization of petty offences or the efficiency of administrative and sanctioning

proceedings in the above-mentioned second category of administrative offences. However, there are also limits for such attenuations, especially for cases with significant financial penalties. This is relevant, for instance, with respect to the methods used in calculating the sometimes staggering fines that can be found in EU competition law. For example, regarding limits to administrative discretion and the minimal level of specificity exhibited by the applicable fining guidelines, the current state of affairs in cartel enforcement appears troubling, considering the gravity of the sanctions imposed. In some of these areas there seems to be an urgent need for reform. A more detailed critical assessment of these proceedings under the ECHR, EU law, and national constitutional law is therefore called for. However, the present analysis shows that there are limits and guarantees which can be used.

B. Defining the Limits of Crime Control Outside Criminal Law

In order to avoid a security law without restrictions, there must also be limits on measures *outside criminal law*. This is especially the case with respect to the above-mentioned legal regimes of police law, intelligence law, the laws of war, civil law, and private compliance regimes. If these regimes are employed for the purpose of crime control, constitutional or dogmatic limitations, I suggest that they should be developed in the course of a three-stage review procedure: (1) checking for elements of criminal law, (2) applying general principles of constitutional law and international human rights law, as well as (3) verifying the prerequisites, specific limits, and dogmatic principles of the respective non-criminal control regimes.

1. Checking for Elements of Criminal Law

In an initial check for limits of specific control regimes used against crime, the question dealt with above of whether the respective measures used for crime control purposes fall within the concept of criminal sanctions should be analysed, for example, according to the Engel criteria of the ECtHR. If this question is answered in the affirmative, the traditional guarantees of criminal law are applicable, possibly with some attenuation for administrative sanctions that deal with less serious offences.

This would be the case, for example, if short-term security arrests under police law were used not only for the prevention of danger but also for purposes of deterrence and punishment. The same would apply if a so-called civil asset forfeiture were not limited to the profits of crime or to clearly preventive purposes but rather extended to other assets belonging to the suspect. Due to such a "surplus", the confiscation would be a penalty and as such subject to the guarantees of criminal law.

2. Applying General Principles of Constitutional Law and International Human Rights Law

If the special guarantees of criminal law are not applicable, general principles of constitutional law and international human rights must be considered.

a) Example: Police Law and Intelligence Law

The main fields of application for these general guarantees are coercive police powers and powers of intelligence agencies used for information gathering. For these

cases, the fundamental rights at issue (e.g., rights concerning the protection of liberty, privacy, and the home) in connection with the principle of proportionality apply. The requirement of a statutory reservation for a parliamentary law allowing limitations of fundamental rights also plays an important role. The German Constitutional Court has announced a multitude of decisions that nullify the procedural powers of police law and intelligence law, for example, with regard to online searches (forensic software) or data mining. In this field of procedural powers, constitutional guarantees in the area of criminal law and those in the area of police law are often quite similar. The respective guarantees for the information-gathering activities of intelligence agencies are generally less strict, since the information collected in this context is used only for monitoring purposes and generally not for more serious consequences such as arrest or conviction (as may be the case under criminal law).

b) Example: Confiscation Law

The important function of general constitutional guarantees in the field of crime control can also be seen with respect to non-criminal confiscation measures. If confiscation measures are criminal sanctions, this implies *inter alia* the presumption of innocence (Art. 6 § 2 ECHR) so that the underlying crime and its connection with the confiscated assets must be proven beyond reasonable doubt. If, however, confiscation measures are limited to re-establishing the *status quo ante* or if their only aim is to prevent future crime (e.g., by confiscating instruments for committing crime) the guarantees of criminal law do not apply. However, this does not exclude constitutional protection. In these cases, the *general* safeguards for protection may be applicable, especially the protection of property (Art. 1 of the Protocol No. 1 of the ECHR) and the right to a fair trial in civil matters (Art. 6 of the Protocol No. 1 of the ECHR).

According to the ECtHR, these non-criminal guarantees do not exclude civil conviction orders based on a preponderance of evidence or with a high probability of illicit origins, as well as a reversal of the burden of proof. Similar results for non-criminal confiscation can be expected under EU law (esp. Art. 17 EUC). Contrary to these interpretations, under German constitutional law, the protection of property goes further: it requires the court, after exhausting all available evidence, "to be *convinced* that the assets concerned were obtained illegally". Thus, this example shows that substantial legal guarantees are also possible outside criminal law in other legal regimes. However, these guarantees may be weaker, less developed, and more insecure than those of criminal law, due to the lesser intrusiveness of the respective measures.

3. Verifying the Prerequisites and Specific Limits of Non-Criminal Control Regimes

As illustrated above, the control regimes outside of criminal law are often able to provide more efficient interventions than criminal law can, since they are designed for specific situations and purposes. For example, the laws of war deal with exceptional threats by serious armed attacks. Intelligence law was developed as an early warning system against special dangers to the state. And in many legal orders, preventive police laws are particularly suited to dealing with the prevention of future dangers. For these reasons, the decisive limits to the application of these alternative control regimes outside of criminal law are often to be found in the prerequisites for their application. This tends to be easily forgotten in light of the multitude of political announcements regarding wars or specific emergency programs against crime.

a) Example: The Laws of War

Special prerequisites for application play a major role in the laws on armed conflicts. These laws are used in "wars" on terror, on drugs, on organized crime, or in cyberwars in order to justify specific actions that would not be legal in times of peace. However, the main goal of *ius in bello* is to limit armed conflicts with a high military potential; thus it contains a variety of important limits and protective guarantees.

These limits and guarantees of the laws of war are most illustrative for methodological purposes. They show that the aims and tasks of the different special regimes used in crime control are not only decisive for the *limits of applying the respective regimes* as such and at all. In addition, the aims and tasks of the various regimes as well as their typical subject matter are also affecting the types, the intrusiveness and the *guarantees of respective control measures or powers* admissible under this regime. For this reason, these two types of limits and safeguards have to be discussed in more detail.

aa) The essential *prerequisite for applying the laws of war* is either an international or a non-international armed conflict. In the context of an initiative against serious crime (a "war on crime"), the rules on non-international armed conflicts are more important. These rules are found primarily in Article 3 of the Geneva Conventions I–IV, in their first additional protocol, and in customary international law. According to these rules, a conflict does not qualify as a non-international armed conflict unless a certain duration and a certain intensity are reached that surpass those of "internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature" (Art. 1 AP I and Art. 8 (2) (f) Rome Statute). The total number, the duration, the weapons used, the number of combatants and victims, as well as the destruction caused by the acts of violence must be comparable – in their nature and their effect – to military attacks between regular armed forces of belligerent states involved in an international armed conflict. Therefore, the ICTY stated in the *Tadić* case "that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State". This is a quite rigorous requirement that does not allow for the application of the laws of war against "mere" large organized criminal groups.

bb) However, limitations of the laws on war lie not only in the requirements for their application but also within the range of their application. Such limitations result especially from the system for distinguishing among different types of people which typically take part or suffer in armed conflicts: The laws define who can act under the respective powers *and* which persons can be attacked under which conditions. A major protective means here lies in the distinction between "combatants" and "civilians", both of whom are protected in a specific way under international humanitarian law. Pursuant to Article 3 of the Geneva Conventions and Article 43 Additional Protocol I, combatants are defined as members of the armed forces of a party to an international armed conflict. Thus, the invention of a third (new) category of "illegal combatant", which has neither the protection of a combatant nor that of a civilian, is highly problematic. Yet, the conflicts of the 21st century are characterized by civilians who participate directly in armed conflict. Therefore, the International Committee of the Red Cross (ICRC) has developed criteria that must be fulfilled before civilians lose the benefits of their

protective "civilian" status as a consequence of direct participation in the conflict. The three ICRC criteria for direct participation in hostilities are as follows: a likely "threshold of harm", which would be "caused directly" by the act in question with a "belligerent nexus".

A similarly problematic concept for extending the powers of the laws on armed conflict is the concept of "targeted killing" if it is used in a non-international conflict that is not clearly defined in terms of scope and time. In this context, "targeted killing" describes some states' practice of killing pre-selected individuals who neither pose an immediate direct threat to other individuals nor are executed as enforcement of a death penalty on the basis of a criminal proceeding. The oftentimes missing link to the battlefield and the lack of a trial of the targeted individual raises severe concerns as regards a violation of international humanitarian law and international human rights. This concern is fueled particularly by recent operations of "target killings" which were not performed against regular "combatants" on the battlefield or which concerned targeted individuals who were linked to irregular armed groups within armed conflicts. Without the concept of "unlawful combatant" these persons are categorized as "civilians" under international humanitarian law and might only be attacked "for such time as they take a direct part in hostilities" (Art. 51 (3) AP I).

In an armed conflict, legal limits concern even the guiding principle for war powers, namely that of military necessity. This principle, on the one side, permits the killing of persons, the demolition of houses, and the occupation of territory. On the other side, it also limits military actions only to those actions that are "necessary" for the realization of military aims. Therefore, the dogma of "military necessity" simultaneously both legitimates and limits military actions. Additionally, the laws of armed conflict are guided by the principle of proportionality and humanity in order to keep the conflict as "humane" as possible and to avoid unnecessary harm. Further protective rules also originate from the general principles of international human rights law, which are applicable as *lex generalis* in addition to the *lex specialis* of the laws on armed conflicts. This illustrates that the concept of legal limits and guarantees for crime control outside criminal law works even within the laws of war, however that their scope and content are influenced by the special regime.

b) Emergency Security Laws

Special prerequisites of specific legal regimes can also be important for emergency laws that allow intensive state intervention in emergency situations. France's currently applicable emergency law (whose prolongation and codification is under discussion) permits the proclamation by the Council of Ministers of a state of emergency for 12 days; subsequent prolongation is possible only by parliamentary law. The present emergency law in France allows warrantless searches and seizures, access to systems of information technology, establishment of security zones with limited accessibility, dissolution of groups, house arrest and residence requirements, bans on assemblies and the closing of meeting places, seizure of weapons, as well as drafting to military or civil service. This area of law shows again that the threats to civil liberties posed by crime control arise not only in the context of penal law but also – and even more so – within the framework of other systems of crime control. As a consequence, the efforts made in criminal law since the Enlightenment to protect civil liberties must also be undertaken in these alternative crime control regimes.

IV. Summary, Evaluation and Future Research

A. The Emergence of Security Law

The global risk society is characterized by new and complex crimes, an increasing fear of crime, a dogma of risk prevention, and a shift in criminal policy from traditional criminal law to preventive security law. The emerging new architecture of security law combines new forms of preventive criminal law with other preventive legal regimes into a new risk-oriented security law.

Since definitions are always functional and serve specific objectives, a research approach to crime control can define this new "security law" as the norms dealing with the prevention of risks caused by human activities. Applying a more focused approach in criminal law and criminology, these activities can also be specified as acts that are or should be covered by criminal law. Such a narrower focus concentrates on more serious acts and respective control methods. This restriction increases the chances of finding more commonalities and achieving better results for controlling crime in view of a tailored future criminal policy. In addition, the term "security law" should be limited in its definition to law aimed at eliminating risks, dangers, and detriment (and not only punishing culpable perpetrators, as is the case in criminal law).

Defining security law in this way unites various legal regimes, especially preventive criminal law, administrative criminal law, police law, intelligence law, the laws of war, and civil law. One could also add elements of the laws relating to migrants and foreigners, or telecommunication law. With respect to the goal of providing security, criminal law is losing its monopoly in the field of crime control. For the purpose of security, criminal law is also being reshaped from a repressive to a preventive tool. This leads to the significant changes in criminal law described above, in both the fields of substantive law and procedural law.

B. The Advantages for Security

The shift from repressive criminal law to prevention and the combined use of various legal regimes unquestionably contribute to a more efficient crime control. This is primarily accomplished by a simple additive effect, since, in principle, these different regimes act independently from each other. Yet, the combined use of the various regimes also leads to additional synergies, especially if information gathered within the legal regimes is exchanged or joint actions are executed. In specific cases, the regime combination may also lead to undesirable results and tension (*e.g.,* when the risk-based power of police law is combined with a preparatory offense in criminal law). However, such effects can be minimized by adequately crafting legal provisions.

All in all, and from a security perspective, the bundling of these various legal regimes can certainly improve security. In the present-day risk society, there is no alternative to embracing this new preventive approach and to the bundling and integration of various legal regimes for controlling complex crime.

C. The Detriments to Civil Liberties

The negative effect of this new orientation concerns civil liberties. Based on the above analysis, three separate grounds can be identified that are responsible for this curtailing effect:

The *first reason* is that the new threats and fear of crime are leading to a climate which gives priority to the objective of security, whereas civil liberties and especially privacy protection become secondary interests. This development is responsible, for example, for shaping a legal landscape in which criminalization is increasingly extended to the preparatory phase or in which new investigation tools (such as online searches of computers) are implemented and accepted.

The *second reason* for the loss of civil liberties is the fact that "prevention", "risk reduction", and "security" are, in principle, borderless concepts. Whereas the traditional criminal law concept of a previously committed culpable wrong deals with a concrete and fixed fact in the past, prevention depends on an open and future-oriented prognosis. In today's complex society, there are always risks (some of them are expected in daily life) and absolute security is not possible. In an atmosphere of serious new risks (*e.g.,* terrorism) and voter-oriented policies based on "governing by fear of crime" there is always more that can be done for security and an incentive to do so.

The *third reason* for the loss of civil liberties is the most interesting one and came to light in the course of the above analysis: The analysis showed that there are immense discrepancies between the various disciplines of security law with regard to legal guarantees, despite the fact that the constitutional starting points, for instance, are quite similar. This is due to the fact that the aims and tasks of the various regimes used for crime control are very different. Throughout the course of this analysis, the respective consequences became especially clear for the laws of war: Whereas most criminal justice systems have abolished the death penalty, the laws of war still permit the killing of persons without any preceding judicial control mechanisms whatsoever. The reasoning for this significant difference results from the different tasks of the various legal regimes. However, such differences also illustrate that major changes in legal safeguards can easily be condoned by bringing a certain case from one legal regime under the roof of another. This is the case, for example, when the competence of intelligence agencies is extended to certain crimes or when the prosecution of a terrorist or criminal organization is considered to be fighting war by assuming an armed conflict. Such shifts of entire concepts are the most serious threats to civil liberties discovered in the above analysis.

D. Future Research

This result has an important influence on the continuation of future research on the new security law: We can solve the questions relating to the limits of security law only if we take an in-depth look at the aims and tasks of the various regimes contributing to the emerging security law. With respect to future criminal policy, we must especially analyse and reconsider the basic elements of the present security architecture.

Thus, the present threats of complex crime might lead to fundamental changes in the present system of police law, intelligence law, the laws on war, and others The need for such a holistic approach justifies the overall analysis and the above definition of a security law. Comparative law research also indicates that there are alternatives to our present solutions. For this reason, research in security law and its architecture is just beginning. There is still a long way to go. I hope that in the future we can continue on this path together - in Timisoara and in Freiburg.

Criminal law faced with the migratory phenomenon

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Abstract:

Migration is accompanied by forms of crime which criminal law is not prepared his respond.

Yet, migration favours, apart from the threat of terrorism, other forms of criminality as well, such as human trafficking, illegal border crossing, migrant smuggling, crimes which came into the target of organized criminal groups.

We shall confine ourselves to showing how the Romanian criminal law influences the granting of the right of asylum and the refugee status, as well as the criminalization of the criminal acts regarding migrant smuggling

Migration cannot be stopped by the means of coercion specific to criminal law, but, nevertheless, criminal law should provide solutions to combat crime that develops alongside migration or as a result of it.

Keywords: migration, refugee status, right of asylum, temporary protection; migrant smuggling.

1. On migrations in general

The migration of populations, even if in the last years it increased to such an extent that it has become a cause of some concern, is not a new phenomenon. Population studies regarding the DNA show that, some 70 000 years ago, a human flow had set off from Africa through what is nowadays the Middle East and had poured out in Europe and elsewhere.

Why would be go back so far in the past? Because now, as always, migrations have had and still have as their cause either the search for food or violent clashes among various populations (wars) or both.

In relation to the causes of migration, it can be either voluntary, when caused by seeking better employment, unemployment, family reunion etc., or forced, when determined by religious or political persecution, civil wars, natural disasters etc.

Migrants have always aroused feelings of insecurity among the local, sedentary populations. The huge wave of immigrants who assail the shores of Europe risking their own lives has generated serious problems, not only political, but also of an economic, social and cultural kind in all European countries.

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The feelings of human solidarity with those forced to flee from territories shattered by wars are opposed by feelings of fear generated by the wave of terrorist attacks caused in the name of the Jihad, although the existing data show that terrorists originate mainly from the Muslim population raised, settled and radicalized in Europe.

From the data of the International Centre for Counterterrorism in The Hague, out of the estimated 4 000 Europeans who have become ISIS fighters, the majority of them come from urban areas in France, Belgium, Germany or England.[1]

The relocation of the refugees in EU countries, apart from the fact that it is met with hostility by some countries, can only be, in our opinion, a mere palliative, a temporary solution, a stop on their way to countries with a high standard of living, such as Germany, England or the Nordic countries.

The political solution should be sought in their countries of origin, by supporting those political forces that can restore peace in those territories and by offering economic aid for rebuilding the destroyed infrastructure and the resumption of the economic activity.

The International Covenant on Civil and Political Rights from December 16th 1966, adopted by Romania in 1974[2], enshrines the right of everyone to leave any country, including his own. The above-mentioned right shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others (Article 12).

If the voluntary migration from outside the European Union is subject to visa and temporary, the forced migration entitles the migrants to several forms of international protection such as the right of asylum and the recognition of the refugee status.

The provisions of criminal law may influence the granting or withdrawal of the right of asylum.

Yet, migration favours, apart from the threat of terrorism, other forms of criminality as well, such as human trafficking, illegal border crossing, migrant smuggling, crimes which came into the target of organized criminal groups.

We shall confine ourselves to showing how the Romanian criminal law influences the granting of the right of asylum and the refugee status, as well as the criminalization of the criminal acts regarding migrant smuggling.

2. Refugee status, right of asylum and temporary protection

According to data released by the General Inspectorate for Immigration, at the end of the first quarter of last year, 59 000 foreigners from third countries had the right to stay in Romania, most of them coming from Moldova, Turkey and China, either as family members, or as people studying or being employed in our country.

Approximately 700 people have received a form of protection in Romania – refugee or subsidiary protection, the approval rate being 45%. Most asylum seekers come from Syria, Afghanistan and Iraq.

Romania is not, and is unlikely to become a new route of the wave of migration originating from the Middle East, both because of the border security measures and of

[1] stiri.tvr.ro/cateva-mii-de-europeni-**lupta**-pentru-**isis**-cei-mai-multi-provin-din-**franta**-g.(accessed 5.04.2016)

[2] Published in the Official Bulletin no. 146 of 20.11.1974.

the legislative measures which provide for thorough verification of the applications for access in the country.

Romanian law provides adequate means to enable the selection of migrants, several regional centres functioning under the subordination of the Romanian Immigration Office for the verification and accommodation of asylum seekers and of those who have been granted some form of protection in Romania.

The right of asylum is affirmed by Article 14 of the Universal Declaration of Human Rights, adopted by the UN General Assembly on December 10th 1948.

According to these provisions, everyone has the right to seek asylum and to enjoy in other countries asylum from persecution. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

The legal status of refugees is regulated by the Refugee Convention, adopted on July 28th 1951 by the UN Conference in Geneva, joined by Romania in 1991,[3] and under which the States Parties recognize the social and humanitarian character of the refugee problem.

The legal status of foreign citizens found on Romanian territory is defined by the provisions of Article 18 of the Constitution, of the Emergency Ordinance no. 194/2002 governing the status of foreigners in Romania,[4] and of Law no. 122/2006 governing the right of asylum in Romania.[5]

According to the Emergency Ordinance no. 194/2002, aliens are refused entry on the Romanian territory if: they do not possess a valid travel document, which is accepted by the Romanian state; they have been notified by international organisations to which Romania is a member, as well as by institutions specialised in combating terrorism that they finance, prepare, support in any way or commit acts of terrorism; there are indications that they are part of organised criminal organisations at international level or that they support in any way the activity of such groups; there are serious reasons to assume that they have carried out or taken part in carrying out acts of violation against peace and humanity or war crimes or crimes against humanity, as provided by international agreements to which Romania is a party; they have committed offences during previous stays in Romania or other states, against the Romanian state or against a Romanian citizen; they have introduced or attempted to introduce illegal aliens to the territory of Romania; they suffer from serious illnesses which may severely endanger the public health, as defined by Order of the Minister of Public Health.

Foreigners and stateless persons living in Romania shall enjoy the general protection of people and property, guaranteed by the Constitution and other laws (Article 18 para. (1) of the Constitution).[6]

A law specific to foreigners only, and covered by the Constitution, is the right of asylum which, according to Article 18 para. (2) of the Constitution, is granted and withdrawn under the law, in compliance with international treaties and conventions to which Romania is a party.

Law no. 122/2006 governing the right of asylum in Romania has been amended in order to transpose into national law:

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[3] Published in the Official Journal, Part I, no. 148 of 17 July 1991.

[4] Republished in the Official Journal, Part I, no. 421 of 5 June 2008.

[5] Published in the Official Journal, no. 428 of 18 May 2006.

[6] I. Chelaru, A-L. Chelaru, *Străinii în România. Regim juridic*, Universul Juridic, 2016, p. 122 -132.

- Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and measures promoting a balance of effort between Member States in receiving such persons and bearing the consequences thereof, published in the Official Journal of the European Communities, series L, no. 212 of 7 August 2001;

- Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, published in the Official Journal of the European Union, series L, no. 251 of 3 October 2003;

- Article 2 letter (f), Article 12 para. (3a) and (3b), and Article 19a para. (1) and (2) of Council Directive 2003/109/EC of 25 November 2003 concerning the status of third country nationals who are long-term residents, published in the Official Journal of the European Union, Special Edition 2007, Chapter 19 – "Space freedom, security and justice", Volume 6, as amended by Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection, published in the Official Journal of the European Union, series L, no. 132 of 19 May 2011;

- Directive 2011/95/ EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, published in the Official Journal of the European Union, series L, no. 337 of 20 December 2011, except for Articles 7 and 9 para. (3);

- Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), published in the Official Journal of the European Union, series L, no. 180 of 29 June 2013, except for Article 49;

- Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), published in the Official Journal of the European Union, series L, no. 180 of 29 June 2013, except for Annex I.

The forms of international protection regulated by law are as follows: recognition of the refugee status; granting of subsidiary protection or temporary protection, and right of asylum.

Refugee status is recognized, upon request, for the alien who, as the result of a well-founded fear of being persecuted because of race, religion, nationality, political opinion or membership to a particular social group, is outside of the country of origin and cannot or, owing to this fear, does not want the protection of this country, as well as the stateless person who, being out of the country where he had his usual residence due to the same reasons mentioned above, cannot or, due to the respective fear, does not wish to return and to whom do not apply the grounds for exclusion from the recognition of the refugee status, in accordance with the law. Refugee status entitles that person to remain on Romanian territory and to obtain residence permits and travel documents for crossing the state border.

The refugee status is not recognized for aliens and stateless persons in relation to whom there are serious reasons to believe that: they have committed, incited or been accomplice to a crime against peace and humanity, a war crime or another offence defined according to the relevant international treaties to which Romania is a party; they have committed a serious common law offense outside Romania, before being

admitted on Romanian territory; or have facilitated or participated in the commission of terrorist acts.

Subsidiary protection is granted to the alien or stateless person who does not fulfil the conditions to have refugee status recognized and regarding whom there are well founded reasons to believe that, in the case of returning to the country of origin, respectively to the country where he has his usual residence, will be exposed to a serious risk, such as conviction to a death sentence or the execution of such a sentence; torture, inhuman or degrading treatments or punishment; or a serious, individual threat to one's life or integrity, as a result of generalized violence in situations of internal or international armed conflict, if the applicant is part of the civilian population, and who cannot or, due to such risk, does not want the protection of that country to whom do not apply the grounds for exclusion from the granting of this form of protection, mentioned above.

Subsidiary protection is also granted, on request, to family members who are on Romanian territory or in the applicant's country of origin.

Temporary protection is an exceptional procedure meant to ensure, in the case of a massive influx or imminently massive influx of people displaced from third party countries who cannot return to their country of origin, immediate and temporary protection for such people, especially if there is a risk that the asylum system cannot process this influx without negative side effects to its efficient operation, in the interest of the aforementioned people and other people who need protection.

The duration of the temporary protection lasts one year and can be automatically extended by periods of 6 months, for up to one year maximum. Temporary protection can be granted under the conditions in which Romania proposes that the Council issue a decision, through which it can ascertain the existence of a massive influx of displaced persons. The proposal will include a description of the specific groups of people upon whom temporary protection will be applied, the date when temporary protection starts as well as an estimation of the scale of movement of displaced persons. Temporary protection ceases when the maximum limit of the period is reached; or at any moment, through a decision of the Council of the European Union, adopted to this effect.

The asylum application is submitted as soon as the applicant has presented himself/herself at a checkpoint to cross the state border, including in the transit area; at the Romanian Immigration Office if the applicant entered the Romanian territory or in the country of origin of the foreigner having the right to stay in Romania had occurred events that have determined him to seek protection. Applications for asylum submitted outside Romania are not admitted.

An appeal can be lodged, against the decision through which the application to receive access to a new asylum procedure has been denied as inadmissible, within 10 days from it being communicated. The appeal falls under the jurisdiction of the court in whose territorial radius the qualified structure of the Romanian Immigration Office, which issued the decision, is found.

The refugee status ceases when its beneficiary has voluntarily availed himself/herself back of the protection of the country that he/she is a citizen of; or after losing citizenship, he/she voluntarily reacquired it; or gained new citizenship and enjoys the protection of the state whose citizenship he/she gained; or has voluntarily resettled back in the country he/she left or outside which country he/she lived, as a result of the reasons for which refugee status was recognized; or can no longer continue to refuse the protection of the country whose citizenship he/she has due to the fact that the

circumstances as a result of which refugee status was recognized have ceased to exist and can no longer claim compelling reasons that refer to previous persecutions in order to motivate this refusal.

The refugee status is cancelled if the person whose refugee status has been recognized has made false statements, omitted to present certain data or used false documents, which were decisive in the acknowledgment of the form of protection and there are no other reasons to lead to maintaining refugee status; or if, after granting the form of protection, it was discovered that the alien is in one of the situations which excluded them from the granting of such status.

The rights of the beneficiaries of any of the forms of protection provided by law are recognized without discrimination, regardless of race, nationality, ethnic group, language, social class, convictions, gender, sexual orientation, age, handicap, non-contagious chronic disease, HIV infection or belonging to a disadvantaged class, of material circumstances, status at birth or status gained or any other distinction.

The asylum seeker cannot be expelled, extradited or forcibly returned from the border or from Romanian territory, except for the cases mentioned in Article 44 of Law no. 535/2004 regarding the prevention and fight against terrorism.

The person who has been recognized as a refugee or who has been granted subsidiary protection is protected against expulsion, extradition or the return to the country of origin or any state in which one's life or liberty has been placed in danger or would be subjected to torture, inhuman or degrading treatment.

The person who has been recognized as a refugee or who has been granted subsidiary protection can be removed from Romanian territory if there are sound reasons for the person in question to be considered a danger to the security of the Romanian state; or the person in question, being convicted of a serious criminal offence by final decision, is a danger to public order in Romania. A serious criminal offence is considered any crime for which the law requires the punishment to deprivation of liberty with a special maximum sentence of over 5 years.

A strict control of the conditions for granting any of the forms of international protection can prevent the access into the country of people who do not justify the need to grant such protection.

3. Migrant smuggling

Migration is accompanied by various forms of crime, ranging from simple illegal immigration to forms belonging to organized crime, the criminal organized groups finding a great source of income from the exploitation of the desire for immigration from both those immigrating forcedly and those migrating in the search for a job.

Romania's Criminal Code incriminates the act of entering or exiting the country by illegally crossing the state border (Article 262), offense which is punishable by imprisonment from 6 months to 3 years or a fine. The offense is more serious if the act is committed for the purpose of circumventing criminal liability or serving a sentence or educational measures, privative of liberty, or by a foreigner declared undesirable or who has been prohibited in any way from entering or staying in the country, in which case the punishment is imprisonment from one to 5 years. The attempt is also punished. The act committed by a victim of human trafficking or by minors is not punished.

From the data provided by the General Inspectorate of the Border Police in relation to the influx of migrants which has affected the territories of European countries, EU

State Members, as well as third countries such as the Western Balkans, the number of migrants apprehended at the borders of Romania in 2015 remained at the level of the previous years. In 2015, at the Romanian borders were detected 2 488 people crossing or attempting to cross the border illegally, out of which 255 people originating from countries producing migrants, who have applied for the granting of the asylum status to the structures of the border police at the moment of the detection of their illegal passage of the border[7].

As ways to attempt illegal entry into Romania, the ones used more often by migrants were crossing or attempting to cross illegally the green border and hiding in vehicles, and as ways to attempt illegal exiting from the country, the most used were hiding in vehicles, crossing or attempting to cross the green border, as well as the use of false documents.

Distinct from human trafficking for the purposes of their exploitation, the Romanian Penal Code incriminates migrant smuggling of migrant trafficking.

Migrant smuggling consists in the recruitment, mentoring, guidance, transportation, transfer or harbouring of a person for the purpose of illegal border crossing, and is punished with imprisonment from 2 to 7 years. The offense is more serious if the act is committed in order to obtain, directly or indirectly, a patrimonial gain, by means which endanger the life, integrity or health of the migrant, or by subjecting the migrant to inhuman or degrading treatments, in which case the penalty is imprisonment from 3 to 10 years and deprivation of certain rights.

The data of the Border Police show that, in 2015, a total of 1 959 people were involved in illegal migration, 1 481 were apprehended when crossing/attempting to illegally cross the border (936 aliens trying to enter and 545 trying to exit the country). Out of these numbers, 175 have served as guides or carriers, 60 being Romanian citizens and 115 foreigners[8].

The cases settled reveal that most often smuggling is organized abroad, the migrants transiting the territory of Romania.

For example, on 11 April 2015, at the Border Road Crossing Point of Nădlac, has presented himself for clearance border a Turkish citizen, driving a truck with trailer registered in Hungary, with the help of which he was carrying pieces of furniture from a company in Turkey to a company in France. The Romanian border police carefully examined the respective means of transportation and discovered 74 people (53 men and 21 women) of Arab origin, who did not speak Romanian and had no identity documents. The hidden people were Syrian and Iranian citizens, who intended to illegally reach France.

There are also cases where the Hungarian or Austrian police discovered migrants transported by Romanian citizens.

In order to prevent such acts, the Romanian Penal Code (Article 264) has incriminated the act of a person who facilitates, by any means, the illegal stay on Romanian territory of a person, victim of a crime of human, minor or migrant trafficking, who does not have Romanian citizenship or residence in Romania, an act punishable by imprisonment from one to 5 years and deprivation of certain rights.

The crime is more serious if the act is committed in order to obtain, directly or indirectly, a patrimonial gain or by a public servant during the performance of service, in

[7] https://www.politiadefrontiera.ro/ (accessed on 3.06.2016).
[8] https://www.politiadefrontiera.ro/ (accessed on 3.06.2016).

which case the penalty is imprisonment from 2 to 7 years and deprivation of certain rights.

It also constitutes crime evading the obligations imposed by the competent authorities by the alien against whom has been ordered the removal from the Romanian territory or against whom has been issued an order that prohibits their right to stay, a crime which is punishable by imprisonment from 3 months to 2 years or a fine.

4. Conclusions

Migration cannot be stopped by the means of coercion specific to criminal law, but, nevertheless, criminal law should provide solutions to combat crime that develops alongside migration or as a result of it.

Exploiting the suffering of people whose lives were put in danger in their home countries constitutes a serious violation of the obligations for human solidarity in the face of which the authorities of any other country cannot remain in a state of passivity.

The solutions for deterring the influx of forced migration can only be political and economic, and must be sought and implemented in those countries that generate this migration.

Trafficking in human beings in Serbia

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Abstract:

Trafficking in human beings is a serious and very complex social problem. In the last fifteen years the international community has undertaken a number of significant steps in confronting this phenomenon. First, in the United Nations Convention against transnational crime i.e. in its additional protocol which refers to the prevention and combating trafficking in human beings, an Institute for trafficking in human beings was set which helped greatly to the certain countries to designate and identify this phenomenon in their national legislation as a criminal offense which carries an appropriate penalty. Second, the countries were instructed to adopt national strategies whose goals are preventing and combating trafficking in human beings, as well as informing the public i.e. potential victims of this phenomenon through a variety of activities, and through education and training of prevention programs. Without adequate data on trafficking in human beings it is not possible to determine the true scope and nature of the problem. The authors of this paper try to analyse the current state of trafficking in human beings in the world, and above all provide statistical overview of criminal offenses of trafficking committed in the territory of the Republic of Serbia for a certain period.

Keywords*: trafficking in human beings, a victim, organized crime groups, the Republic of Serbia.*

1. Introduction

As a form of transnational organized crime, trafficking in human beings is just one in a line of criminal activities organized crime groups are engaged in. This phenomenon brings with it considerable human and social risks, it violates basic human rights, it spurs corruption, money laundering, illegal labour, causing a demographic destabilization, migration processes, in a word it represents a great social evil. Victims are subjected to various forms of exploitation such as sexual, labour, illegal child adoptions, trafficking in organs, forced marriages, involvement and participation in armed conflicts, involvement in specific criminal activities, etc.

In principle, every country should have it own prevention strategy that would target each possible cause of human trafficking. Likewise, the countries should further strengthen their institutions and create adequate regulations, because it's the only way to successfully respond to the activities of human traffickers and suppress more efficiently making profits through exploiting other human beings.[1]

Until 2003, the crime of Trafficking inhuman beings was not regulated in criminal legislation of the Republic of Serbia, so many of the offenders of this crime remained unpunished or they went on a trial for minor offences. By accepting and adopting United Nations Convention against Transnational Organized Crime and its two accompanying protocols that relate to trafficking and smuggling of migrants, the legal basis to start a successful fight against this type of crime was provided for many countries. A certain number of countries in the world has ratified this Convention and associated protocols. The Republic of Serbia, introduced criminalization of human trafficking into the Criminal Code in 2003 for the first time, defining it in a similar way as it had been defined in the UN Convention against Transnational Organised Crime, i.e. in its Protocols. However, the criminal legislation of the Republic of Serbia went through some changes, so that on 1st January 2006 the new Criminal Code came into force, where the crime of trafficking in human beings underwent certain changes.

In *The Criminal Code* of the Republic of Serbia, under Article 388, *Human Trafficking* is committed by whoever by force or threat, deception or maintaining deception, abuse of authority, trust, dependency relationship, difficult circumstances of another, retaining identity papers or by giving or accepting money or other benefit, recruits, transports, transfers, sells, buys, acts as intermediary in sale, hides or holds another person with intent to exploit such person's labour, forced labour, commission of offences, prostitution, mendacity, pornography, removal of organs or body parts or service in armed conflicts.

There is a case of severe form of offense if the offense is committed against a minor, where the offender shall be punished even if there was no force, threat or any of the other above-mentioned methods of perpetration. Second, there shall be a possible case of severe form of offense if the commission of an offense resulted in grave bodily injury of a person or a minor, while the most severe form of the offense, if the offense committed against a person or a minor resulted in the death of one or more persons. A special case of offense shall exist if someone commits a criminal offense against persons or minors, or the offense is committed by groups, or if the offense is committed by an organized crime group. Also, there shall be a special form of offence if someone knew or could have known that a person is the victim of trafficking, so he used her/her position or made it possible for others to take advantage of his/her position for exploitation. The consent to exploitation or establishing of slavery or similar status referred to in paragraph 1 of this Article shall not affect the existence of this offence.[2]

2. The current situation of human trafficking in the world

Considering the problem of human trafficking, many countries in the world have started the development of appropriate national strategies that incorporate specific

[1] Matijašević, J., Pavlović, Z., *Trafficking the Influence and Consequences on Human Rights,* Year XXVI, Novi Sad, July - August 2009, No. 7-8, p. 21-33.

[2] Criminal Code of the Republic of Serbia, 2006.

measures and actions which should gradually solve problem of human trafficking. These measures and actions are primarily:

- Legal framework;
- The identification of victims and adequate punishment of the offenders;
- The establishment of special centres with specialized staff to assist victims of trafficking;
- Prevention;
- Education;
- International cooperation between governmental and non-governmental organizations;
- Raising public awareness and organizing a large number of information campaigns on the harmful effects of human trafficking;
- Coordination of activities.

According to some reports, it is estimated that there are more than two million victims of human trafficking in the world; between 800,000 and 900,000 victims are women and children; 50% of women are forced into prostitution and forced labour; the profit that criminal organizations gain from trafficking in the course of one year is between 7 and 13 billion dollars, and so on.

In a broader context, in the beginning, human trafficking for sexual exploitation was considered the most widespread form of exploitation, but by expanding knowledge of this phenomenon this view has been changed now. The latest trends show that trafficking for sexual exploitation may be the most widely recognized form of trafficking, but that does not mean that it is the most widespread. It cannot be said with certainty which category of exploitation is prevalent in figures, and this often depends on the location considered. For example, it is likely that in the European Union, trafficking for sexual exploitation is the most widespread category, while in other parts of the world, especially in regions that include the countries of origin, such as Central and South-eastern Asia, Southern and Western Africa and South and Central America, the situation is less clear and it is likely that the number of victims trafficked for different exploitation of forced labour such as those in agriculture, illegal factories etc., is greater than the number of victims of sexual exploitation.[3]

Based on the United Nations Office on Drugs and Crime's database service, it can be concluded that 127 countries in the world are the countries of origin, 98 states are transit countries and 137 are destination countries. The largest number of organized crime groups in the world originated in Asia and Central and Eastern Europe. Considering the fact that trafficking often has a transnational character, we come to a conclusion that there has to be a wider cooperation between the countries in order to suppress it.

Organized crime groups can operate successfully only in those cases where there is some coordination between those who recruit, transport and exploit. These three interconnected networks are separated only by their 'products' (final result), which in cases of trafficking are exploited individuals[4]. The existence of groups for recruitment, transportation and exploitation is documented in court records and specific studies in

[3] Holms, P.: *Trafficking in persons for the Western Balkan Region*, 2006, p. 41.

[4] Albanese, J.S: Cases of Human Trafficking in the United States: A Content Analysis of a Calendar Year in 18 Cities, *International Journal of Comparative Criminology*, 2004, p. 104.

different parts of the world. A study conducted in Albania, for example, indicates that Albania was primarily a transit country between Romania and Ukraine, Moldova, Serbia and Italy and Western Europe. When 371 girls (174 found in Italy, 115 in Albania) were interviewed it was discovered which entry and exit smuggling routes were used. The victims were recruited as follows: 35% were recruited voluntary, 35% were given false promises, 25% were promised to get a job and 5% were sold or kidnapped. Out of the total number, 95% of the victims crossed the border without proper documents, while 2/3 experienced sexual or physical abuse, and some victims were forced to take drugs.[5]

2.1. Models of the trafficking business of organized crime groups

Crime groups dealing with human trafficking exist at several levels, from spontaneous to highly complex, international, organized networks. **Informal networks** usually can be recognized in the form of smaller groups of individuals within the family networks and ethnic communities that operate across borders. These networks often operate in the border areas between the countries of origin and countries of destination. **Large organized crime networks** control all aspects of human trafficking, from recruitment and local transport to management of brothels and street prostitution. Trade operates as a business: "the recruitment agency", "Office for obtaining documents", "The Transport Agency" and "Control office". In this regard, traders are doing their job seriously and professionally. **Criminal distributive networks** are networks of criminal groups that recruit and transport victims from one country to another. They could be called 'wholesalers' or 'distributors' who sell victims to ' retailers'.[6]

In practice, there are several models of the way of functioning or 'trading' of organized crime groups when it comes to human trafficking:

1) Russian (Post-Soviet) or 'the business model – human trafficking looks is similar to selling 'products' (or 'natural resource'). This model is based exclusively on trafficking in women. It does not operate and it does not reflect integrated business model, but instead it is focussed on short-term profits. Business is based on the recruitment of women and their intermediaries who supply the markets where they, 'serve customers'. Most often women are sold to neighbouring partners, *i.e.* nearby crime groups. This model does not maximize profits, so the money is spent for different purposes.

2) Chinese or "investment model" – this model of human trafficking involves investing in "goods" in order to turn a profit. This model is most applicable for the smuggling of men, but it is also common for the trafficking of women who represent about 10% of human trafficking. Chinese and Thai criminal groups operate as "businesses" that are integrated from start to finish. These organized crime groups control the trafficking of human beings at all stages – from recruitment to exploitation. This business model looks like other Chinese business models, in a way that it is integrated across continents.

3) The Balkan or 'violent model' ('violent entrepreneur') – is characterized by the presence of very serious forms of violence at all stages of human trafficking. This model is almost exclusively dealing with trafficking in women. It includes a large number of women, which have been sold to Balkan 'retailers' by organized crime groups from the

[5] Lesko, V., Entela, A.: *The girls and the trafficking*, Vlora, 2003, p. 15.

[6] UNDP, Law enforcement manual for fighting against trafficking of human beings, 2001, p. 46.

former Soviet Union and Eastern Europe. Balkan crime groups[7] run integrated business and they are intermediaries between criminal groups from Eastern Europe. Profits from this trade is used to finance other illegal activities and for investments in the real estate business.

There are plenty of documented and reported cases that show threat of violence, rape and even murders. Use of violence is characteristic especially for the Balkan crime groups, which have their own methods transferred to Western Europe, using it during the prostitution control. The last few years there has been a growing trend, and it is – women being forced into addiction on hard drugs, in that way victim grows a specific way connection to the trafficker. This method is especially popular among traffickers involved in the smuggling of narcotics. For example in Finland, foreign prostitutes are very mobile and they are regularly used for smuggling drugs as couriers or dealers.

4) Nigerian or 'slave model'. Nigerian organized crime groups that traffic in people are multifaceted criminal groups, trade in women is only a part of their criminal activities. Their members manipulate with voodoo tradition and they are able to force the victims into obedience through psychological and physical pressure. By using modern transportation connections in Nigeria, traffickers become effective because they 'combine sophisticated forms of modern technology with tribal customs'. By exploiting vulnerabilities of uneducated women, they make this trade resemble the traditional slavery, which is modernized by the process of globalization.

5) Mexican or "supermarket model" – is based on the distribution of large quantities of "goods" (a mixture of smuggling and trafficking). This model applies to the smuggling of migrants and trafficking in human beings. Trade is based on maximizing profits by moving the largest numbers of people with relatively low cost for each individual moved. Statistical data show that in 2000, 1.8 million people who tried to cross the border between Mexico and America were caught. This model is characterized by a connection of organized crime groups with the border control police. In this sense, there is a high rate of corruption of police officers. The money earned from the trafficking and smuggling of migrants is invested in legal activities in the country.[8]

The link between human trafficking and organized crime in itself does not give a complete picture of this phenomenon, because individuals who are not members of organized criminal groups are also involved in it. It is known that in Thailand families, relatives and friends provide, i.e. help human trafficking.[9] Although it may seem that this is done mainly for economic reasons, it is considered that the sale of off spring is a part of their culture. Also, persons with criminal backgrounds are not only ones dealing with human trafficking. Some organizations such as private corporations (e.g. construction, textile, and garment production), employment agencies, matrimonial agencies etc. in one way or another have become part of the chain in the process of human trafficking[10].

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[7] Taking into consideration final court judgments against criminal group of MladenDalmacija and 'Novi Sad criminal group' it was unambiguously confirmed that human trafficking as a form of organized crime exists in the territory of the Republic of Serbia. Based on available information, this organized criminal groups in its activities in great deal used force, i.e. coercion and serious threats to the victims of human trafficking, which confirms the existence of the Balkan or 'violent model'.

[8] ICMD (International Centre for Migration Policy Development), *Law Enforcement Manual to Combat Trafficking In South-Eastern Europe*, Belgrade, 2003, p. 27.

[9] Obokata, T.: *Trafficking of Human Beings from a Human Rights Perspective*, Lieden-Boston, 2006, p. 34.

[10] Ruggiero, V.: Trafficking in Human Beings: Slaves in Contemporary Europe, 25 *International Journal of Sociology of Law* 231, 1997, p. 236.

It has also been found that the members of the national armed forces or international peacekeeping forces are also involved in human trafficking. This criminal activity where individuals or organizations are engaged can be as equally sophisticated as in the case when organized crime groups are engaged.

3. Current situation of human trafficking in Serbia

Studying human trafficking in Serbia in the period from the end of the nineties of the twentieth century until today, we can see that this is the manifestation of this form of crime has undergone through some transformation when it comes to the nationality of the victims, the number of criminal offenses, the perpetrators' organization, changes in legal norms, recruitment methods as well as the increasing extent of the problem as an internal phenomenon.

In this part of the paper we will take a closer look at the individual cases of human trafficking that took place in Serbia and intrigued and engaged the attention of broader public, and also we will deal with statistical overview of human trafficking in 2014.

Two cases are particularly attracted the attention of the public in the Republic of Serbia and its neighbouring countries. The first case took place seventeen years ago in Kosovo and Metohija and it refers to the trafficking of human organs. Before the War Crimes Chamber of the Belgrade District Court, on 26th March in 2008, pre-trial proceedings were initiated concerning the allegations of the sale of organs of Kosovo Serbs during and after the bombing of the Federal Republic of Yugoslavia. Office of the War Crimes Prosecutor announced before that that it had formed a case that relates to the sale of organs of Kosovo Serbs. The Prosecution ordered to check informal knowledge and findings obtained during the course of research about the crimes against Serbian civilians committed by members of the 'Kosovo Liberation Army' 'and that the two trucks with captured Serbs from Kosovo in 1999 were transferred to Albania. Also, the former Chief Prosecutor Carla Del Ponte in her book 'The Hunt: Me and the War Criminals'' said that the prosecution, during the investigation of 'KLA' crimes against non-Albanians, was informed that the persons missing from the conflicts in Kosovo were victims in operation of trafficking in human organs. She said that tribunal investigators and UNMIK officials received information that in the summer of 1999, Kosovo Albanians used trucks to transfer across the border more than 300 kidnapped persons whose bodies were later used for sale into northern Albania. A former spokesperson for the Prosecutor of the Tribunal, Florence Hartmann, in an interview for Frankfurter 'Vesti' also accused individuals of UNMIK that they did not want to cooperate in the particular case of trafficking in human organs of kidnapped Serbs from Kosovo.

The second case saw the light of the day on 20th July, 2005, when the National Assembly of the Republic of Serbia, formed an Inquiry Committee in order to gain insight, find out and determine facts and the truth about the missing new-born babies. Serbia became known for unexplained cases of trafficking in new-borns[11] that had

[11] The case of *Mirjana Čumić* is considered to be the one with most facts, proves and arguments in the entire trafficking in new-borns affair. This woman had been collecting documents by herself and finally she found her. However, when she brought criminal charges, and when she gave insight and presented the entire documentation which indicated that one of the two girls, born on 12th December, 1978 really could be her daughter, the Republic Public Prosecutor Office issued an instruction which prohibited the court to order a DNA analysis, which would have determined motherhood.

occurred in the period from 1970 to 1990. It is believed that there are 3,000 families tracing their children in Serbia and according to some estimates, there are up to 30,000 parents who suspect that their babies were abducted after their birth. Out of the total number only 110 families have managed to find their stolen children and that has happened because of their personal commitment. In almost all cases it was about the alleged death of children in maternity or paediatric wards directly after births or in institutions for pre-mature born babies, mainly in large cities. Most of these cases occurred in Belgrade, Niš, Kragujevac, Prokuplje, Kruševac, Čačak, Vranje etc. Also, the committee came to the conclusion that the competent authorities were unable to investigate due to the statute of limitations. Committee has devoted special attention to the problem of DNA analysis, because parents have high hopes for this method of identification in order to determine the final truth, in a way where they would compare DNA profiles of parents with DNA profile of tissue taken at autopsy of a new-born.[12]

One of the key prerequisites for creating appropriate policies for combating human trafficking and to find the optimal response to it is to search and find out everything about the scope, structure and characteristics of this form of organized crime in a given area in a given time period. In this regard, it seems important to build a structured system of monitoring human trafficking, both at national and at regional and international level, and ensuring the systematic collection of quantitative and qualitative data on this phenomenon.[13]

Information on human trafficking are often difficult to access, heterogeneous, mutually unconnected and outdated. Awareness of these shortcomings joins more and more often government institutions and scientists in efforts to eliminate inconsistencies with the more or less explicit, aim of determining the real quantitative dimensions of this phenomenon[14]. As long as the data on human trafficking are scarce, unreliable and not comparable, it will be very difficult to develop efficient and effective countermeasures and strategies, not only at national but also at regional and international level[15]. In what scope the human trafficking phenomenon is a product of organized crime groups action was partly answered by conclusions that were reached during the workshop "Analysis of cases of human trafficking in the Republic of Serbia in 2012", held in Vrnjačka Banja from 28th to 30th October 2012, when police officials presented all the cases where criminal charges

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Milanka Milic from Belgrade gave birth to male twins in October 1978, at the Obstetrics and Gynaecology Clinic Narodni Front in Visegradska Street. One of the boys was said to have been born dead, although in the discharge papers was written that both babies received BCG vaccines. Three years later, when the son was taken to a hospital in Tiršova because of the problems he had on the left ear, the doctor told them "And why have you brought the child again, you were with him here last week". And then in 2003, Milić family, experienced another shock. Many relatives and friends told to Mrs. Milanka that on September 23rd , on the cover page of "Vecernje Novosti" was published a photo of a café in ObilićevVenac in Belgrade, and on the photo was their son. However, Milanka found out that her son had not been to any of the cafes.

[12] Ristović, M.: New- born babies trafficking-Born to Vanish, Niš, 2006, p. 147-149.

[13] S. Ćopić, V. Nikolić-Ristanović.: *Mechanism for monitoring the trafficking in human beings in Serbia,* Collection of works *"Monitoring human trafficking-Bosnia and Herzegovina, Croatia and Serbia ",* IOM, Belgrade, 2006. p. 67.

[14] Savone, U.E., Stefanizzi, S.*: Measuring Human Trafficking, Complexities and Pitfalls*, Spriger, USA, 2007, p. 34.

[15] Radović, N., Lalić, V.: Insight of the collecting of data on trafficking in human beings, Bezbednost, Ministry of interior of Republic of Serbia, 3/2009, p. 142.

were filed under the Article 388 of the Criminal Code of the Republic on the territory of Serbia, except AP of Kosovo and Metohija. Participants conducted a detailed qualitative analysis of 30 cases in 2012, where it was also observed that not a single case had been reported as the case of human trafficking committed by the organized crime group.[16]

Table 1: Overview of criminal charges, solved crimes and injured parties – victims by organizational units – number of person who filed criminal charges in 2014

Organizational units-which filed criminal charges	**Number of filed criminal charges**	**Number of detected crimes**	**Number of offenders**	**Number of victims**
Police Department Novi Sad	**4**	**4**	**4**	**4**
Police Department forth city of Belgrade - UZS	**3**	**5**	**6**	**3**
Criminal Police Directorate Belgrade - Service for Combating Organized Crime	**1**	**1**	**5**	**1**
Police Department Novi Pazar	**1**	**1**	**1**	**1**
Police Department Čačak	**1**	**1**	**1**	**34**
Police Department Pančevo	**1**	**1**	**1**	**1**
Police Department Kragujevac	**1**	**1**	**1**	**2**
Police Department Požarevac	**1**	**1**	**1**	**1**
Police Department Sremska Mitrovica	**1**	**1**	**2**	**1**
Police DepartmentSombor	**1**	**1**	**1**	**1**
Police Department Kruševac	**1**	**1**	**1**	**1**
Police Department Šabac	**1**	**1**	**1**	**2**
Total	**17**	**19**	**25**	**52**

Based on the data in Table 1, it can be noted that in 2014 the number of filed criminal charges was 17, and that 25 persons participated in the commission of 19 crimes while the number of victims was 54. In the table above it can also be seen that the Service for Combating Organized Crime filed one criminal charge as opposed to the five persons they filed charges on reasonable doubt that they operated as a crime group committed the crime of human trafficking.

[16] Dostić, S., Gosić, S.: (2013) Trafficking in human beings as a crime phenomenon, Bezbednost, Belgrade, vol. 55, br. 3/2013, p. 182.

Table 2: Overview of reported offenders disaggregated by nationality and gender for 2014

Offenders			
Nationality	**male**	**female**	**total**
Serbian	16	8	**24**
Greek	1	-	**1**
Total	**17**	**8**	**25**

Table 3: Overview of human trafficking victims classified by nationality for 2014

Victims – injured parties			
Nationality	**male**	**female**	**total**
Serbian	39	13	**52**
Total	**39**	**13**	**52**

Table 4: Overview of victims listed by type of exploitation, sex and age structure for 2014

Types of exploitation	**Age structure - number of victims**						**Total**
	Male-minors		**Male-adults**	**Female-minors**		**Female-adults**	
	Up to 14	**14-18**		**Up to 14**	**14-18**		
Labour			35				**35**
Sexual					4	4	**8**
Organized beggary	1			2			**3**
For the purpose of committing crimes		2					**2**
multiple -beggary and labour-			1				**1**
Multiple -sexual and for the purpose of committing crimes-						1	**1**
multiple -sexual, beggary and labour-					1		**1**
No exploitation/ forced marriage					1		**1**
Total	**1**	**2**	**36**	**2**	**6**	**5**	**52**
	3			**8**			

Taking a closer look at Table 4 it can be seen that 35 people were victims of labour exploitation, 8 persons were victims of sexual exploitation, 3 persons were victims of organized beggary, 2 persons were victims of exploitation for the purpose of committing criminal acts, one person was the victim of multiple exploitation of organized beggary and labour exploitation, one person was a victim of multiple sexual exploitation and exploitation for committing criminal acts, and one person was a victim of forced marriage. Collectively, during 2014 in Serbia there were 52 victims of human trafficking and most of them were victims of labour and sexual exploitation.

In recent years, in the Republic of Serbia trafficking at local and national level in human beings has been dominant, and the victims have been mostly of Serbian nationality and they have been exploited by Serbian nationals – traffickers. Internal trafficking is confirmed by the fact that the criminal acts of trafficking offenders who were discovered were in more than 95% Serbian citizens, with the same percentage of nationals among the identified victims. However, Serbia is still a country of origin of victims of trafficking who are also exploited outside the country, and it is also a country of transit and destination for victims of trafficking from other countries, but to a lesser extent. There have been same changes in the types of exploitation. By 2013 most victims were victims of sexual exploitation (around 41% of the total number of victims), while in 2014 most victims were of labour exploitation (78.4%). This is contrary to the trend that is present in the European Union, where 70% of victims are victims of sexual exploitation, and 19% of victims are victims of labour exploitation.[17]

Centre for Human Trafficking Victims in the Republic of Serbia in 2013 and 2014 identified a total number of 217 victims of trafficking. Of the total number of these victims, 64 were minors (30%), with dominant number of females (85%). When it comes to victims of human trafficking, it can be said that the majority of victims were Serbian citizens, which is in line with the prevailing internal trafficking but identified victims were also from Bosnia and Herzegovina, Montenegro, Romania, Afghanistan, Austria, Moldova, Albania, Ukraine, Slovenia, and Turkey and so on. When the age of the victims is considered, the most common forms of exploitation of minors are beggary and forced marriage. Labour exploitation is common among adults, while sexual exploitation is equally common in both age categories.[18]

Structure of victims varies by gender, which confirms that human trafficking has a strong gender aspect. Considering this fact, the victims of labour exploitation are mainly men (over 98% of identified victims) while victims of sexual exploitation are mostly women. In cases of exploitation for the purpose of committing criminal acts victims are mostly males, and in cases of forced marriage and illegal adoptions are usually female.[19]

4. Conclusion

Human trafficking, as a deviant social phenomenon[20] is a very complex criminal activity and there are several reasons for that. In those cases when trafficking is transnational in nature it is very difficult to detect and prove it. In most cases the victims

[17] Assessment of serious organized crime threats, the Ministry of Internal Affairs of the Republic of Serbia, Belgrade, 2015, p. 52. http://www.mup.gov.rs/.

[18] *Ibid.*

[19] *Ibid.*

[20] Bjelajac, Ž,Marković M, Pavlović Z., *Particulars of Modern Slavery as a Deviant Social Phenomenon, The Review of International Affairs,* Belgrade, Vol. LXIII, no. 1146, April – June 2012, p. 33-34.

do not want to cooperate with the authorities and have a legitimate and reasonable fear of traffickers and their revenge. In modern practice it has been shown that organized crime groups dealing with this phenomenon skilfully adapt to the current situation and they do more and more those criminal activities which bring them more income and less risk. In the world, there are numerous types of exploitation of human trafficking whereby the labour and sexual exploitation are most common. Combating human trafficking in Serbia in the last decade gave satisfactory results which are indicated by reduced number of crimes and the willingness of public authorities to minimize this phenomenon. The bare fact that at the beginning of the twentieth century in Serbia there was a large number of foreign nationals (of Ukrainian, Russian, Moldovan, Romanian women) who were often victims of transnational human trafficking and that today there are almost no such cases clearly shows that crime simply adjusts to the given social and economic conditions in the particular country or moves to less dangerous criminal markets. Current situation in Serbia is such that there are about fifty to sixty offenses annually, where the victims are Serbian citizens, and the most common type of exploitation is sexual and labour. In this regard, the victims of labour exploitation are mainly men (over 98% of identified victims) while the victims of sexual exploitation are mainly women. Serbia still represents the country of origin, transit and destination of human trafficking victims but to a far lesser extent than before. If we want to give an opinion taking into consideration the current situation we can conclude that this type of crime in Serbia is not alarming, but within acceptable limits compared to the trend almost two decades ago. Republic of Serbia, *i.e.* state authorities as well as many non-governmental organizations are making great efforts in order provide to the victims of human trafficking adequate treatment and to make things easier and help them overcome the consequences arising from this crime.

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The European policies on fighting against trafficking in human beings Challenges for Romania

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Abstract:

The study takes into consideration the current issues related to trafficking in human beings: dimensions (growing the phenomenon and its consequences), contexts of preventing and combating, involvement of EU and national (Romanian) institutional actors to transpose into practice the requirements of EU policies, EU Strategy and National Strategy (Romanian Strategy) in this matter.

The study aims to analyse relevant aspects regarding: the legal framework for implementation, monitoring and evaluation the measures on preventing of and fighting against human trafficking; the most effective solutions in the fight against trafficking of human beings at the EU level and national level (especially for the case of Romania), highlighting the punishment of offenders and protection/support of victims of human trafficking.

The approach to human trafficking imposes an interdisciplinary research, aimed to reveal the synchronized elements and the deficiencies of measures applied in this matter, in accordance with national criminal legislation, strategies and policies and the effective proposals for improvement the objectives and actions focused on responses to the challenges of human trafficking nowadays.

Keywords: *trafficking in human beings, EU Policies, EU Strategy, National Strategy, offenders, victims, criminal legislation.*

The multidisciplinary approach to human trafficking issue highlights: the legislative measures regarding the means of the offender's coercion or repression and the identification and diminishing of the potential sources of human trafficking; the economic, social and administrative measures for prevention of human trafficking and for protection of the victims of human trafficking. Multi-causal and multi-factorial analysis of the phenomenon of human trafficking is able to provide relevant data regarding the preventive and the repressive actions and the potential sources of crime (the necessity to diminish these sources).

In accordance with the requirements of the European Strategy on matter of trafficking in human beings[1] is necessary to analyze the impact of anti-trafficking prevention initiatives in particular awarness-raising activities as well as educational programmes, measures to reduce demand, measures specifically targeting root causes as these are directly linked to trafficking in human beings[2].

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[1] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - The EU Strategy towards the Eradication of Trafficking in Human Beings 2012–2016, COM (2012) 286 final;

[2] *Study on prevention initiatives on trafficking in human beings - Final Report*, Luxembourg Publication Office of the European Union, 2015.

Taking into account the framework of crime prevention is important to evaluate:

-the causes and conditions that encourage crime, the dynamics of crime;

-the involvement of state authorities on development of appropriate measures to reduce criminality rate;

-the effectiveness of the activity of Inter-ministerial working groups, the actions of specialized bodies required in accordance with the provisions of the strategies for prevention and combating particularly serious forms of crime (e.g. human trafficking);

-the cooperation between the competent bodies to achieve the objectives of the strategy on matter of human trafficking: National Strategy against Trafficking in Human Beings for 2012-2016[3];

-improving institutional coordination in the fight against human trafficking as serious form of crime; cost-effectiveness analysis of preventive programs – campaigns to inform the population, especially the vulnerable groups, regarding the benefits of prevention and the risks of perpetration of crime, the "cost of crime";

-the relevance of special techniques of prevention and the community model or "model of community mobilization for effective design and implementation of social measures for prevention";

-strengthening the public security and the crime control.

To reduce the crime rate is important that the prevention programs and actions to prove effectiveness by:

-establishing the methodology, the horizontal and vertical organization of preventive structures, elaborating and validating minimum standards of service quality, specialized prevention training/specialization interveners (own personnel in specialized institutions, experts) in preventing and combating crime;

-planned activities, from educational and social training to professional insertion of young people or organization of leisure time for populations with social risk;

-the collaboration between the police authorities and the public, especially young people and the coordination of preventive activities in human trafficking issues; elaborating and dissemination of educational materials (through newsletters, seminars, meetings, debates, reports, periodicals) for the population or certain segments of the population (public opinion, officials, offenders, victims) on preventing and combating human trafficking;

-the requirement of protection of the unattended children whose one or both parents work abroad: is noted the social reality in Romania and the amended legislation which offers the institutional framework for the protection, integration and surveillance of those minors (Law no. 257/2013[4]).

The EU policies in matter of human trafficking emphasizes the benefits of: the adequate knowledge of the current system of criminal justice at the European level and the national level of EU Member States; the comparative analysis of best practices, procedures and standards on prevention of and fighting against human trafficking (providing comprehensive anti-trafficking responses); the coherent proposals for the improvement of the activity focused on the punishment of offenders and protection/assistance of victims of human trafficking; the recommendations for the implementation, monitoring and evaluation of the measures in the area of prevention

[3] National Strategy against Trafficking in Human Beings for 2012-2016.

[4] Law no. 257/2013 which amends Law no. 272/2004 on the protection and promotion of the rights of child.

and combating the human trafficking (especially for the case of human trafficking for purpose of sexual exploitation or for purpose of forced labour, trafficking in women and children).

The EU legislative framework takes into consideration the main aspects related to trafficking in human beings:

-This serious form of crime is prohibited by article 5 paragraph 3 of the Charter of Fundamental Rights of the European Union[5] - in the context of the prohibition of slavery and forced labour, the human trafficking represents a violation of human rights (e.g. dignity, individual freedom)[6].

-The Treaty on the Functioning of the European Union (article 79 on Policies on Border Checks, Asylum and Immigration and article 83 on Judicial Cooperation in Criminal Matters)[7] requires the implementation of the comprehensive policy to effectively address trafficking in human beings - focused on the prevention of trafficking, prosecution of offenders, protection of victims and partnership with the different stakeholders and actors involved within an integrated and multidisciplinary perspective correlated with a human-rights-centred and gender-specific approach[8].

-The Directive 2011/36/EU[9] replaces Council Framework Decision 2002/629/JHA and is transposed into the national criminal legislation of EU member states (e.g. the settlements of the Romanian New Criminal Code on human trafficking); in accordance with the provisions of the Directive 2011/36/EU, early identification of the victims (particularly vulnerable victims, including children, women) is necessary for an effective assistance, support, protection and social inclusion of the victims of trafficking in human beings (based on the appropriate mechanisms) and enables police and prosecution authorities to better investigate and punish traffickers[10].

-The EU Strategy towards the Eradication of Trafficking in Human Beings 2012–2016[11] is focused on measures that support the implementation of the Directive 2011/36/ EU on preventing and combating trafficking in human beings and protecting its victims; victims are often recruited, transported or harboured by force, coercion or fraud in exploitative conditions, including sexual exploitation, forced labour or services, begging, criminal activities, or the removal of organs; this perspective is correlated with the constituent elements of trafficking in human beings (process, means and purpose) highlighted by the internationally recognised definition of this form of serious crime (in accordance with the Protocol to Prevent, Suppress and Punish Trafficking in Persons,

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[5] Beatrice Andreșan-Grigoriu, Tudorel Ștefan, *Tratatele Uniunii Europene. Versiune consolidată*, Editura Hamangiu, București, 2014, p. 166.

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[11] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions -The EU Strategy towards the Eradication of Trafficking in Human Beings 2012–2016, COM (2012) 286 final.

especially Women and Children, which supplemented the United Nations Convention against Transnational Organized Crime[12].

The EU Strategy on trafficking in human beings 2012-2016 establishes five priorities: identifying, protecting and assisting victims of trafficking; stepping up the prevention of trafficking in human beings; increased prosecution of traffickers; enhanced coordination and cooperation among key actors and policy coherence; increased knowledge of and effective response to emerging concerns related to all forms of trafficking. These priorities regards both the EU institutions/bodies and the EU Member States institutions/authorities, civil society, taking into account the evaluation and monitoring of European and national strategies and activities aimed at addressing human trafficking.

At the national level, the New Criminal Code-Special Part includes provisions regarding the trafficking in human beings in the Title I (Offences against person)-Chapter VII (Trafficking and exploitation of the vulnerable persons): articles 210, 211, 216[13]. Before this Code is entered into force, on matter of human trafficking the Law no 678/2001 was the reference law focused on prevention of and fighting against trafficking in human beings[14].

The persons who perpetrate the offence of trafficking in human beings may be both men and women. The traffickers profits by the victims (especially children and women), taking into account the precarious aspects regarding their education (the lack of education or the low level of education and professional preparation), their social-economic conditions of life (the poverty, the unemployment), their psychological profile (their naivety, credulity). In many situations, the offenders know very well the criminal mechanism and are experienced in attracting the victims and their placement for the purpose of sexual exploitation/forced labour/begging.

The current Romanian legislation provides for the trafficking in human beings the punishments privative of liberty: the trafficking of adults and trafficking of minors are punished with prison from 3 to 10 years; the human trafficking committed in the conditions provided in article 210 paragraph 2/article 211 paragraph 2 is punished with prison from 5 to 12 years.

In case of the offence of trafficking in human beings, the victim's consent to the recruitment, transport or accommodation by the deceit for exploitation does not exclude the criminal liability of the offender (in accordance with the article 210 paragraph 3/article 211 paragraph 3 of the New Criminal Code). The act of the offender who, by deceiving of the victim to help her for working abroad, made the necessary arrangements to obtain the passport and travel document gave to the victim the necessary amount for crossing the border, has indicated a contact person and an accommodation for her exploiting, represent the constitutive elements of trafficking in human beings stipulated in article 210 paragraph 1 of the New Criminal Code.

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[12] United Nations Convention against transnational organized crime, Additional Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (2000); Lucrecia Rubio Grundell (Social and Political Science Department, European University Institute), *EU Anti-Trafficking Policies: from Migration and Crime Control to Prevention and Protection*, Migration Policy Centre, May 2015.

[13] New Criminal Code – Law no. 286/2009 published in Official Monitor of Romania no. 510 from 24 July 2009 and Law no. 187/2012 for application of the New Criminal Code.

[14] Law no. 678/2001 on prevention of and fighting against trafficking in human beings, published in Official Monitor of Romania no. 783 from 11 December 2001.

Even if the victim expressed her consent to go abroad and accepted that the offender fulfils the formalities and pay the necessary amount to cross the border, according to the article 210 paragraph 1 of the New Criminal Code, the victim's consent of human trafficking does not represent the justified cause.

Increasing the criminal rate in matter of trafficking in human beings (particularly trafficking in children and women) requires a coherent and coordinated multidisciplinary perspective on this current issue. Also, is important to correlate the legislative instruments in matter of human trafficking adopted at international, European and national level with the practices and standards implemented and evaluated for an effective response to this serious form of crime.

The European policies, developed in connection with the national policies on trafficking in human beings, emphasize the involvement of the EU institutions/bodies and the national institutions/authorities in coordination of process of monitoring of human trafficking and its implications.

The architecture of the EU policies and the challenges for the EU Member States (in the case presented in this study – Romania) underlines the main contribution on strengthening the institutional relations and consolidating the collaboration between EU and national bodies/civil society into a really network aimed to elaborate and apply the best practices in the area of monitoring the migration flows/human trafficking and to find together the best solutions for the issues related to the prevention of and fighting against organized crime (particularly, trafficking in human beings).

The added value of this approach is represented by: the cross-sectorial analysis on issues regarding transnational organized crime (especially trafficking in human beings); the transfer of knowledge, the exchange of information between the law enforcement officers, labour inspectors, judges, prosecutors, social workers, regarding the EU legislation and national legislation in the area of human trafficking; the implementation of good practices, especially on identification, protection, assistance and support of victims of human trafficking; the consolidation of the judicial cooperation in criminal matters between the Member States in the EU area of freedom, security and justice; the accomplishment of the specific requirements related to the prevention of and fighting against trafficking in human beings both at the EU level and the national level.

Policy and regulation of immigration, refugee and asylum within the world refugee crisis - challenges and prospects -

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Abstract:

In accordance with the Constitution of BiH policy and the regulation of immigration, refugee and asylum is prescribed as one of the functions that are vital for the functioning of Bosnia and Herzegovina as a modern state, and which therefore falls within the exclusive jurisdiction of its state institutions. Of state institutions we will first mention the Ministry for Human Rights and Refugees, which is responsible for the provision of organized collective accommodation of these persons in BiH. For this purpose, qualified refugee center for refugees and other persons who have been in the asylum granted the right to international protection in Bosnia and Herzegovina.

Asylum is international law established legal and security institute and recognized the right of refuge to foreigners, which regulates every state positive applicable legislation. The right to asylum to a refugee, where such status is recognized by international law (Art. 1st Geneva Convention relating to the Status of Refugees of 1951), and all who are outside their own country and it can not return due to well-founded fear that there could be subjected to violence or persecution.

Immigration is defined as the process of the migration of the population to a space due to its specific, for people appealing factors. An immigrant is a person who exceeds the limits of their former country of nationality or residence, for various reasons, either because of a desire for economic prosperity, whether they were expelled or fleeing conflict or natural disasters, or simply the weight of a better life.

Keywords: *asylum, immigration, politics, security, human rights.*

Introduction

This article was prepared on the occasion of status issues of immigration and asylum, the resulting "World refugee crisis," which will be published in information Journal "Journal", the Republic of Romania. The content of work does not necessarily reflect the views of the World refugee crisis and no refugee crisis affecting the European Union, but they are generally viewed in terms of the general or common problems with regard to the political, legal and security status of asylum in BiH and beyond.

Scientific reading on legal and security issues of immigrants and asylum in BiH is defined by the author, bearing in mind that the representatives of the UNHCR in Bosnia and Herzegovina, the competent Ministry of Security and the Department for Refugees, Displaced Persons and Housing Policy of the Ministry of Human Rights and Refugees, with the financial support of the European Commission Delegation in BiH, prepared

Handbook on asylum in Bosnia and Herzegovina, which sought to present what has been done in the field of asylum and international protection in BiH so far.

Therefore the aim of the present study to be an easily understandable way so far constructed a legal political system of asylum and international protection in BiH, and finishing with the legal safety requirements, and that any future activities directed towards upgrading of the already value through:

✓ security, legal and administrative authorities who are professionally trained for the conduct of procedures determining refugee status or temporary residence on humanitarian grounds in the asylum procedure and the status of subsidiary protection,

✓ institutions that were established, professionally educated and trained their staff to take care of the rights and the integration of which is already recognized as a refugee in terms of subsidiary protection and temporary admission status,

✓ the role of non-governmental sector in terms of Protection of political rights and security in the field of asylum and

✓ valid legislative legal framework has so far set up in the field of asylum, through the Constitution, laws, conventions, declarations, protocols on the status of refugees and other acts.

The authors intend to briefly in one place what is displayed, "all" been done so far in the area of legal and security protection of asylum and its international protection in BiH and beyond, in order to "all" future theoretical and practical activities directed towards upgrading of the already normative value of the subject matter.

Also, the authors of the texts will attempt to gather this work as many important texts relating to the boredom made applicable regulations that are directly related to the legal certainty of aliens who are able to seek and obtain asylum and international protection through valid BiH legislation, which normatively regulate the legal security institution of asylum.

1. Asylum

Asylum is a real political issue of refugees, which refers to its refuge in a foreign country. In general, asylum represents each refuge from trouble, persecution, disease, old age, often in the form of institution (shelter for abandoned children, the elderly, the poor and the homeless). The right to asylum is one of the fundamental human rights, in particular of the Universal Declaration of Human Rights in the 14th article, according to which this law can and enjoy it people who fled to another country because of different types of persecution in their country of origin. This right can not look for people who are in their countries required in order to non-political offenses or for acts contrary to the purposes and principles of the United Nations.

An alien who is under the applicable legal terms granted asylum, the state provides the asylum seeker accommodation, means of subsistence and health care.

If it is determined that a stranger - an asylum seeker during the stay in Bosnia and Herzegovina, or another state acts against the constitutional of succession of or against the international interests of BiH or other states in the international community, he may be deprived of the right of asylum. The decision on the recognition or withdrawal of the right of asylum brings official in charge of the competent institution for the respective tasks and duties. On the decision to take away the right of asylum, an alien may file an appeal directly to the higher authority certain state which is responsible for resolving the issue in question.

The decision shall contain a deadline for an alien as undesirable person (persona non grata) must leave the territory of a particular country that has recognized the status of asylum. Deadlines are an individual matter of each country after a given district.

The right to asylum is a constitutional right in Bosnia and Herzegovina. It is for the reasons for the decision of the Court of Bosnia and Herzegovina is clear that the right to asylum is a constitutional right.

Although the issue of asylum falls within the jurisdiction of Bosnia and Herzegovina, BiH Constitution does not explicitly "right of asylum" in the catalog of the rights and freedoms set forth in Article II, paragraph 3 of the Constitution. Unlike the Constitution, and the Constitution of the Republic of Serbian Constitution of the Federation of Bosnia and Herzegovina in Article 2 points. i) states that the Federation of Bosnia and Herzegovina in particular to ensure that all persons in the territory of the Federation shall enjoy the right to asylum. Regardless of what the right to asylum is not specifically mentioned as a constitutional right in the Constitution of Bosnia and Herzegovina, the right to seek and enjoy asylum is a constitutional right as it was recently the Court stated in the reasons for its decision: "the right to seek and to enjoy in other countries asylum from persecution is a right guaranteed by Art. 2nd tač.3. and items. 4 of the Constitution of Bosnia and Herzegovina, in conjunction with Article 2, item. 14 of the Universal declaration of Human Rights. This provision provides that all persons in the territory of Bosnia and Herzegovina enjoy human rights and freedoms, and that the rights and freedoms defined in the European Convention for the protection of human rights and fundamental freedoms directly in Bosnia and Herzegovina and have priority over all other law. Article 2, paragraphs. 7. Universal Convention on human rights provides that all persons are equal before the law and are entitled without any discrimination to equal protection of the law. Furthermore, all are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

In addition, everyone has the right to seek and to enjoy in other countries asylum from persecution (Article 14 of the Universal Declaration of Human Rights)".

2. Legal security question of asylum in Bosnia and Herzegovina

As acknowledged in the OAU Convention, the Cartagena Declaration and the United Nations Declaration on Territorial Asylum of 1967, granting asylum is a humanitarian and apolitical act. The word "asylum" is not defined by international law, but has become an umbrella term for the overall protection provided by a country to refugees on its territory. Thus, asylum means, at the very least, basic protection – *i.e.,* no forcible return to the frontiers of territories where his life or freedom would be threatened refugees – with the possibility of staying in the host country until a solution outside that country. Asylum is international law established legal and security institute and recognized the right of refuge to foreigners, which regulates every state positive applicable laws.

As in Bosnia and Herzegovina and other countries in the world – (the international community) legal – Security Institute, asylum, a foreigner can acquire who was exiled because of his advocacy of democratic views and movements for social and national liberation, for freedom and human rights or of the freedom of scientific and artistic creation.

In the Ministry of Security Sector There seekers who performs administrative and other professional tasks relating to the execution and implementation of policy and asylum procedure in Bosnia and Herzegovina, coordination of organizational units, perform tasks related to compiling drafts of laws and subordinate legislation in this field, securing reception, accommodation and support to asylum seekers, following progress in the achievement of European standards in this area, perform analysis and reporting, as well as other activities that by their nature fall within the competence of the sector.

2.1. The development of political, legal, security of the asylum system in Bosnia and Herzegovina

While the situation on the ground dictated by the urgency in providing international protection to refugees arriving in large numbers in Bosnia and Herzegovina, much slower this process went adoption of the legislative framework by the BiH Parliament, the establishment of competent authorities and personnel training for the implementation of these regulations.

Law on Immigration and Asylum is the first law in this field adopted by the Parliament in December 1999. This Act asylum in BiH guarantee: (a) refugees who meet the requirements of Article 1A (2) of the Convention relating to the Status of Refugees of 1951 and its 1967 Protocol; (B) persons who do not meet the requirements of the Convention but who can not return to their country of origin or habitual residence where their freedom or life would be threatened or where they would be subjected to torture, inhuman or degrading treatment. The Act stipulated that the request for asylum considered and decided by the same organizational unit within the Ministry of Civil Affairs and Communications, which is fully qualified in the field of asylum and refugee law. This law is also guaranteed to all persons who have already obtained refugee status or who have been recognized temporary shelter in Bosnia and Herzegovina recognition of that status and by this Act. At the same time authorized the Council of Ministers to make regulations to further edited the questions related to the large influx of refugees.

In this turbulent security situation in which they are usually changed and refracted jurisdiction of state authorities responsible for asylum issues, it was extremely difficult to build "organizational unit that is fully qualified in the field of asylum and refugee law" as it stipulated the Law on Immigration and Asylum. Nevertheless, UNHCR Mission in Bosnia and Herzegovina in 2002 provided full financial, security and tehničkopravnu support the Department of Immigration and asylum in the then Ministry of Human Rights and Refugees in order to recruit qualified lawyers and translators who have been extensively trained in the country and abroad in the field of refugee law, including the so-called "job training" with which it began in 2003. In the period from 2003 to 2007, the European Commission through the CARDS projects that provide financial support to the Mission of UNHCR in Bosnia and Herzegovina in implementing the above objectives.

At the same time, UNHCR Mission in BiH has worked intensively on building a network security and law centers in which they were trained lawyers to provide free legal assistance to asylum seekers and persons with recognized status in the asylum procedure. At the state level is a registered association "Your rights BiH" with a network of legal centers covering the whole territory of Bosnia and Herzegovina. This is based NGO sector which is supposed to assist the state authorities to meet a statutory obligation to provide asylum seekers with free legal assistance. Training of personnel and the non-governmental sector was supported through the above projects CARDS.

Ministry of Security and Ministry of Human Rights and Refugees concluded with the Association "Your rights BiH" protocols for the lawyers of this Association gives access to asylum seekers and people with recognized status in the asylum procedure, in order to provide free legal assistance during the asylum procedure and in the proceedings integration.

UNHCR Mission in BiH has established partnerships with non-governmental organizations that provide psycho-social support to persons placed in the APC has a time when they set up first-and APC. This cooperation is still ongoing and indispensable mechanism in the present situation when the social welfare system to function poorly and to the citizens of Bosnia and Herzegovina.

This is completed legislation and built are essential facilities which were required to take over the Ministry of Security of UNHCR procedure for determining refugee status and subsidiary protection status, as provided by the Act and the Regulations. It was also made official the signing of the Protocol on the transfer of the status of refugees and other responsibilities related to asylum with the UNHCR to the Ministry of Security, under which from 1 July 2004 the Ministry of Security claimed to act upon the requests received for asylum.

These conditions have been created to intensify the adoption of by-laws that would regulate in detail the conditions under which persons with recognized status in the asylum procedure can achieve security and other rights guaranteed by the Act.

The Ministry for Human Rights and Refugees defined as the ministry which is responsible to take care of these issues in a very short time the ministry has taken a series of actions in order to make by-laws that will be applicable on the ground by the municipal, cantonal and entity authorities.

The Ministry of Human Rights and Refugees with the help of the UNHCR mission in Bosnia and Herzegovina, within less than a year passed two ordinances to ensure: (a) access to health care and health insurance, and (b) the civil registration of birth of refugee children and people under subsidiary or security protection, weddings and other status issues.

In the course of 2004-2007, The Ministry of Security, Ministry for Human Rights and Refugees and UNHCR have jointly built a comprehensive legal and security legislation in the field of asylum and perform interventions in a number of legal acts aimed at the full protection of asylum seekers and other persons under international protection in BiH. All adopted legal acts have been incorporated into the text of the Manual on asylum, so that in one place you find all existing regulations in this area.

3. Policy and Asylum

3.1. The right to asylum

Clause 18th Charter of Fundamental Rights of the European Union guarantee the right to asylum. This right of a refugee, where such status is recognized by international law (Art. 1st Geneva Convention relating to the Status of Refugees of 1951), and all who are outside their own country and it can not be recovered because of well-founded fear that there could be subjected to violence or persecution. The recognition of such a status achieved in countries that have signed specific agreements with the United Nations, or by the UNHCR. In this sense, political asylum is a special case of the right to asylum. This is a shelter for those who are persecuted because of their political ideas.

Bosnia and Herzegovina has managed to establish and develop a sustainable state structures that provide the administrative framework for the implementation of policies in the area of visas, asylum, migration and borders. Some of the EU conventions relating to human rights and fundamental freedoms are already incorporated in the existing Constitution of Bosnia and Herzegovina or are transferred through succession together with other countries of the former Yugoslavia. Research has shown that the adoption of legislation and the establishment of proper structures only a starting point in the desired direction. Creating conditions for a functional and efficient system requires additional effort involving all government structures. So far, the institutions are not adequately monitored the implementation of the adopted legislation. The lack of adequate financial and human resources has created a lot of problems regarding the application of the necessary legislation in the field of asylum and migration. Despite the progress that Bosnia and Herzegovina has made it still faces problems, some of which are common to the region and some that are unique to Bosnia and Herzegovina. The adoption and implementation of legislation in the field of Justice and Home Affairs of Bosnia and Herzegovina should be a priority for the state to progress in the EU accession process and ensure freedom of movement for its citizens.

The hypothesis of this research scientific and professional work is defined in the following question: "Is there a possibility of abolishing the visa regime for all citizens of Bosnia and Herzegovina within the next two years?" Mr. Renzo Daviddi, Deputy Head of the European Commission Delegation in Bosnia and Herzegovina responded to this question, it can also be concluded and after the research:

"There is still no political will and readiness for such a step in the EU, mainly due to the slow implementation of the reforms and the development of democratic society in all segments in Bosnia and Herzegovina".

3.2. Asylum policy

European asylum policy is a matter of common interest since the Maastricht Treaty. Since the entry into force of the Amsterdam Treaty in 1999, asylum policy is in the competence of the Community and the Member States. At the European Council meeting in Tampere in October 1999, the European Union leaders decided on a strategy in two phases. The first phase is to establish minimum rules, and the second phase is aimed at establishing a common European system based on a common asylum procedure and equal asylum status valid throughout the European Union. Much has been achieved, including:

- establishing a European Refugee Fund;
- adoption of a specific temporary protection system in the event of a mass influx of displaced face;
- determination of the State responsible for the selection of a valid application for asylum;
- introduction of a system for comparing the fingerprints of asylum seekers within the European Union. Still the negotiations on certain aspects such as the proposed directive for determining refugee status and the procedures for granting and revocation of refugee status.

The right to asylum can be granted to an alien who is outside their country of origin, and based on well-founded fear of being persecuted for reasons of race, religion or nationality, for belonging to a particular social group or political opinion, if you can not or due to fear do not want to put under protection of that country.

The same applies also to stateless persons who are outside the country of previous residence and can not or well-founded fear unwilling to return to that country.

Significant progress was made on the legal framework which regulates the movement and residence of foreigners in Bosnia and Herzegovina with the adoption of the Law on Movement and Stay of Aliens in 2003. The text of the said Act, at the time of its adoption, was to a large extent aligned with the acquis of the European Union *(acquis communautaire)* in the field of immigration, and international refugee law. For the first time the law has defined the responsibility of the Ministry of Security for providing special protection and assistance to victims of trafficking for their recovery and return to the country of habitual residence, as well as the possibility of establishing specialized institutions for reception of aliens. The law gave the legal basis for the establishment of adequate services for the implementation of the policy of immigration and asylum, stay and movement of foreigners in Bosnia and Herzegovina, which has resulted in the adoption of the Law on Service for Foreigners 'Affairs and the establishment of the Service for Foreigners' Affairs. However, this law has not resolved two instances in certain administrative procedures of which in the first instance to the Ministry headquarters. The development of the acquis of the European Union in this area, the need for amendments to the significant number of provisions of the applicable law, to bring it into line with EU regulations. The aim of the legislation of Bosnia and Herzegovina in the field of immigration into line with the European Union and the Schengen Agreement, as well as to address shortcomings that have arisen in the application of the Act in 2003, the new Law on Movement and Stay of Aliens and Asylum entered into force on 14.5.2008. year

Immigration and Asylum is a very dynamic and permanent objective of the legal framework for the harmonization of legislation in force in the field of immigration and asylum to the acquis of the European Union *(acquis communautaire).* The aim of the legislation of Bosnia and Herzegovina in the field of immigration and asylum policy into line with the conventions which Bosnia and Herzegovina is a signatory, the Schengen Agreement and the legislation of the European Union as well as to address the shortcomings that have arisen in the implementation of the provisions of the applicable law, in the course of the work on the Law on amendments to the Law on movement and stay of aliens.

4. National legislation

Accession to the Refugee Convention and Protocol is only the first step in establishing a sound legal foundation for refugee protection. National legislation must be adopted or amended to allow for the effective implementation of the provisions of the Refugee Convention and Protocol. UNHCR works closely with States to help ensure that the legal tradition and resources of each State comply with its international obligations. At a time when many governments are proposing legislation or undertaking administrative measures aimed at placing tighter controls on immigration, special care needs to work to ensure that refugee protection principles are fully incorporated in the legal structure. Adoption of national legislation on refugees, which are based on international standards, the key is to strengthen the institution of asylum, improving the effectiveness of protection and creating a basis for finding solutions to the problems of refugees.

5. International legal framework

At the moment there are a number of international treaties which a Contracting Party is Bosnia and Herzegovina, which have a direct or indirect impact on the content and composition of the Strategy in the area of migration and asylum (2012-2015). The provisions of these agreements are important both in terms of the execution of previous commitments of Bosnia and Herzegovina and in view of the continuing integration process towards EU membership. In this way, it is possible to say that in the context of earlier indications of regulation of migration and asylum purely a question of state sovereignty of Bosnia and Herzegovina, especially from the point of prescribing the conditions of entry and residence of foreigners on the national territory and the allocation of some of the forms of international protection. However, current developments in the area of globalization, distinct migration flows, integration and the universalization of human relations has significantly reduced the sovereign right of a state to regulate these issues. It should take into account the fact that Bosnia and Herzegovina has a clearly defined foreign policy, which identified priorities, including accession to Euro-Atlantic integration processes is of great importance. This is, among other things, important for establishing the international obligations of Bosnia and Herzegovina as well as factors that affect the projection of measures and activities in the field of control of migration and asylum in Bosnia and Herzegovina. In this regard, it is important to identify the most important sources of international character whose contents must be taken into account when drafting the respective Strategy. They are, of course, numerous and hard to come by their precise division. Taking into account the time of accession to these treaties can be said that some of them were completed in the past, before the international recognition of Bosnia and Herzegovina as a sovereign state, and as such are the basis of the Agreement on Succession Issues between the Member States of the former Yugoslavia to take legal order Bosnia and Herzegovina. A typical example of such agreements are the Convention Relating to the Status of Refugees and the 1951 Protocol Relating to the Status of Refugees and 1967. In addition, Annex I of the Constitution of Bosnia and Herzegovina comprises international instruments that are an integral part of the Constitution of Bosnia and Herzegovina. On the other hand, Bosnia and Herzegovina is the most important international agreements for the creation of the Strategy in the area of migration and asylum (2012-2015) concluded in recent years. Taking into account their character can be said that this is a multilateral and bilateral agreements governing the larger or smaller number of questions in the field of cooperation on migration and other related phenomena. Seen from the point of application areas they are universal, regional or local character. From regional sources special place and importance for Bosnia and Herzegovina are those relating to the accession of our country to the EU. A typical example of such a contract is the Stabilisation and Association Agreement (SAA), concluded between Bosnia and Herzegovina and the European Union. In the background of the contract is worth noting that the negotiations on this issue open in November 2005, while the technical negotiations ended a year later, precisely in December 2006. The agreement was initialled on 5 December 2007 and signed on 16 June 2008. Full implementation of the provisions of the Stabilization and Association Agreement for Bosnia and Herzegovina is a key step towards further integration and full membership in the European Union. Regarding the issue of immigration and asylum, it should be noted that it regulated in Chapter VII of the Stabilisation and Association Agreement (Justice, Freedom and

Security). In particular, issues related to visas, border management, asylum and migration are covered by the provision in Article 80 of this Agreement, while Article 81 regulates the issue of prevention and control of illegal migration and readmission (readmission). Under the terms of the Stabilisation and Association Agreement, Bosnia and Herzegovina has an obligation to cooperate when it comes to visas, border control, asylum and migration, both from the European Union and the countries of the region.

The second most important source of the readmission agreement between the European Community and Bosnia and Herzegovina, which has the advantage of application over the provisions of any other bilateral agreement or arrangement on the readmission of persons without permission to stay, and they have been concluded between individual EU Member States and Bosnia and Herzegovina. The second category of sources are important for EU integration make unilateral acts adopted by the EU. Among the most important are the decisions of the EU Council Regulation of the European Parliament and the EU Council, and EU directives that regulate certain issues of importance to the development of the respective strategy. In this regard, some of these regional origin adopted under the auspices of the EU are: (1) Council Decision on the principles, priorities and conditions contained in the European Partnership with Bosnia and Herzegovina and repealing Decision 2006/55/EC (2008/21/EC), (2) Regulation of the European Parliament and the EU Council No. 1091/2010 of 24 November 2010 amending Council Regulation (EC) No 539/01 on the list of third countries whose citizens are required to possess a visa when crossing the external borders and those countries whose nationals are exempt from this rule, (3) directives governing a series of questions in relation to entry, residence and movement of foreigners in the territory of the EU, and (4) EU documents on migration and development. Given that Bosnia and Herzegovina now has the status of a potential candidate for EU membership, the anticipated acceptance of the contents of these legal sources in the EU legal order of Bosnia and Herzegovina certainly contributes to faster EU integration. On the other hand, some of these sources, such as the Regulation of the European Parliament and the EU Council on the so-called. "Visa liberalization" for the citizens of Bosnia and Herzegovina are an important source from the standpoint of the results achieved in the field of regulation of migration and asylum in Bosnia and Herzegovina, but also represents a reminder of the need to have a comprehensive and better development of instruments of migration policy of Bosnia and Herzegovina to maintain this status.

5.1. The responsibilities of the States Parties to the Refugee Convention

Countries that have ratified the Refugee Convention are obliged to protect refugees on its territory in accordance with the terms of the Convention, but every refugee has duties to the country in which there is a particularly has an obligation to comply with laws and regulations as well as measures to maintain public order. States Parties shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.

Nothing in this Convention shall not affect the other rights and each Contracting State shall accord to refugees the regime that applies to foreigners in general.

Among the provisions that States Parties to the Refugee Convention and Protocol must apply are the following:

- ✓ Cooperation with UNHCR - Article 35 of the Refugee Convention of 1951 and Article II of the 1967 Protocol contain an agreement for States Parties to

cooperate with UNHCR in carrying out its functions, in particular, to assist in monitoring the implementation of the provisions from those agreements.

- ✓ Information on National Legislation - The States Parties to the Refugee Convention agree to inform the Secretary-General of the United Nations the laws and regulations adopted to ensure the implementation of the Convention
- ✓ Exemption from Reciprocity - Where, under the laws of a country, the right of foreigners secured only when a similar treatment provided and the country of citizenship of these foreigners (reciprocity), refugees are exempt from this rule.

The notion of reciprocity does not apply to refugees as they do not enjoy protection in their home country. After a stay of three years, all the refugees in the territory of a Contracting State shall enjoy exemption from legislative reciprocity. Each Contracting State shall continue to give refugees the rights and benefits to which they might aspire, in the absence of reciprocity, at the date of entry into force of this Convention for that State.

Final considerations

Scientific work on political, legal and security issues of asylum in BiH is defined by the author, bearing in mind that the representatives of the UNHCR in Bosnia and Herzegovina, the competent Ministry of Security and the Department for Refugees, Displaced Persons and Housing Policy of the Ministry of Human Rights and Refugees, with the financial support of the European Commission Delegation in BiH, prepared Handbook on asylum in Bosnia and Herzegovina, which sought to present what has been done in the field of asylum and international protection in BiH so far.

Member asylum seekers in many parts of the world are concerned about the failure to resolve certain long-standing refugee problems, issues related to urban refugees and irregular migration, a perceived imbalance in the distribution of burdens and responsibilities, as well as increased costs of hosting refugees and asylum seekers.

Despite the challenges faced in several important areas, the Convention has proven its durability. This is because the 1951 Convention has a legal, political and ethical significance that goes beyond its specific terms:

a) the legal, in that it provides the basic standards on which to base its principled action;

b) the political, in that it provides a truly universal framework within which States can cooperate and share the responsibility resulting from forced displacement; and

c) ethical, in that it is a unique declaration by those 141 States which currently are Parties, and of their commitment to preserving and protecting the rights of one of the most vulnerable and disadvantaged groups of people in the world. This publication can be dedicatedly used as policy makers in the field of asylum in BiH, as well as persons in institutions that directly or indirectly deal with the protection of legal and security issues of asylum seekers, persons granted refugee status or persons who have been recognized subsidiary or international protection.

This work essentially has at least a twofold purpose and significance:

a) through conferences and published in the "Journal" to inform the present scientific, professional and academic public and parliamentarians about the founding principles, challenges and prospects of international security and refugee law, then,

b) to mobilize them, as policy makers, in the implementation of laws that refugees or immigrants ensures adequate security and legal protection through various forms of

donor conferences, such as, donor conference to help Syria: US pledged $ 900 million, Germany 2.3 billion (2016) and others.

Harmonizing immigration and asylum with EU standards in the past 10 years, Bosnia and Herzegovina has made significant progress in establishing the capacity to manage migration and asylum. Most established institutions and agencies working on migration and asylum have been founded, had minimal experience in this field.

In this period were adopted three laws which prescribe the field of immigration and asylum, and is currently at the stage of adopting the Law on Amendments to the Law on Movement and Stay of Aliens, which clearly shows that Bosnia and Herzegovina is trying to follow up the development of the acquis of the European Union in this area and sufficiently incorporated it into domestic legislation.

Currently, Bosnia and Herzegovina has all the basic institutional structure for the management of migration, which are trained to deal with the control of movement and residence of foreigners and to fight against illegal migration, in accordance with the current challenges in this field.

The system of international protection in Bosnia and Herzegovina was established and successfully carried out by the competent authorities in accordance with national legislation in this area.

There is no doubt it can be concluded that Bosnia and Herzegovina has built an institutional, legislative and administrative structure of migration management and asylum. Achievements in the field of development of the legal framework, increasing institutional capacity, improving interagency coordination and international cooperation, as well as analysis of past and predict future trends of migration flows in the territory of Bosnia and Herzegovina and at the regional level, indicating that Bosnia and Herzegovina essentially drives the migration policy, which is determined geostrategic position of our country on the already identified routes of migration in this part of the continent. The primary goal of controlling migration flows in Bosnia and Herzegovina is to establish effective control over the entry, residence and movement of foreigners in the national territory while ensuring all guaranteed human rights and freedoms of persons who are under the legal jurisdiction of Bosnia and Herzegovina, and by providing adequate mechanisms for the integration of foreigners in social, economic and any other environment in Bosnia and Herzegovina. Such political and strategic commitment is necessary from the standpoint of the European integration process which Bosnia and Herzegovina is an active participant, and respect relevant international standards for refugee rights and asylum.

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Conventions

1. The Convention for the Protection of Human Rights and Fundamental Freedoms;
2. Convention on the Status of Refugees 1951 and Protocol relating to the Status of Refugees of 1967;
3. The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment;
4. of the Convention relating to the Status of Stateless Persons.

The acquis of the European Union

1. Council Directive 2001/51/EC of 28 June amending the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985;
2. Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers;
3. Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or persons who for other reasons are in need of international protection and the content of the protection granted;
4. Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures for recognizing and withdrawing refugee status in Member States.

The role of Serbian customs services in prevention of smuggling of migrants

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Abstract:

The wars that have been fought in the Middle East countries for the past few years have led to the fact that a large number of refugees from war-affected areas moved towards the countries of Western Europe in 2015, seeking asylum and a chance for a better life. The Republic of Serbia, due to its geographical position, is one of the countries located along the so-called Balkan route, through which 764.000 of refugees passed in 2015. The large flow of people has led to a great opportunity for circumvention of the system and has created a fertile ground for the growth of all forms of crime, particularly the smuggling of migrants, enabling the illegal crossing of the state border without adherence to and compliance with the necessary requirements for the legal entry into the country of reception. Given the number of countries through which the migrants pass, this type of crime has stepped out of the national framework and has taken on international proportions. The fight against this form of organized and international crime requires the engagement and coordinated functioning of all state authorities. One of the state bodies with serious capacities to combat this type of crime is the Customs Administration where, within its Centre for Customs Enforcement, there is also the Department for Fighting against Smuggling. The results of the work of Department for Fighting against Smuggling are certainly visible and do exist, but the Customs Service, with all its organizational units has much bigger and under-utilized potential for detecting and combating the most serious forms of crime, particularly smuggling, and surely deserves a bigger role than it now has in the overall system of the security of the Republic of Serbia.

Keywords*: Migrants, Customs Service, crime, smuggling, coordinated action.*

Introduction

"When the Wise Men had gone, an angel of the Lord appeared to Joseph in a dream. Get up!, he said. Take the Child and His mother and flee to Egypt. Stay there until I tell you, for Herod is going to search for the Child to kill Him. So he got up, took the Child and His mother by night, and withdrew to Egypt".

The Gospel of Matthew

As we can see, according to the Gospel of Matthew, the Lord bestowed upon His Son, Jesus Christ, the new-born, and his righteous parents, Joseph and Mary the refugees and the exile. We cannot help but wonder, is it possible that any man or nation do not" drink from a bitter cup "of exile and migrations during their lifetime? Miloš Crnjanski,

poetically touches the divine providence, and cries: "There is no death, only migration!". The people in Serbia felt it, and still feel it continuously, for centuries, since we migrated to these regions ... Isn't that pro-vocation of a man, especially throughout history, until metaphorically speaking Herod dies, until the countless causes, reasons and circumstances that make the exile inevitable vanish? The massive scale of the exile, assuming the proportions of exodus from war-affected Middle East countries, primarily Syria, Libya, Iraq and then Afghanistan, indicates that the termination of the causes of exile is not even in sight. Given that Europe, where all the refugees rush to, is not all sunshine and roses, and that, above all, economic and any other crisis (spiritual, moral, political)are the reasons which may indicate the justifiability of concern, we wonder, will it in Europe soon gape the powdered wound for which a cure hasn't been found yet? Capitalism absorbed its weaknesses long time ago and lost its antipode of socialism that, conceptually and practically, underwent a defeat in the countries of the former Eastern Bloc, and thus the time and the space in which and where it could shift its own entropy, so the contemporary thought, with a small number of the true thinkers that remained, asked itself: where and how to move on! Perhaps the exodus of refugees from the Middle East is just, as it is told in the aphorism of the Polish poet Jerzy Lec, the migration from Sodom to Gomorrah? We hope not, and we hope that the deep pessimism permeating from this pondering is more of a subjective experience and feeling of the author of these lines than the objective state of affairs. However, there are many reasons for a concern, questioning and an attempt to find an answer for all thinking people, groups and movements! The problem of illegal migrations, or unsolicited or unauthorized entry, movement and stay of a person in the territory controlled by a social group where he or she does not belong to, as we can see from the above written, is as old as the first territorial organized society. Today, the crossing of the state border or a person's residence in the territory of a foreign country without the approval of the competent state authorities is a common offense to which has significantly contributed contemporary globalization trends.[1]Big profitability and low risk when smuggling migrants have led to the fact that this form of crime is present as much as the illegal trade of weapons and narcotics on a global level. The coordination of all national services and international cooperation is one of the ways to fight against this plague of modern times, and precisely the involvement of the Customs Service Administration in this struggle, within its competence and potentials would be the subject of this paper.

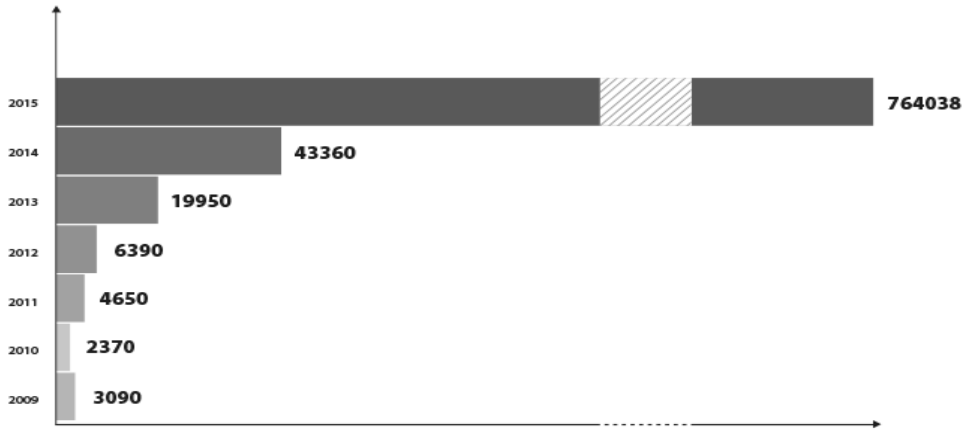
Migrant statistics

Statistical data best reflect the seriousness of the situation in which both Europe and Serbia as well find themselves today. It is estimated that during the last year about one million migrants arrived in Europe, and that a record of 1.82 million people illegally crossed the borders of the EU Member States. This is shown by the risk analysis of the European Union Agency for Border Security, Frontex. The number of requests for asylum grew by amazing 1.35 million in 2015, which was 86% more than in the same quarter last year. The number of illegal crossings was more than six times the previous record set in 2014. The largest number of illegal crossings was registered with people who had arrived to the Greek islands via Turkey, and who later crossed the state

[1] Mijalković, S., *Confronting human trafficking and smuggling of migrants*, PC "Official Gazette", Belgrade, 2009, p. 21.

borders in the Western Balkans as well. The largest number of illegal crossings, near 885.400, was registered in the Eastern Mediterranean route *via* Greek islands in the Aegean Sea, and more than 90% of illegal crossings were recorded in the second half of last year, about 803.000. Syrian nationals accounted for the largest proportion of users of that route, although the share of Afghans rose significantly towards the end of the year. Iraqis were the third largest nationality using that route. Around 764.000 crossings were recorded on Hungary's and Croatia's border with Serbia.[2] Migrants and refugees are most often transported in rubber boats and overcrowded boats, putting their lives in danger. Frontex managed to save as much as 90% of people in the Aegean Sea around the Greek islands with their actions. Also, in accordance with the enormous increase in the number of migrants in 2015, the number of smugglers increased as well, the victims being mostly Moroccans, Albanians and Syrians.

Graficon 1: *Illegal border crossings on the Western Balkans route in numbers*



Source: *www.frontex.europa.eu*

The smuggling as a means of illegal immigration

The smuggling is a form of organized crime which includes the legal transfer of goods across the border, avoiding customs controls. Commodities and persons can pass the state border at the official border crossing point or outside it. Avoiding customs control at the border crossing is done by hiding the goods, the use of coercion, corruption of border services or their misleading. The most common forms of smuggling include smuggling of arms, drugs, cigarettes, oil, migrants and many others. Migrant is a person who temporarily or permanently moves from one socio-cultural environment to another or from one country to another. Smuggling of migrants represents a criminal activity where by intermediary operation and with the consent of the person who is the subject of smuggling, the illegal entry to a foreign country is enabled. In domestic legislation, article 350 of the Criminal Code of the Republic of Serbia, the criminal

[2] Frontex, *Western Balkan route*. Taken from*: http://frontex.europa.eu/trends-and-routes/western-balkan-route/* ,last access time: may. 18, 2016.

offense of illegal crossing of the state border and smuggling of people is regulated.[3] However, the international nature of this criminal act itself requires the establishment of a system of international assistance and cooperation, as well as the adoption of bilateral and multilateral agreements that would allow more efficient operation of all relevant stakeholders. The Federal Republic of Yugoslavia ratified the United Nations Convention against Transnational Organized Crime in 2001, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children and the Protocol against the Smuggling of Migrants by Land, Sea, which supplement this Convention, adopted in Palermo from 12 to 15 December, 2000. The Protocol against the Smuggling of Migrants by Land, Sea and Air, in Article 3 of smuggling of migrants, is defined as ensuring of illegal entry into a foreign country to persons who are not its citizens or have permanent resident status, with the aim to obtain, directly or indirectly, a financial or other material benefit. Illegal entry is any crossing of the state border without adherence to and compliance with the necessary requirements for legal entry into the receiving country.[4] The forms and the way of the smuggling of migrants differ and may depend on some factors such as: distance of the destination country from the city of the origin of the migrants, the number of migrants, and many other factors, but the aim of the smuggling itself remains the same, and that is the illegal crossing of the state border. Migrants can be smuggled through the official border crossing point, outside the border crossing point, by land, across water surfaces, and by means of air transport. Smuggling of migrants across the territory of the Republic of Serbia has undergone an expansion in 2014 and 2015, when the largest number of refugees from war-affected areas moved towards the Western Europe. Headquarters for fighting against the smuggling of migrants in the Republic of Serbia is the Department of the Ministry of Internal Affairs, more precisely the Border Police Directorate with the assistance of other security services and other state organs. However, the number of 764.000 people, who only in 2015 passed the so-called Balkan route through Serbia, was a kind of test for such an organized system which with great difficulties fought with this problem in an emergency situation. Countries in this region, such as the Former Yugoslav Republic of Macedonia (FYROM) and Serbia, have faced with the dramatic increase in the number of refugees. It is estimated that half of the refugees who have passed through the region remains unregistered by the competent authorities and have been subjected to violence and abuse by smugglers and criminal groups. The capacities of the Republic of Serbia and other transit countries to effectively respond to the emergency situation are severely overstretched. While the authorities are trying to alleviate the situation by establishing facilities to receive and process them, UNHCR is concerned about reports of border police preventing refugees from entering. In some instances, refugees alleged that some police officers are using violence and pushing them back into the hands of smugglers. The refugees, including women and small children, often end stranded along

[3] Criminal Code, Official Gazette of RS, no. 85/2005, 88/2005 - corr., 107/2005 - corr., 72/2009, 111/2009, 121/2012, 104/2013 and 108/2014.

[4] Act on Ratification of the United Nations Convention against Transnational Organized Crime and its Protocols, the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, Official Gazette FRY-International Agreements, no. 6/2001.

the borders without protection and access to basic services such as food, water and hygiene items. All this shows that there is no adequate coordination between key state bodies and that all the capacities which the state possesses have not been used. The question is whether the significant results in the fight against the smuggling of migrants would be achieved if the individual state authorities are given a broader scope of authority and responsibility, in accordance with organizational capacities they already possess. One of the state bodies with serious capacity for detecting and combating this type of crime that should be given more significant role in the security system of the country is Customs Administration.

The role of the Customs Service

The word customs at the same time marks the authority, service, administration and duties. In our language, it is considered that the customs gets its name from the fact that it represented a duty to be charged in the name of the emperor (czar).[5] Customs Administration represents the executive body within the Ministry of Finance of the Republic of Serbia, which performs state administration in order to protect the economic, fiscal and financial interests of the Republic of Serbia, and as a protection of the Republic of Serbia from the illicit and illegal trade, as a security and protection of people and the environment and facilitation of the international trade. The customs authority controls international transport of goods, contributing to free trade, implementing the external aspects of the domestic market and principles relating to trade, as well as the general safety of the chain store.

In order to perform the prescribed actions, the customs authority may exercise any control action to ensure proper application of Customs laws and regulations.[6] The Customs Administration has a large number of organizational units in charge of specific tasks within its competence. One of these organizational units is the Department for Customs Enforcement, which performs the following tasks: suppression of smuggling, customs investigations and intelligence; control of legality in the work of internal units of the Customs Administration on matters of customs clearance, customs control, temporary import – export, material and financial operations, collection of charges, preventing the illegal import of weapons, drugs, currency and other serious violations of customs regulations; it proposes measures and methods for improving risk management planning and analysis of available resources, organization and coordination of the activities of the identification of appropriate targets in the area of the most anticipated risks, contacts with other internal units to ensure the actuality of data, risk analysis and the tendency of new violations of regulations and other activities within a domain of the sector. By National Strategy for Fighting against Organized Crime, the Customs Administration and the Department for Customs Enforcement within it are particularly pointed out as one of the pillars of fight against the organized crime.[7] The organization itself and competencies of Customs Services are a clear indication that this service has the capacity to be a significant advantage in the fight against all forms of crime. Considering that the Customs Service provides customs supervision and customs control of goods

[5] Popović, M., *Customs business*, Belgrade, 1974, p. 51.
[6] Criminal Code, Official Gazette of RS, no. 18/2010, 111/2012 and 29/2015, Art. 2.
[7] National strategy for fighting against the organised crime, Official Gazette of RS, no. 23/2009.

traffic across the border and that for the smuggling of migrants often are used means of transport for the transport of goods, the customs authority members often come into contact with smuggled migrants and smugglers. Increasing number of perpetrators of this criminal act, caused by migration of people from war zones, require maximum involvement of all state authorities. Bearing in mind all the facts mentioned above, as well as a broad field of operations of the Customs Service within the control of the flow of goods, passengers, means of transport and documentation that define responsibilities in the field of customs, foreign trade, foreign exchange and taxation system, the Customs Service is emerging as a possible factor of cohesion of the new concept of national security and the fight against all forms of crime. To support all the above, the following characteristics of the Customs Service are listed:

- The existence of the information system of the Customs Service, which has been developing since 1974, and has been in function since 1995, and is made of a complex computer system composed of a central computer, more than 100 district computers and 1,000 terminals deployed in 13 customs offices and 127 customs organizational units at the border and within the country.
- The distribution of human and technical resources at the border (24 consecutive hours), and in the interior of the country in strategic places (goods-market-traffic-commercial-industrial centers).
- Preventive action in regard to the suppression of crime activities.
- Familiarity with other state and social entities of formal social control (MIA, inspections Directorate for money laundering prevention, Prosecutor's Office, courts, etc.).
- Non-repressive psychological performance in public in terms of acting (as opposed to the army and police).
- The possibility of international connections and cooperation with foreign customs administrations and international organizations (the Interpol etc.).

We can conclude that the Customs Service, on the basis of the above mentioned characteristics, possesses all the prerequisites of modern safety systems that can significantly improve the fight against all forms of crime. Due to the existing information system there is great potential for the realization of the so-called soft – information power, according to its nature of operation *ante delictum*, i.e. the possibility of discovering wrongful activities during the inspection of goods, means of transport, passengers and documents represents the subject that is primarily in a function of crime prevention (because adverse effects do not occur), there is the possibility of coordination and cooperation, in other words to involve *ante delictum* in the operation and other subjects of formal social control (the army, MIA, inspection services, the financial police, Security Information agency, Prosecutor's Office, Directorate for prevention of money laundering, etc.). The way of organizing government departments and agencies of the United States of America (USA) in the fight against the smuggling of migrants with great success could be implemented in our area. The number of migrants in the world in 2015 reached 244 million, while the USA is the country with the largest number of migrants, as many as 47 million, or a fifth of the total number of migrants in the world. In search of a better life, many migrants from Central America are trying to reach the United States, the largest number coming from Mexico. The concept of national security of the United States involves the coordinated action of all government services. After the September 11th, 2001, when the terrorist attacked on New York and Washington, in the United States a new Ministry of National Security - Homeland

security was formed. The main task of the Ministry is to protect US territory and its population from terrorist threats. However, the Ministry received other jurisdictions, such as control of shipment of infectious diseases, control of road safety, environment, training of civil servants dealing with the suppression of infringements; training and coordination of national measures against infectious diseases; response to natural and nuclear disasters; advancement of scientific technology to ensure the country; protection of the President of the United States; protection of the coast and territorial sea of the United States. As it can be seen from the above, the activity of the new Ministry of National Security is not just a fight against terrorism, although it is one of the most important function, but also the protection of the national territory and population from infectious diseases, nuclear threat, taking measures in case of disasters that occur in the USA and the improvement of scientific and information technology to meet these objectives and organization of training for all civil servants engaged in the fight against violation of regulations. One of the most important agencies that incorporated into the Ministry of National Security is the Customs Service, which has suffered its transformation in 2003. After this transformation, a new body was called the Service for Border and Customs Protection and it included the following authorities: Customs Service, Immigration Service, the Agricultural Inspection Service and The Service of Border patrol. By the transformation of Customs Service into the Service for Border and Customs Protection with the above agencies in its composition, the further rationalization of government bodies working at the USA border was done, efficiency was increased, the border procedures were modernized, better communication was enabled between officials while previously independent agencies conducted it through cross-training. Therefore, the USA Customs as a new organ works not only at the border crossing, but it is also the only state agency that carries out activities on the border of the USA, (in Serbia these activities are carried out by the representatives of MIA) consisting of 80,000 people. As positive experiences that are studied and that can be accepted in Serbia, we are mentioning the following:

- Reduced number of government agencies at the border implies reduced number of centers for decision making as well as improved and modernized process.
- The Customs Service has received the control of travel documents and control of agriculture as its competence, and in that way the procedure at the border crossing of the USA is completed and uniformed.
- Cross-training is done, which means that customs officers are trained in immigration affairs and the affairs of the agricultural inspection, a former immigration officer in customs duties and agricultural activities of control and so on.
- The concept of integrated border management is implemented consistently. At border crossings work Service for Customs and Border Protection, Agency for the control of permits in road transport and Agency for the control of means of transport in order to provide the road safety in the United States. Officials of all three agencies at customs terminals are located in the same area, help each other, and replace each other in a case of need of control outside the business premises.
- All the information is pouring into the center of the Directorate for Customs and Border Protection in Washington, after that in the Ministry of National Security and then can be exchanged with other government agencies

Based on the concept of the present organization of public services of the United States, the benefits of coordinating their action can clearly be seen. The application of this concept in our system, with maximum capacity utilization of all state bodies, would undoubtedly influence the increase of the national security of the country and thus, the elimination of all forms of crime. However, there is a great resistance in all subjects regarding the coordinating role of the Customs Service and introduction of "rights" that Customs becomes correlation factor (especially within the country, rather than at the border). This resistance can be expected mostly by the system and organs in previous periods, and that traditionally in this region were exaggerated, fully independent and powerful (the Army of Serbia, MIA, SIA). These systems will perceive eventual coordination and the imposition of Customs Service as a cohesive and correlative factors as way of limiting their independence, freedom of action and as degradation.[8] However, there are some assumptions that the Customs Service must achieve in order to become a respectable factor in the fight against organized crime and these are: to carry out the reorganization and modernization of the system in the direction of increasing its efficiency in terms of the flow of goods and passengers, detection and suppression of customs and other offenses, to be well-dressed for the realization of the above mentioned objectives, to be well-equipped and to have the appropriate authorizations. The realization of these four prerequisites will enable the development of Customs Service, from its fiscal and protective functions, that it has now, into the security and coordinative function.

Conclusion

The USA invasion of Iraq in 2003, has opened a process by which the Levant from Beirut to Basra began to return to its historical borders of countries and that, in the so-called “Agreement on small Asia” from the 16th of May 1916, secretly, with the consent of Russia, signed France and Britain, the two colonial powers of that time. By this agreement the division of spheres of influence was made, which was an invisible frame of the geopolitical situation until 2003. Power vacuum in Iraq, which was created by the administration of George W. Bush, has begun to destroy the structure of the artificial state, created at the time of the mentioned Agreement from 1916. Iraqi Shiite and Kurds have their own autonomous regions. Alaviti and their allies-Christians, Druzis, and Ismailis, have autonomous region in Syria, as well as local Kurds. Lebanon is deeply divided. Melting turn could be the emergence of the Islamic State, the militant Sunni group, which in Mosul in June 2014, on the occupied territory from the Euphrates River to the Mediterranean, declared caliphate that rejects the concept of nationality. Kurds are the biggest losers of the 1916 agreement. Palestinians are still waiting for the border of their country. Egyptian Sinai turned into a separate territory outside the control of Cairo. The Middle East is now full of boundaries that do not appear on official maps, and a decades-long geopolitical architecture, built on the Agreement from 1916, today is rocking and crushing dangerously. All this caused that numerous refugees from these regions seek safer place to survive until the great powers and small nations, who can „spoil the stomach" by the great ones, as it warned the Albanian representative of Bismarck, at the Berlin Congress, in 1878, agree on a new (or old) geopolitical

[8] Jerinić, D., *Modernisation of the Customs Service of Serbia*, Printing press Zagorac, Belgrade, 2007, p. 125.

configuration of this part of the world. Holy Fathers indicate that evil "serves to awaken the good in us and around us" ... perhaps, in terms of this insight we can, without affectation, conclude that refugees and exile, as a consequence of deeper causes, have to wake up empathy in us, of course, primarily at the individual level, and then certainly within the collectivity to which we belong. Many of us had already felt, but many of us may unfortunately feel in the future, the torment of this status. From this human and necessary sense of solidarity, all relevant social and state forces of social control must be put into function, so that each entity within its jurisdiction may give an adequate response to the challenge of exile. However, the effectiveness of prevention and repression of illegal movement of individuals and groups, who do not respect international law and positive law established procedures and activities, mostly depends on the individual efficient or less efficient "response" of certain state bodies or institutions, as well as social, governmental and non-governmental organizations, but that success is directly related to and conditionality, creating the so-called single platform of activities of all relevant governmental and social entities of social control and reaction.[9] The operation of so-called single platform, primarily involves coordinating and sharing of information. It would be appropriate to appoint a body or bodies that would perform the function of coordinator and who would be responsible to provide an effective and uniform operation. It is clear that good coordination with the relevant authorities of neighboring countries, as well as compliance with what the attitudes of European policy with regard to the problem of refugees must be a common framework and the basis for coordinated action of all European states, first of all, and all those who are in refugee "route" aspiring to be part of the EU and European standards, otherwise, there is no effective way of not converting the torment of the exodus into a ruin and conclusive evidence of the inability of European countries, which are proud of their humanism and high standards. There is no doubt that each body of social control, including the Customs Service, makes its contribution to the detection and suppression of criminal actions. However, multiplication of the effect and achieving the maximum of contribution of each factor of social control is possible only in the context of the organization and training of the so-called single platform of an operation of all relevant government bodies. *De lege ferenda* role of Customs Service of Serbia, we see in realization of the potential coordinating, IT and security role of Customs Service, primarily within the IT resources and performances that modern Customs service already has. The above mentioned means operationalization and constant improving of the networking with all the other relevant factors of social control and, also, the exchange of relevant information. This primarily refers to the cooperation of the intelligence department of the Customs Service, Department for Risk Analysis and the Department for the Prevention of trafficking (which are constituted and operate in a modern way within the Customs Administration since 2004) with the appropriate intelligence centers of relevant state bodies and institutions (SIA, MIA, judiciary, inspection bodies, etc.). US practice and the concept of Homeland Security show that this expectation is reasonable and appropriate, because this is the concept in which the Customs Service represents the pillar of the national security system and the factor of more efficient response to all security challenges of the 21st century, including an effective framework approach to the issue of immigrants and illegal crossing of a border.

[9] Bjelajac, Ž., Marković, M., and Pavlović, Z., *Particulars of modern slavery as a deviant social phenomenon*, The review of international affairs, Belgrade, 2012, no. 1146.

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3. Criminal Code, Official Gazette of RS, no. 85/2005, 88/2005 - corr., 107/2005 - corr., 72/2009, 111/2009, 121/2012, 104/2013 and 108/2014;

4. Criminal Code, Official Gazette of RS, no. 18/2010, 111/2012 and 29/2015, Art. 2;

5. Frontex, Western Balkan route. Taken from: *http://frontex.europa.eu/trends-and-routes/western-balkan-route/* ,last access time: may. 18, 2016;

6. Jerinić, D., *Modernisation of the Customs Service of Serbia*, Printing press Zagorac, Belgrade, 2007;

7. Mijalković, S.,*Confronting human trafficking and smuggling of migrants*, PC "Official Gazette", Belgrade, 2009;

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9. National strategy for fighting against the organised crime, Official Gazette of RS, no. 23/2009.

Confiscating the proceeds of crime in human trafficking cases in Romania

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Abstract:

The cross-border dimension of human trafficking challenges the limits of the classic paradigm of criminal law. Fighting against such transnational crime involves cooperation between legal systems and harmonization of their legal instruments. The preset study aims at revealing one legal dimension of the strategy of combating trafficking in human beings in Romania. It will be shown the advantages of the confiscation as an alternative instrument for tackling such offence and the mechanism of how the confiscation really works.

Key-words: *confiscation, proceeds of crime, trafficking in human beings, Romania.*

Why confiscating the proceeds of human trafficking crime?

The exploitation of human beings is a highly lucrative business for organized criminal groups[1]. According to International Labor Organization (hereinafter the ILO) estimates[2] there are at least 2.4 million trafficked persons at any given point in time, out of 12.3 million forced labor victims worldwide. Yet there are only a few thousand convictions of traffickers every year. Despite growing awareness and more effective law enforcement responses, trafficking remains a low-risk criminal enterprise with high returns. In 2008 the ILO estimates that annual profits generated from trafficking in human beings are as high as 32 billion USD. This estimation situates human trafficking on the 16th place of the Global Black Market[3], but if we notice that prostitution is on the 2nd place (186 billion USD), we understand that the above estimation refers exclusively to the amounts obtained from trafficking, without taking into account the income generated by the trafficked persons. This is also supported by the fact that the estimation for human smuggling (14th place in the range with 35 billion USD income) has the same appearance. The two issues point to a superficial distinction between women who are trafficked and men who are smuggled, differences unconfirmed in practice[4]. ILO estimates[5] indicate, however, that 32% of all victims were trafficked into labor exploitation, while 43% were trafficked for sexual exploitation and 25% for a mixture of both. Women and girls make up the overwhelming majority of those

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1 https://www.unodc.org/unodc/en/frontpage/2012/July/human-trafficking-organized-crime-and-the-multibillion-dollar-sale-of-people.html

2 International Labor Organization (2008). *Action against trafficking in human beings*. Geneva: ILO Publications, p.1.

3 Data available at www.havocscope.com .

4 International Labor Organization (2008), *op. cit.*, p. 29.

5 International Labor Organization (2008), *op. cit.*, p.3.

trafficked for the purpose of sexual exploitation (98%) and as many as 1.2 million victims of trafficking are minors (under 18).

According to the estimation report drawn up in 2012 and published in 2014, statistics worsened. The ILO estimated[6] that 20.9 million people are in forced labor globally, trafficked for labor and sexual exploitation or held in slavery-like conditions. Of these, 4.5 million (22 %) are victims of forced sexual exploitation and 14.2 million (68 %) are victims of forced labor exploitation, primarily in agriculture, construction, domestic work, manufacturing, mining and utilities. Women and girls represent the greater share of the total – 11.4 million (55 %) – compared to 9.5 million (45 %) men and boys. Adults are more affected than children – 15.4 million (74 %) are aged 18 or older, with the number of children under the age of 18 estimated at 5.5 million (26 %).

It is estimated[7] that the total illegal profits obtained from the use of forced labor worldwide amount to 150.2 billion USD per year. More than one third of the profits – 51.2 billion USD – are made in forced labor exploitation. Two thirds of the profits from forced labor were generated by forced sexual exploitation, amounting to an estimated 99 billion USD per year. Profits per victim are highest in forced sexual exploitation, which can be explained by the demand for such services and the prices that clients are willing to pay, and by the low capital investments and low operating costs associated with this activity. Unlike drug trafficking, where the commodity is contraband and must be hidden, sexually exploited women and girls are not easily identified and can be sold over and over again, exposing traffickers to lower risks and yielding high profits for their exploiters[8]. A fundamental premise of a human trafficking case is that the trafficker takes all the profits from the

forced labor of the victims, so the unfortunate truth is that the money earned through illegal activity are proceeds of the crime and none of it is "the victims' money," even though they likely are the ones who earned it[9]. With a global average profit of 21,800 USD per year per victim, this sector is six times more profitable than all other forms of forced labor, and five times more profitable than forced labor exploitation outside domestic work.

In most cases[10] of documented forced sexual exploitation, a whole chain of traffickers and exploiters benefits: the recruiter who imposes high recruitment fees; the people in charge of travel and transport, who make sure the victim safely reaches the place of exploitation; corrupted law enforcement paid to close their eyes to obvious cases of illegal migration or exploitation; owners of flats or houses; companies in charge of advertising; and, of course, the brothel owner or manager of the prostitution networks.

The main incentive for traffickers is the high profit obtained[11]. More research on the financial aspects of human trafficking might reveal much about the profits of

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[6] International Labor Organization (2014). *Profits and poverty: the economics of forced labor*. Geneva: ILO Publications, p. 7.

[7] International Labor Organization (2014), *op. cit.*, p. 13, 15.

[8] Ch. Whitman (2013). *Hitting Them Where It Hurts: Strategies for Seizing Assets in Human Trafficking Cases*. Strategies in Brief, 20, p. 1, available at www.aequitasresource.org.

[9] L. Longhitano, Ch. Whitman (2014). *Assisting Human Trafficking Victims with Return of Property and Restitution*. Strategies in Brief, 21, p. 2, available at www.aequitasresource.org.

[10] International Labor Organization (2014), *op. cit.*, p. 26.

[11] F. Vlad (2006). *Merchants of Living Souls: Traffickers of Human Beings in Romania*. MA Thesis, Stanford University, p. 37, available at http://law.stanford.edu/wp-content/uploads/2015/03/Vlad Florin-tft2006.pdf

different actors and the social organization of these illegal activities[12]. A survey made in Serbia strongly indicates that human trafficking is a very important source of labor and income for a large number of people, especially for those living in areas near the borders[13]. Not surprisingly, the percentage of unemployed traffickers was very high (46.7%)[14]. In Great Britain, human trafficking is included as a lifestyle offence under the Proceeds of Crime Act 2002. This legal label allows the authorities to recover all of the value of the assets the "lifestyle criminal" obtained in the six years prior to the crime (unless s/he can prove otherwise) as opposed to merely the benefit of a particular crime that can be gained from non-lifestyle offenders[15]. In Italy, a crucial country given its geographical position and high demand for sexual services, exploiters are able to identify criminal opportunities in the various regions and also the areas in which the greatest demand is concentrated[16].

Why Romania?

According to US Department of State 2015 Report on Trafficking in Persons[17] "Romania is a source, transit, and destination country for men, women, and children subjected to labor trafficking and women and children subjected to sex trafficking. Romanians represent a significant source of sex and labor trafficking victims in Western Europe (particularly the United Kingdom, Italy, Spain, and France) and Central and Southern Europe (particularly the Czech Republic, Hungary, and Greece). Romanian men, women, and children are subjected to labor trafficking in agriculture, construction, domestic service, hotels, and manufacturing, as well as forced begging and theft in Romania and other European countries. Romanian women and children are victims of sex trafficking in Romania and other European countries. Romanian victims of forced begging and forced criminal activities are often Romani children. Romania is a destination country for a limited number of foreign trafficking victims, including sex trafficking victims from Moldova and Poland and labor trafficking victims from Bangladesh and Serbia".

The above report also includes some recommendations for Romania (which is placed in the second category namely of the states which do not fully comply with the minimum standards for the elimination of trafficking, but, however, make significant efforts to do so). None of the recommendations regards the confiscation of proceeds of crime as an alternative to conviction.

According to the last data available, Romanian authorities investigated 875 trafficking cases in 2014, an increase from 714 in 2013. The government prosecuted

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[12] E.S. Kleemans, M. Smit (2014). *Human Smuggling, Human Trafficking, and Exploitation in Sex Industry*. In L. Paoli (ed.): The Oxford Handbook of Organized Crime. Oxford: Oxford University Press, p. 396.

[13] V. Nikolić-Ristanović (2012). *Human Trafficking between Profit and Survival*. In A. Šelih, A. Završnik eds.): Crime and Transition in Central and Eastern Europe. New York: Springer, p. 219.

[14] V. Nikolić-Ristanović (2012), *op. cit.*, p. 221.

[15] P. Sproat (2012). *A critique of the official discourse on drug and sex trafficking by organized crime using data on asset recovery*. Journal of Financial Crime, vol. 19, issue 2, p. 150.

[16] M. Mancuso (2015). *Estimating the revenues of sexual exploitation: applying a new methodology to the Italian context*. In E.U. Savona, F. Calderoni (eds.): Criminal Markets and Mafia Proceeds. London and New York: Routledge, p. 20.

[17] Available at http://romania.usembassy.gov/2015-tip-en.html.

534 defendants in 2014, similar to the 552 in 2013. Romanian courts convicted 269 traffickers in 2014, slightly more than 252 in 2013. The government did not disaggregate law enforcement statistics to demonstrate action against both sex and labor trafficking. Sixty-seven percent of convicted traffickers were sentenced to time in prison, ranging from one to 15 years' imprisonment; this marked an increase from 2013, when 59 percent of convicted traffickers were sentenced to time in prison. However, in 2014, courts suspended 73 prison sentences and instead levied fines against 15 traffickers. Looks like the government made strong law enforcement efforts but obtained weak or suspended sentences that neither deterred traffickers nor kept victims safe when traffickers were released.

Public officials and NGOs identified 880 victims in 2015 and 757 victims in 2014, a decrease from 896 in 2013. Sixty-six percent of victims were female (seventy-four percent in 2014) and 31 percent of victims were children (37 % in 2014)[18]. In 2014, sixty-three percent of victims (475) were subjected to trafficking for sexual exploitation and 25 percent (188) for labor exploitation in agriculture and construction[19]. Considering that the number of victims is around 900 per year it is possible to estimate the profits (3,000-6,000 USD for one girl sold[20]) to a maximum of 5.5 million USD in one year.

Legal instruments

Tracing and seizing money and assets often look like a task more able to perform instead of chasing criminal individuals. Romania has powerful instruments form this point of view.

One of the objectives of the National Strategy against Human Trafficking during 2012-2016 implemented by Government's Act no. 1142/2012[21] is represented by the improvement of the institutional ability to investigate human trafficking offences, especially trafficking in minors, as well as the tracking of the illicit gain by the law enforcement authorities.

Act no. 678/2001[22] on the prevention and suppression of human trafficking was almost completely repealed, especially as concerns the related offences, once the new penal code (hereinafter the NPC) came into force. The new law transposes the 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[23]. Presently, the penal code sanctions trafficking in adult persons at art. 210 NPC, by penalties between 3 to 10 years of imprisonment and trafficking in minors at art. 211

[18] National Agency against Human Trafficking (2016). The Graphic Analysis of Victims Identified in 2015. Available at http://anitp.mai.gov.ro//ro/docs/Cercetare/Analize/analiza%20generala%202015.pdf, p. 2.

[19] National Agency against Human Trafficking (2015). The Statistics of Victims of Human Trafficking Identified in 2014. Available at http://www.anitp.mai.gov.ro/wp-content/uploads/analiza%20a%20 victimelor%20in%202014%20-%2025.08.2015.pdf, p. 14.

[20] Estimation available at http://www.havocscope.com/black-market-prices/human-trafficking-prices/.

[21] Published in the Official Journal no. 820 of 6th December of 2012.

[22] Published in the Official Journal no. 783 of 11th December of 2001.

[23] For a comment on the EU Directive see F. Ciopec (2012). *New* Acquis Communautaire *in Protection of Human Trafficking Victims* in T. Grünwald, P. Messina (eds.): Innovative Network for Security and Prevention through Inter-regional Euro-cooperation. Padova: Centro di ricerca e servizi „Giorgio Lago", pp. 63-74.

NPC, by the same penalty. Offences related to human trafficking are provided in art. 216 (use of an exploited person's services) by a penalty from 6 month to 3 years, art. 264 NPC (facilitating the illegal stay in Romania) by penalty from 1 to 5 years and art. 374 NPC (child pornography) by a similar penalty.

Art. 19 of Act no. 678/2001 on confiscation of assets and proceeds of crime following human trafficking was repealed by the new penal code. Presently, the provisions of art. 112 which settles special confiscation shall apply. The legal text provides "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;

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".

Additionally, the new penal code has also introduced the possibility to apply extended confiscation in case of human trafficking (expressly mentioned in art. 112^1 para. 1 b NPC). The legal text stipulates that "Assets other than those referred to in art. 112 NPC 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: […] b) trafficking in and exploitation of vulnerable people […]. 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)".

By Act no. 318/2015[24] there was established the National Agency for the Recovery and Management of Seized and Confiscated Assets derived from offences, including the ones of human trafficking. Although still unfunctional, since the rules on organization and functioning of the Agency have been adopted very recently by Government's Act no. 358/2016[25], this institution aims at improving the enhancement of the proceeds of crime and synthesizing the data related to this type of claims[26].

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[24] Published in the Official Journal no. 961 of 24th December 2015.

[25] Published in the Official Journal no. 383 of 19th May of 2016.

[26] For a comment on this institution see F. Ciopec (2015). *Despre noua Agenție Națională de Administrare a Bunurilor Indisponibilizate* [On the New National Agency for the Recovery and Management of Seized and Confiscated Assets]. Curierul Judiciar, 10, pp. 523-525.

Hitting Them Where It Hurts Most

The place of confiscation as an alternative instrument for the fight against human trafficking depends on the efficient manner of searching and neutralizing the proceeds of crime as well as the economic advantage pursued by traffickers. Asset forfeiture laws provide for the seizure of property that is a fruit of – or was used to further – the criminal enterprise. Utilizing these laws is one effective way to deter and disrupt traffickers while providing trafficking victims with the monetary means to rebuild their lives[27].

In Romania, in order to be in the presence of ordinary confiscation, called special confiscation, a criminal trial needs to be started against the author of the offence of human trafficking or the related offences (art. 264 or art. 374 NPC). However, special confiscation can be ordered regardless of a conviction (art. 107 para. 3 NPC). Applying a penalty is not necessary, but since confiscation is a penal sanction, i.e. a detention order, it must be ruled only by a criminal court. Romanian law is not familiar with non-conviction based confiscation for the proceeds of crime derived from human trafficking, an institution which is highly used in USA[28].

For the imposition of special confiscation, the penal judge must ascertain the fulfilment of three conditions:

i) Commission of an act provided by criminal law and unjustified. Romanian law does not condition the imposition of such measure on the existence of an offence, but only on act provided by criminal law, a reason why as shown above, it is not necessary to apply a penalty. As such, any way of committing the *actus reus* described in art. 210 NCP must be proved, namely recruitment, transportation, transfer, harboring or receipt of persons for exploitation purposes:

a) by means of coercion, abduction, deception, or abuse of authority;

b) by taking advantage of the inability of a person to defend themselves or to express their will or of their blatant state of vulnerability;

c) by offering, giving and receiving payments or other benefits in exchange for the consent of an individual having authority over such person.

ii) A state of danger which can be removed only by imposing a detention order. In case of confiscation, we refer to an objective danger (*in rem*), which is not an inner part of assets subject to confiscation, but results mainly from the way they were acquired which is prohibited by criminal law, but becomes relevant when committing an act provided by the same law (the above mentioned condition). By enforcing the penal code, the mostly preventive nature of confiscation has been addressed, which aims at removing a state of danger. According to art. 112 NPC, in case of human trafficking offences there shall be subject to confiscation the following category of assets:

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; […]

d) assets given to bring about the commission of an offense set forth by criminal law or to reward the perpetrator;

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[27] Ch. Whitman (2013). *Op. cit.*, p. 1.

[28] Aequitas – The Prosecutor's Resource on Violence against Women (2014). *Restitution and Asset Forfeiture: A Focus on Human Trafficking*. Available on www.aequitasresource.org.

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.

iii) Identifying the goods that can be subject to confiscation. This is the hardest activity since in the absence of assets, confiscation is deprived of its object. Identifying the assets is a difficult task for judicial authorities since it implies specific powers (*assets intelligence*) which are not familiar to the former. This is the reason why such powers were provided for the new National Agency for the Recovery and Management of Seized and Confiscated Assets. The Agency has the right to access, directly or indirectly, the database on all categories of assets which can be subject to confiscation in a criminal trial, on the basis of protocols concluded with a series of public authorities and institutions, namely the Tax Management Agency, the Registry of Companies, the Financial Supervision Authority, the National Office of Prevention and Suppression of Money Laundering, the Department of Fight against Fraud, the National Agency of Real Estate Registration and Recordation, the National Union of Judicial Executors, the National Union of Notaries Public, the National Bar Association. Judicial authorities or the courts shall be able to require the Agency on the basis of standard application form data and information in order to identify and track the assets. The transmission of these data and information shall be done on its own motion when the Agency considered that they will lead to the facilitation of identifying and tracking those assets by said authorities. The provisions are similarly in case of cooperation with the counterpart agencies of other countries.

Romanian law also provides for the special confiscation by cash equivalent. In cases referred to in art. 112 par. (1) lett. b), 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. If the assets subject to confiscation pursuant are not to be found, money and other assets shall be confiscated instead, up to the value thereof. 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 art. 112 par. (1) lett. b), shall be also confiscated.

In the case referred to in art. 112 par. (1) lett. b), 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.

According to Act no. 678/2001 the instruments of crime also included the means of transport used for the trafficking of persons as well as the harboring establishments for these persons, if they belong to the authors of the offence (art. 19 para. 2). After this text was repealed by the new penal code, such a provision no longer exists, therefore art. 112 para. b) NPC becomes applicable.

The prerogatives in the matter of confiscation have been extended by Act no. 63/2012[29] which amended the penal code. The extension refers to three aspects[30]: (*i*) the confiscation of certain assets which are no longer directly linked with the offence for the conviction was ruled; (*ii*) confiscation shall also aim third parties which are

[29] Published in the Official Journal no. 258 of 19th April of 2012.

[30] F. Ciopec (2015). *Confiscarea extinsă: între de ce și cât de mult*? [Extended Confiscation: Between Why and How Much?] București: C.H. Beck, p. 5.

connected to a certain extent with the convicted person and (*iii*) confiscation shall be also ordered for a period of 5 years going backwards to the moment when the offence was committed, which is subject to an analysis of the acquired assets.

Extended confiscation is itself a detention order which in general terms is governed by the same rules as special confiscation but at the same time has some specific features. The criminal judge shall be able to extend confiscation to other goods than those subject to special confiscation, namely:

a) A conviction was ruled in a criminal trial against an offender for an offence of certain degree of seriousness. Although the minimum requirement in order to impose a detention order is the commission of an act provided by criminal law unlawful and unjustified, extended confiscation imply a higher standard, since it is necessary that the act constitute an offence and that a conviction for the former be ruled. The convicted can be only an adult natural or legal person. Since according to the new penal code (art. 114), courts cannot convict minor offenders to penalties but only rule educational sanctions against them, extended confiscation cannot be ordered in case of the former. In fact, human trafficking has little compatibility with the active involvement of minor offenders. The seriousness of the offence is a criterion which matters in case of human trafficking since the penalty provide by the law is more than 4 years, the minimum level which allows access to extended confiscation.

b) The act committed is liable to provide some valuable consideration. It has been considered[31] that his condition implies the analysis of two elements: (i) an objective one, namely that the value of the assets acquired by the convicted person in a certain period of time obviously exceeds the income lawfully obtained; and (ii) a subjective one, namely the court's persuasion that the respective assets are derived from activities similar to those which led to the conviction. Criminal law includes in the category of assets the mobile, immobile, as well as the amounts of money. Moreover, 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. 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. The legal text does not state if the services from which the convicted person benefited during the reference period are also taken into account. The answer is only affirmative, since services have an economic value less likely to neglect, being able to disguise the proceeds of crime such As the real estates or financial banking investments (tourists offers, beauty services or healthcare services on demand – aesthetic or dental surgery). The reference period taken into account in order to assess the value of the acquired assets is of 5 years going backwards and, if the case may be, after the moment when the offense was committed, until the court is referred to. The five-year term is similar to the one in tax matters related to the statute of limitations that the state benefits from in order to determine and track the income of taxpayers.

c) It was not possible to prove the lawfulness of the acquired asset. Extended confiscation is understood when used to fight against organized crime, but it must be associated with safeguards meant to limit the abuse of confiscation. One of these safeguards is the possibility of the accused to be able to rebut the factual presumptions by proving that the goods were lawfully acquired, which serves for the inapplicability of

[31] F. Ciopec (2015). *Op. cit.*, p. 127.

extended confiscation. The right of a person to require the supplying of counter-evidence against judicial presumptions which established that the assets whose value exceeds the person's lawful income are derived from crime activities similar with the ones which entailed the conviction, has its direct source in the presumption of innocence. Common defenses[32] to a petition for asset forfeiture include that the respondent did not commit the crime that makes the property forfeitable or that he/she did not have knowledge of the criminal activity. When a third party owner's property is subject to forfeiture, he/she may argue that he/she took steps to curtail the criminal behavior of the possessors/lessees, but was unsuccessful. Another common argument is that the assets in question were not part of the criminal enterprise.

If the assets to be seized are not to be found, money and other assets shall be confiscated instead, up to the value thereof. The assets and money obtained from exploiting the assets subject to confiscation as well as the assets produced by such shall be also confiscated. Confiscation shall not exceed the value of assets acquired during the period of 5 years referred above that are up to the convicted person's lawfully obtained income.

What this institution brings about as a novelty is the radical change of the conditions provided by classical criminal law: a direct chain of causation between the criminal act and the obtainment of the asset, and, respectively, a superior standard in case a decision in criminal matters is ruled.

The judge in criminal matters has now the power to order a repressive measure in relation to assets that the court is convinced that they originate from criminal activities similar with the ones which entailed the conviction. Therefore, it is true that the detention order affects certain assets in case of which no conviction has been or shall be ruled, given that the criminal court has not been referred to in order to judge the acts from which said assets are derived. Although the criminal court does not rule on all the acts, it shall form its conviction based on all the circumstances of the criminal case according to which those acts did exist, were committed by the defendant and procured him some valuable consideration. As to the acts which were not part of the conviction, the standard of proof is less high: „the court is convinced that the relevant assets originate from criminal activities…" than the one necessary to entail a conviction. In the majority of states, the standard of proof for the establishment of forfeiture by wrongdoing is a preponderance of the evidence; the standard is clear and convincing evidence in only three states[33]. Preponderance of the evidence, requiring a showing that it is more likely than not that the evidence presented is true, is significantly lower than the standard required for proof of a defendant's guilt at trial (beyond any reasonable doubt).

In such cases the court shall use a series of factual presumptions in order to form its conviction that the wealth originates from acts that are similar with those which led to the conviction of offenders, e.g. are they employed? How do they live? Do they have an income? Do they have an explanation for cash? Where real property or cars are involved, a third party must be asked whether the offender paid rent or a monthly payment equal to or in excess of market value. Did they pay in cash? Does the owner have records of the transactions? These presumptions are not incompatible with the

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[32] Ch. Whitman (2013), *op. cit.*, p. 3.

[33] J. G. Long, T. Garvey (2012). *No Victim? Don't Give Up. Creative Strategies in Prosecuting Human Trafficking Cases Using Forfeiture by Wrongdoing and Other Evidence-Based Techniques*. Strategies Newsletter, 7, p. 4, available at www.aequitasresource.org.

presumption of innocence, as the Court of Strasbourg stated in its case-law[34]. All these factual presumptions shall allow the imposition of extended confiscation, on condition that they may not exceed a reasonable limit, so that the judge is in a position where he can no longer establish the facts of the case.

Despite of the arsenal provided by criminal law, Romania did not seem to achieve a great deal of success in the fight against human trafficking. Low numbers of convictions combined with limited use of financial investigations hinder efficient confiscation of assets in human trafficking cases[35]. In order to have efficient and functional schemes based on confiscated assets, it needs to improve its criminal justice responses, particularly by focusing more on financial intelligence.

[34] Case-law *Pham Hoang v. France,* Decision of 25th Spetember od 1992, para. 33, available at http://hudoc.echr.coe.int; case-law *Salabiaku v. Franţei*, Decision of 7th October of 1998, para. 28, available at http://hudoc.echr.coe.int.

[35] United Nations Office on Drugs and Crime (2014). *Global Report on Trafficking in Persons*. New York: United Nations Publications, p. 53.

Inside or outside: human trafficking flows and changing dimensions (The case of the Republic of Macedonia)

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Abstract:

Human trafficking, like every other appearance, has adjusted its characteristics on the conditions and opportunities in modern world. Its normal functioning is directly dependent from possibilities in community.

Starting from the fact that the phenomenon is a complicated criminal process, its research asks the crime to be analyzed from different aspects. All of those aspects refer to one side of the crime, connecting it with same or similar acts, leaving us possibilities to discuss the existence of synonyms, antonyms and homonyms. Today's form of human trafficking, gives us a possibility to connect it with other similar practices from past and search its roots. Through analyses of past and today's forms we could conclude that their content is still the same, that what changes is only the form, and to some levels the roles of subjects and objects of the crime.

The paper, starting from 2002, will draw a line and put on the surface the changes of victim's characteristics, their origin, and their demographical characteristics and all to that to show how human traffickers adapted on territorial, political, social and judiciary changes and new legal methods and tools. So we can make a difference between chronological parts, a case study analysis will be used, analyzing the case of the notorious human trafficker in Macedonia, D.B.L., which case study will directly point out the deficiencies of the legal system before the Palermo Protocol.

Keywords: *Balkans, dimension, human trafficking, organized crime, Palermo Protocol.*

Introduction: Lets traffick in the Balkans

Attempts of suppressing human trafficking are as old as the existence of this crime. Authorities, through its police forces have changed many methods in investigating the phenomenon, which on the other side resulted with different modus operandi of organized crime groups and individual perpetrators of this crime.

The Balkan Peninsula, because of its geographical position (for some of its countries) is a bridge between modern Europe (European Union) and the other part (still candidate countries for full membership in the European Union); and war conflicts on its soil for about 15 years, during and at the end of 1990s and the beginning of the XXI Century, were seen as solid soil for being used as territory of exploitation and transport of victims of human trafficking. Lack of control in new countries (Yugoslavian Federation was falling apart), fragile systems, corrupted politicians and the fight for

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higher material and financial benefit by elites were one of many factors leaving organized crime an open door for smooth crawling in every part of society. Human trafficking was one of many tools used for fast and easy money, using victims' dreams and necessities, organized groups used them for fulfilling pleasures of military and foreign forces (peacekeepers) and other clients. The Palermo Protocol illuminated governments, included human trafficking into legal and penal documents, finally after years made real the *de facto* difference between prostitution and human trafficking for the purpose of sexual exploitation.

Years later, legal systems, because of harmonization with European legislature were adjusted to international documents, newer methods were accepted, border controls, action against corruption, police actions and investigations, changes in legal and criminal incriminations. And such policies gave results. They decreased the level of crimes, but caused changes of phenomenon's phenomenology. The human trafficking we knew mutated and overnight changed key points in the process.

That is the main **hypothesis** of the paper. The development, new police methods, flows in migration, border changings in Macedonia, resulted with changed human trafficking (domestic victims, new kinds of exploitation, staying inside borders, etc.).

The paper using **data analysis and comparative method**, through statistical data from the Ministry of Internal Affairs of the Republic of Macedonia, will analyze phenomenological characteristics of human trafficking, its volume, dynamics, structure and structural changes, possible manifestations and the characteristics of perpetrators and their victims. So we can make a difference between chronological parts, a **case study analysis** will be used, analyzing the case of the notorious human trafficker in Macedonia, D.B.L., which case study will directly point out the deficiencies of the legal system before the Palermo Protocol.

In this way results provided will help to check how undertaken steps by Macedonian authorities influenced on operating Balkan organized criminal groups and their acts in human trafficking process. Using those results, authorities can build new strategies for suppression and most important, prevention of trafficking.

Also, conclusions based on data analysis will be used for framework of suggestions covering wider territory, accenting the need of institutional and international cooperation. Measures will be offered, measures that will cover all sides of human trafficking, all of its phases, starting from recruitment until exploitation, with one and only goal at the end of actions – to put human trafficking at the lowest rate in its existence in these countries.

Human trafficking is real? The Palermo protocol and its impact on national legislation

Being in the Balkans and having a fate of candidate and neighbor of European Union and of course being "born" in times of numerous war conflicts, it what makes you an important country of transit and destination for human traffickers. Although conflicts happened at the end of XX and beginning of XXI Century, human trafficking in Macedonian legislation was incriminated after the Palermo Protocol.

Newer researches in criminology, count trafficking in human beings into the so called "consequent crime", which indicates the crime that unites the most difficult forms of crime, physical, psychological and intellectual exploiting of every human being,

always mixed with most difficult, most cruel methods of violence and physical and psychological coercion. It's a crime that, because its wideness and the effects of human beings life and work, is difficult to be revealed and proved.[1]

The Palermo Protocol was signed by Macedonian Delegation on December the 12th 2000 and ratified five years later. Human trafficking for the first time was incriminated in 2002. The first incrimination was changed in 2004 when the possible methods of exploitation were expanded and penal sanctions became more severe than before. In 2008 a new incrimination connected with human trafficking was added in the Macedonian Penal Code and for the first time trafficking in children became special incrimination with much more severe penal sanctions (minimum eight years of imprisonment).

The incrimination in its first paragraph elaborates human trafficking in its primary definition, the one taken from the Palermo Protocol. The second one is regarding the personal documents which are always taken away by traffickers. Also, there is a paragraph (3) which incriminates using sexual services from victims of trafficking. If the perpetrator is a public official, then the sanction is severe. And of course, in accordance with the Council of Europe's Convention on action against trafficking in human beings the victim's consent is irrelevant for the existence of the crime.

It is quite clear that Macedonia starting from the first incrimination in 2002 through years showed maturity, preparedness and ability to be in line with new legal recommendations given by international community. The Macedonian incrimination (both incriminations) elaborates human trafficking in its every aspect (act, means, goals) and finally after long time of victims' suffering and minor penalties for perpetrators, there is an incrimination that will help in the process of phenomenon's suppression, of course together with other preventive measures.

Police is always one step back: Phenomenology of human trafficking in the Republic of Macedonia

Phenomenological characteristics of crimes are one of most important theoretical elements, especially in researching crime or some of its types. Researching phenomenology helps us understand the bigger picture, starting with the number of crimes, their form and shape, perpetrator's and victim's characteristics, using all of it to estimate future trends of crime.

The volume of crime is defined as the total number of committed crimes in one area at a specific time. Dynamics of crime and delinquency are determent with their social character. Every period through history has its own crime. Changes in social, economic, cultural and other relations mean change in crime's dynamics. Namely, through the prism of dynamics, changes in crime's volume can be noticed, helping us to start the alarm of the possible reasons for such development of numbers. Sometimes effective and efficient police work can result with different dynamics, but sometimes it can be result of sophisticated *modus operandi* of organized crime groups or individual

[1] Љупчо Арнаудовски. "Криминалитетот "Трговија со луѓе" – проблеми во дефинирањето" *Родова перспектива на трговијата со луѓе* (2004): 47.

offenders. In different words individual and social development in every area of human existence can provoke changes in the criminal area.

Analyzing the number of registered crimes of human trafficking, we could conclude that this crime had its culmination in 2003. Namely, starting from 2002 when 18 crimes were committed the phenomenon had its increase for 75% in the next year. In 2004 the number decreases for 45.2% compared to the year before. This decreasing trend continues in 2005 when human trafficking declines for 63.2%. The period 2006-2012 is a period with the lowest percentage of these crimes.[2]

Trafficking of children until 2008 was not a specific crime, but was a part of human trafficking (art. 418-a). Starting from 2008 it is a specific crime, although basically it is the same phenomenon. In the first year of statistical monitoring 9 crimes were noted. Same as the basic from of this crime, trafficking in minors had its period of decline with only 7 crimes committed in 2009, 3 in 2010 and only 1 in 2012.[3]

Analyzing the total number of crimes of human trafficking we can make a conclusion that although percentage share of human trafficking in the overall crime is very low, yet we must know that these crimes destroy human dignity and does not respect basic human rights.[4]

Structure is not a mechanical sum of scattered parts, but of facts placed in a system which shows the wholeness of the phenomenon. The complexity of human trafficking as a criminal process is a sum of different and individual acts which together create the circle of modern slavery. Because of this human trafficking can be structured using different criteria, as: the method of recruitment, the method of transport, the type of exploitation, victim's age, victim's gender, the number of offenders, the territory where its committed etc. We will classify human trafficking using the type of exploitation because it is the main purpose of traffickers.

Regarding most often types of exploitation we can conclude that in the Republic of Macedonia when victims are adults they are sexually exploited and when victims are children they are sexually exploited and forced to work unpaid jobs and in inhuman conditions, at the same time.

Offenders 'gender has never existed as independent determinant but is always connected with economic, cultural and social conditions. Starting from long ago till today crime is seen as male's profession. Some authors give ratio 1:5 between female and male convicts, 1:10 for prisoners and 1:20 for juveniles. This difference is known as "gender gap" or "ratio gender-crime" which is one of the key themes of feminist criminology. Women commit fewer crimes; they give up without hesitation; they reach critical age earlier than men and rarely commit professional crimes. Maybe it is the result of different way of social upbringing of genders. Girls must be polite and calm, but boys must be strong. This is result of natural predestination of women to become pregnant. It is not only sexual education but a whole social codex.

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[2] Известувања од Министерството за внатрешни работи на Република Македонија со рег.бр.19.4 - 490 од 28.02.2011 година и рег.бр. 22.2 - 2486 од 28.09.2012 година.

[3] Известувања од Министерството за внатрешни работи на Република Македонија со рег.бр.19.4 - 490 од 28.02.2011 година и рег.бр. 22.2 - 2486 од 28.09.2012 година.

[4] Известувања од Министерството за внатрешни работи на Република Македонија со рег.бр.19.4 - 490 од 28.02.2011 година и рег.бр. 22.2 - 2486 од 28.09.2012 година.

Table n. 1

Offenders 'gender (human trafficking ar. 418-a and 418-g) in the period 2002-2012

Year	Offenders	Women	Percentage (%)
2002	33	1	3.03
2003	78	/	/
2004	42	3	7.14
2005	6	/	/
2006	4	1	25
2007	4	/	/
2008	4	1	25
2009	1	/	/
2010	/	/	/
2011	6	2	25
2012	6	1	16.7

Source: Ministry of Internal Affairs of the Republic of Macedonia

Table n. 2

Offenders age (human trafficking ar. 418-a and 418-g) in the period 2002-2012

		Age									
Year	Offenders	18 – 25 years	Per-centage (%)	26 – 35 years	Per-centage (%)	36 – 45 years	Per-centage (%)	Above 45 years	Per-centage (%)	Unknown	Per-centage (%)
2002	33	2	6.06	15	45.4	9	27.3	2	6.06	5	15.1
2003	78	6	7.7	23	29.5	26	33.3	7	9	16	20.5
2004	42	6	14.3	13	31	20	47.6	3	7.1	/	/
2005	40	1	2.5	1	2.5	2	5	2	5	34	75
2006	4	/	/	3	75	1	25	/	/	/	/
2007	4	/	/	3	75	1	25	/	/	/	/
2008	4	1	25	2	50	1	25	/	/	/	/
2009	1	1	100	/	/	/	/	/	/	/	/
2010	/	/	/	/	/	/	/	/	/	/	/
2011	6	1	16.7	2	33.3	2	33.3	1	16.7	/	/
2012	4	/	/	2	50	/	/	2	50	/	/

Source: Ministry of Internal Affairs of the Republic of Macedonia

Regarding traffickers in the Republic of Macedonia two age groups are dominant. The first one from 26 to 35 years covers the period when ones necessities are bigger then possibilities, so crime is seen as an exit in some cases. The second one (36-45) is the period of maturity when people have stabilized life so intentional and planed crimes are reality.

On the other hand, the concept of victimization risk is connected with the possibility of someone becoming a victim of crime and is connected with predictions of potential injury. Using it we can statistically analyze which groups are vulnerable of specific type of crime. However such estimations are not always connected with special characteristics of a potential victim or with interaction and relations between the victim and the trafficker.

Table n. 3

Victims gender (human trafficking ar. 418-a) in the period 2002-2012

Year	Victims	Men	Percentage (%)
2002	41	/	/
2003	132	/	/
2004	17	/	/
2005	6	/	/
2006	4	/	/
2007	6	/	/
2008	1	/	/
2009	1	1	100
2010	/	/	/
2011	2	/	/
2012	3	2	25

Source: Ministry of Internal Affairs of the Republic of Macedonia

Table n.4

Victims' age (human trafficking ar. 418-a) in the period 2002-2012

Year	Victims	Minors	Percentage
2002	41	6	14.6
2003	132	24	18.2
2004	17	3	17.6
2005	6	/	/
2006	4	1	25
2007	6	3	50
2008	1	1	100
2009	1	/	/
2010	/	/	/
2011	2	/	75
2012	3	/	62.5

Source: Ministry of Internal Affairs of the Republic of Macedonia

Table n.5

Victims' age (human trafficking ar. 418-g) in the period 2002-2012

Year	Victims	1 – 7 year	8 – 14 year	14 – 17 year
2008	11	/	4	7
2009	7	/	/	7
2010	5	/	/	5
2011	6	/	/	6
2012	5	/	/	5

Source: Ministry of Internal Affairs of the Republic of Macedonia

High risk group are children between 13 and 18 years of age coming from poor and dysfunctional families, and children without parents' care. In their families' social and economic problems, domestic violence, socio-pathological phenomena are everyday life. Also, children with low grades at school or ones that are not part of the educational process are potential trafficking victims.[5]

Roma minors are also vulnerable group because of their tradition to enter in marriage on early age going afterwards in Western European countries where they become victims of human trafficking. Mostly adult unemployed people with no education or low level of education, between 18 and 33 years of age, accept working in the country or abroad using intermediaries not knowing the work conditions. In this way they became victims of human trafficking for the purpose of forced labor.[6]

Synonims or mutations? The case of D.B.L.

The biggest process before Macedonian courts happened for the period between 2000 and 2001, a period when human trafficking was not incriminated. The offenders were accused for crimes incriminated in article 191 paragraph 1 and 3; procedures at the beginning were individual and later were merged into one criminal procedure which took place before the Primary Court in Bitola in the period between 2003 and 2004.

I. Prosecution act

1. D.B.L. – article 191 p.1 and p.3 from the Penal Code of Macedonia;
2. R.V – same;
3. K.P. – same;

DBL in January 2000 bought victim A from a person in Kumanovo, then he brought her in his night club in the village of Veleshta, where she was kept captive and forced to give sexual services to clients until July 2000. Afterwards he gave the victim to RV and KP who took her to the night club of the first one where she was again forced to give sexual services to clients, mostly KFOR soldiers. In November 2000 she was brought back to DBL who continued with exploiting her until June 2001, when the victim managed to escape.

[5] National Reporter. *Yearly report.* (Skopje, 2012), p. 13.
[6] *Ibid,* p. 14.

Statement of victim A (21, Moldova) - because she was not being possible to find employment in her country she applied for a job in Italy. She found the job in an advertisement in a newspaper. The transport was going through Romania, Hungary and Serbia; all borders were crossed legally with her original passport. Then they crossed to Bosnia and Herzegovina, where she was told that she can go to Italy, but illegally. The victim accepted the offer. The problem started when she realized that she was not transported to Italy, but back to Serbia where her passport was taken and then she was taken to Kumanovo using an illegal crossing path. The next day she was chosen by few people and was taken in Veleshta. In the night club DBL told her that she will work as a dancer, but if some of his clients ask for sexual services she will accept. The price for her services was 120 German marks for an hour or 200-300 for a night. When she tried to say no she was beaten. After a period of time she and other girls were asked if they want to go Ohrid and work there as dancers. Thinking that she will not have to give sexual services, the victim A accepted the offer. Arriving in Ohrid she realized that she will have to give sexual services to KFOR soldiers. Beatings continued. In few months' time she was taken back to Veleshta where the exploitation continued. In December 2000 after a raid in the night club where she was deported from Macedonia and she was given a ban to enter Macedonian territory in a period of two years. She and few other girls were taken to the border with Serbia where a person told them that it is not safe to cross borders walking and managed to persuade them to get into his car. Making that move victim A was taken back to Veleshta where she continued to give sexual services till the beginning of 2001 when she managed to escape and using a bus to get to the Moldavian Embassy in Skopje. During the sexual exploitation she got pregnant and had an abortion.

II. Prosecution act

1. D.B.L. – article 191 p. 1 and p. 3 from the Penal Code of Macedonia;
2. R.V – same;

The victim worked for a month and a half as a waitress in the night club, but after a period of time DBL forced her to work as a dancer and later as a prostitute. Her passport was taken away and after few months she was sold to RV and worked in his night club. In August 2000 she managed to escape.

Statement of victim B: in 2000 victim B met DBL's brother in Bulgaria where he gave her his phone number and invited her to his hotel in Struga, Republic of Macedonia. She accepted the invitation and in May 2000 came to Macedonia and started a sexual relationship with him. Few months later he offered her a job as a waitress in DBL's night club in Veleshta. Although she refused, at the end accepted to work there for a month and a half and then go back to Bulgaria. But later DBL using physical force made her to work as a dancer and later to give sexual services. During her sexual exploitation she tried to kill herself, got Hepatitis and in August 2000 was sold to RV. There saying that she will go to buy cigarettes managed to go out, enter in a cab and drive off to Ohrid where she told the police what is happening in Veleshta.

III. Prosecution act

1. D.B.L. – article 191 p.6 in connection with p. 1 Penal Code of the Republic of Macedonia;
2. Zj.N. – same;
3. R.V. – same;
4. K.P. – article 191 p.1 from the Penal Code of the Republic of Macedonia.

DBL gave employment to several number of women in his night club in Veleshta. Seven of them were foreign citizen who were forced to give sexual services. ZjN and RV did the same in their night clubs in Struga and Ohrid. KP was part of their activities.

Statement of victim C (22, Moldova): a woman who was working in Italy gave her information that she can help her to find employment as maid. The victim accepted the offer after which she was taken to Chisinau where she met another man who was supposed to take her to Romania. She entered Romania legally then Serbia and at the end Macedonia, where she entered illegally using mountain routes.

Statement of victim D (23, Moldova): same as victim C this victim was approached by a woman who supposedly worked in Italy. When victim D accepted to go and work there she was illegally taken to Macedonia using the same transit points from Romania through Serbia and then Macedonia. She was taken to DBL's night club where her passport was taken away (DBL gave her a copy so she can send money at home). She was forced to give sexual services to clients.

Statement of victim E (23, Romania): she travelled from Timisoara, Romania to Belgrade, Serbia for shopping. In the bus she started a conversation with a woman who sad that is coming from Romania. Arriving in Pancevo the woman met someone and she introduced him as her close friend. Because victim E was planning to stay few days in Pancevo she accepted the offer to stay in his apartment. The next morning she found out that there are six other girls in the apartment, the man she met was called P and he took her passport and personal items. She stayed there for several days; everyday people were coming and were buying girls. The victim was sold in the Republic of Srpska in September 2000. There she managed to escape from the apartment where she was held, went to Banja Luka and informed the police. They gave her documents and money and together with a police officer sent her to Belgrade. When they arrived in Belgrade, the officer they were with took them to P. P and sold her in Macedonia where she entered legally with forged passport (her photo, but other personal information).

Statement of victim F (23, Moldavia): as many others also she was offered a job in Italy, but this time as a babysitter. Using her passport she entered legally in Romania and Serbia, but afterwards using mountain routs she was transferred in a village near Kumanovo. From there with another girl were transported in Struga where DBL forced them to give sexual services.

Statement of victim G (20, Moldova): the *modus operandi* of the organized criminal group is the same as in the cases before. But, what is interesting in this case is that the victim stated that she was not forced to give sexual services.

Statement of victim H (19, Romania): using the same methods of recruitment this girl was recruited as the one in P's apartment. Using a passport with her photo, but other personal data she entered legally on Macedonian territory. ZjN was at the border waiting for her. She was taken to Veleshta where she was sexually exploited and beaten by DBL. Her clients were mostly coming from Albania, but also they were NATO soldiers. In one period of her exploitation she was working in ZjN's night club. What it is important in her statement is the fact that during the crossing of the Serbian border she and the other girls were asked what they will work in Macedonia. When the answered that their employment is as dancers the custom officers took them in another room and made them dance.

I. Prosecution act

1. D.B.L. – article 191 p.1 in connection with article 22 from the Penal Code of the Republic of Macedonia;

2. I.F. – same.

During the month of October 2001 until February 2002 victim A was held up against her will, forced to give sexual services to clients in exchange of money which were taken by the accused.

II. Prosecution act

1. D.B.L. – article 191 p. 1 from the Penal Code of the Republic of Macedonia

During 2001 two Romanian citizens were held against their will and sexually exploited by DBL.

III. Prosecution act

1. D.B.L – article 191 p. 1 from the Penal Code of the Republic of Macedonia

All procedures coming out as result of the above mentioned prosecution acts in 2003 were merged in one procedure before the Primary Court in Bitola. DBL was accused for crime of article 191 p.1 in connection with p.2 and p.3 from the Penal Code of the Republic of Macedonia. During the criminal procedure beside the already mentioned girls two more testified against DBL.

Statement of victim I (24, Moldova): she was working in a bar in Moldova at the time when someone promised her employment as waitress in Romania. But, she never started working there. Instead she was taken to Serbia and from there to Kumanovo, Macedonia, where she was bought by DBL. She said that she was sexually exploited in his nightclubs.

Statement of victim J (26, Moldova): because of her poor economic situation she accepted an offer to work in a home for old people. But, she ended up in Macedonia where she was taken illegally. After a raid in the night club in Veleshta she was deported to her country.

At the end of the criminal procedure the accused were sanctioned with:

1. D.B.L. – three years and 8 months imprisonment;
2. Zj.N. – 1 year imprisonment;
3. R.V. – same;
4. K.P. – same.

In March 2007 the Court of Appeal in Bitola decided to free DBL six months prior the end of his punishment. The Court concluded that the prisoner has had positive behavior, understood the punishment and paid his debt towards Macedonian society.

Analyzing this case we must conclude that what was happening was human trafficking. Using promises for better life and employment as a method of recruitment is one of the many acts from the definition in the Palermo Protocol. The *modus operandi* of the organized group is similar to those of other group that committed human trafficking in years when it is incriminated as crime. The victims are foreign citizens who are sexually exploited in night clubs in the Western part of the Republic of Macedonia. They cross the border legally sometimes using their original passports sometimes using forged once. Arriving at the place where they should work as dancers, their passports are taken away, they are forced to give sexual services because they need to pay off their debt for the transport.

The punishment of three years and eight months of imprisonment does not fit the seriousness of the crime *de facto*, although *de jure* the accused was punished for different crime. The organized crime group connected with DBL was operating in a period of time when the international community knew about the existence of human trafficking, international documents were in draft versions or were opened for signing by states, but most of them still did not have implemented the obligations given with the international document.

Conclusion

The period 2004 – 2006 is marked by the transnational trafficking in human beings and all the victims are foreign citizens. From 2007 till 2011 all the victims are domestic. It is obvious that trafficking of foreign victims became too dangerous and complicated for criminal groups, especially because of the need of legal or illegal border crossing, the need for forged documents, bribing officials at the borders etc. The internal trafficking in human beings allows easier transport of the victims, also when you are inside the borders of a country it is easier to hide your tracks in it, there is no need for bribing officials during crossing borders. But, internal trafficking has a very important weakness; the victims that are exploited in their own country of origin are not so vulnerable in terms of the language spoken in the country of exploitation, which weakness is always used during a transnational trafficking in human beings.

Also, we must mention the good functioning of the law enforcement, especially in cases of proactive investigation, the many actions in the night clubs, bars, where many victims have been found, the international cooperation, greater control of the borders. This situation has also been recognized by the US State Department in its Year Reports where the actions of national governments in the process of prevention and suppression of the modern slavery are valued.

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Combating and sanctioning migration and related criminal phenomena

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Abstract:

Due to the fact that migration has grown, it is necessary to establish the correct constitutive elements of the criminalization of migrant trafficking in the Romanian legislation, as well as the elements whereby this act differs from others with similar content, such as trafficking in persons or procuring, and setting up an organized criminal group. The main element is the social value that the legislature intended to protect by criminalizing the act, namely the state border, a value which prevails over the freedom of the individual and which essentially distinguishes between the offence of migrant trafficking and the offence of human trafficking despite the similarities of the material element of the two offences.

Therefore, a correct assessment of the connection between the offence of migrant trafficking and human trafficking is required in order to hold or not the concurrence of the two acts in case the illegal crossing of the state border involves victims of human trafficking or child trafficking.

Keywords: *migrant trafficking, human trafficking, procuring, patrimonial benefit, inhuman or degrading treatment, freedom, criminal liability.*

General considerations on the need to criminalize the offence of migrant trafficking

Providing entry into the territory of a state under fraudulent conditions, by violating the law, of a person who is not a national of that state or who is not a resident in that state, may give rise to threat to state authority, state of threat that must be prevented by the criminalization of this kind of acts. This justifies the criminalization and sanctioning under criminal law of migrant trafficking, regardless of whether the person who assists illegal border crossing aims or not at obtaining a material benefit from his activity.

The regulations on the migrant trafficking offence as provided by the 2009 Criminal Code are similar to those on the same offence by Government Emergency Ordinance no. 105 of 2001. The criminalization was taken over by the 2009 Criminal Code which outlined distinctly the offences regarding state border, thus creating in Title III – Offences regarding the authority and the state border – Chapter II which reunites state border offences, regulating the acts consisting in illegally crossing the state border – art. 262 of the Criminal Code, migrant trafficking – art. 263 of the Criminal Code and facilitating illegal stay in Romania – art. 264 of the Criminal Code.

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The social value prejudiced by the commission of this act is the common element that determines the placement of the three acts in the same chapter. As for the offence of migrant trafficking, one should understand the legislature's option regarding the treatment of this crime as a state border offence, not as a crime against the person, the exploitation of a vulnerable person. Migrants are characterized by a state of vulnerability caused by their economic situation in particular, situation that makes them try to cross the state border fraudulently, illegally. This state of vulnerability is exploited by the perpetrator, therefore seemingly the freedom of the individual should have been first protected. However, the political and social movements taking place internationally justify the orientation of the legislature to consider this crime as a state border offence. State border security, the prevention of actions which aim at illegally crossing state border appears as a priority in the current conditions. It even exceeds in importance the protection of vulnerable persons due to the situation of migrants.

Legal framework and sanctioning of the offence in the Romanian legislation

The offence of migrant trafficking was first reflected in the provisions of GEO no. 105/2001, and the act was "the recruitment or guidance of one or more persons for the purpose of illegally crossing the state border, and the organization of these activities"[1]. The Criminal Code took over this regulation, but it provided in detail the material element, including, in addition to recruitment or guidance, the acts of transportation, transfer of or accommodation provided to a person, and giving up the provision on the activities of organizing them in the material element of the offence.

Thus, in the current Code[2], the offence of migrant trafficking consists in the recruitment, guidance, transportation, transfer of or accommodation provided to a person for the purpose of illegally crossing the Romanian state border and is punishable by imprisonment from 2 to 7 years. In its aggravated forms[3], the offence covers the act for the purpose of obtaining, directly or indirectly, a patrimonial benefit; by means which jeopardize the life, integrity or health of migrants; by subjecting migrants to inhuman or degrading treatment, and in these cases, the punishment is imprisonment from 3 to 10 years and deprivation of certain rights.

As for the aggravated forms of the offence, the current Code differs from the previous one, since it provides a new aggravated form – committing the crime in order to obtain, directly or indirectly, a patrimonial benefit – and renounces the criminalization in the aggravated variant of the situation where the act resulted in the death or suicide of the victim.

The legislative solution is justified in both cases. For the variant in which the perpetrator acts for the purpose of obtaining, directly or indirectly, a patrimonial benefit, it was necessary to establish a difference in the sanctioning treatment as compared with the situation when he commits the act without such a purpose. It is known – and judicial practice confirms this - that in most cases, migrant trafficking is committed while aiming to obtain a patrimonial benefit. The perpetrator is aware that he violates the law and puts in jeopardy the state border, but this behaviour is

[1] Pursuant to art. 71 of Government Emergency Ordinance no. 105/2001.
[2] Pursuant to art. 263(1) of the Criminal Code.
[3] Pursuant to art. 263(1) of the Criminal Code.

determined, most often, by the perspective of material gains. However, there are situations where the perpetrator commits the same actions for the purpose of illegally crossing the state border, without seeking a material benefit, but, on the contrary, animated by feelings of mercy, compassion for the situation of the migrant, the wish to help him. It is obvious that, in terms of sanctions, a distinction must be made and a more severe punishment must be inflicted where the patrimonial benefit is the purpose of the perpetrator, and this distinction is illustrated by the distinct provision, as an aggravated form, of the situation where the act is committed in order to obtain, directly or indirectly, a patrimonial benefit.

Regarding the situation in which the act is likely to jeopardize the life or safety of migrants or to subject them to inhuman or degrading treatment, and it has resulted in the death or suicide of the victim, it is no longer provided for in the current Code as an aggravating circumstance of the offence. Therefore, if the perpetrator uses means that jeopardize the life, integrity or health of migrants or subject the migrant to inhuman or degrading treatment, and his act results in the death of the victim, he will also be charged with the offence of migrant trafficking and the offence of bodily injury or bodily injury causing death.

By criminalizing the offence of migrant trafficking, the aim is the protection of social relations concerning respect for the public authority whose activity consists of the supervision and control of state border, the protection of which depends on the interdiction of the acts of illegal migrant trafficking[4].

The offence is an offence of jeopardy, the protection of the social value is required too where there is no illegal crossing of the state border, but this purpose is only pursued, a purpose that already leads to the creation of jeopardy necessary for the existence of the offence.

From this standpoint, the main passive subject of the offence is the state, which is the holder of the social value protected by law, and the secondary passive subject is the migrant with regard to whom, in the aggravated forms of the offence, there are means used which are likely to jeopardize the life, integrity or health or who is subjected to inhuman or degrading treatment.

The material element of the offence in the new criminalization can be achieved by committing, alternatively, one of the following actions, namely recruitment, guidance, transportation, transfer of or accommodation provided to a person for the purpose of illegally crossing the Romanian state border.

The actions consisting of recruitment, transportation, transfer, accommodation or receipt make the material element too in the offence of human trafficking or child trafficking, the difference being that it does not refer to a migrant, but to a person or a minor who has Romanian citizenship or is a resident in Romania, and the purpose for which the perpetrator acts is that of exploiting the trafficked person. By "exploiting a person, one understands:

a) subjecting him to the performance of a work or performance of services forcibly;

b) keeping him in a state of slavery or other similar procedures, i.e. deprivation of liberty or servitude;

c) forcing the person into prostitution, pornographic manifestations in the production and dissemination of pornographic materials or other forms of sexual exploitation;

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[4] Dobrinoiu V., Neagu N., *Drept penal. Partea specială,* Ed. Universul Juridic, Bucureşti, 2012, p. 319.

d) forcing him into begging;

e) retrieval of organs, tissues or cells of human origin, illegally.[5]"

So, what distinguishes migrant trafficking from human trafficking or child trafficking and is essential for the existence of the offence of migrant trafficking is that all actions of the perpetrator are subordinated to a purpose – that of illegal crossing of the Romanian state border. The illegal crossing of the Romanian state border means both the entry and the exit from the Romanian territory through places other than those stipulated by law or places for this purpose, but fraudulently[6].

In terms of guilt, the perpetrator must act with direct intent, which means that he foresees and pursues that his actions will have a purpose, that of illegally crossing the Romanian state border by migrant persons. If the existence of this purpose is not proved, although there are material activities specific to the material element, the perpetrator cannot be charged with the commission of the offence of migrant trafficking.

In the judicial practice[7] it was established that although the defendant committed material acts that could be classified as the material element of migrant trafficking, they were not committed with the form of guilt required by law in order to entail criminal liability. Thus, although the defendant drove a van in which there were three migrants of Somali origin, it was not proved the he knew the purpose of carriage (of calls resulting that the defendant knew he had to load/unload a cargo from the van and the other defendant erroneously induced him to transport them, without communicating him the nationality of the persons transported, the fact that they were foreigners and they would cross the border illegally). Therefore, the court ordered the acquittal of the defendant, holding that the constitutive elements of the offence were not fulfilled.

Preparation acts in order to commit the offence are not punishable, but the attempt is sanctioned by the law[8], the legislature considering that the action materializing the decision to commit the offence, either interrupted or completed, but without producing an effect, is serious enough and jeopardizes the social value protected by law, therefore the punishment is justified.

The offence is committed when any of the criminalized actions are carried out, when the jeopardy is presumed as for the social value protected by law which represents the socially jeopardizing consequence of the offence.

The offence may be in a continued form, and in this case, at various intervals and in order to put into practice the same criminal decision, the perpetrator commits actions/inactions, each having the content of the migrant trafficking offence, actions/inactions committed against the same passive subject. The requirement of the single passive subject is considered to be met in case the offence prejudices different secondary passive subjects, but the main passive subject is only one[9]. In the case of migrant trafficking, the social value protected by law makes the state be the main passive subject of the offence, the migrant being just the secondary passive subject, which means that, if the offence is committed in a continued form, the offence has,

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[5] Pursuant to art. 182 of the Criminal Code.

[6] Griga I. in *Explicațiile Noului Cod Penal,* vol. IV, by Antoniu G., Toader T., Brutaru V., Daneș St., Duvac C., Griga I., Ifrim I., Ivan Gh., Paraschiv G., Pascu I., Rusu I., Safta M., Tănăsescu I., Vasiu I., Ed. Universul Juridic, București, 2016, p. 56.

[7] The High Court of Cassation and Justice, criminal section, decision no. 1649/2014, www.scj.ro.

[8] Pursuant to art. 263(1) of the Criminal Code.

[9] Pursuant to art. 238 letter b) of Law no. 187/2012 for the enforcement of Law no. 286/2009 on the Criminal Code.

besides the moment of completion, a moment of exhaustion represented by the termination of the criminal activity.

Criminal phenomena related to migration and criminal law means to combat them

Although the existence of the migrant trafficking offence does not require the fulfilment of a requirement regarding the pursuit of a material benefit, most often actions typical of the material element are committed for the purpose of obtaining such a benefit. Getting a patrimonial benefit, either directly or indirectly, from committing migrant trafficking is an aggravated form of the offence, the aim of the perpetrator, even if it is not achieved, entailing a more serious punishment (imprisonment from 3 to 10 years and the interdiction to exercise certain rights).

In case of seeking to obtain a benefit from migrant trafficking, considering the complexity of the actions and the risks involved in such activities carried out systematically, in order to obtain gains, the perpetrator does not usually act alone, but together with more people for the same purpose. Therefore, there are frequently associations of persons who intend to commit such acts, in which case the offence of trafficking in migrants will be accepted in concurrence with the offence of setting up an organized criminal group.

Setting up an organized criminal group consists of "initiating or constituting an organized criminal group, joining or supporting in any way such a group"[10], and an organized criminal group is "a structured group of three or more persons, constituted for a certain period the time to act in a coordinated manner for the purpose of committing one or more crimes"[11].

Moreover, the offence of setting up a criminal organized group jeopardizes public peace and order by simply initiating, setting up, joining or supporting in any form an organized criminal group, and it is not necessary for this group to fulfil the purpose for which it was set up. If the group organized for this purpose committed a crime, the law expressly provides that the rules of concurrent offences apply[12].

Judicial practice is constant to hold the concurrence between the offence of setting up an organized criminal group and the migrant trafficking offence[13].

Migrant trafficking is subordinated to the pursuit of a specific purpose, that of illegal crossing of the Romanian state border, the existence of this purpose jeopardizing the social value protected by law which is the immediate consequence of the offence. It is not necessary for the existence of the crime that the offender succeeds in what he pursued, namely to succeed in helping the migrants to fraudulently cross the state border. In case this aim is attained, the offence of migrant trafficking is held in concurrence with complicity in illegally crossing the state border[14] and, to the extent that for this purpose there were used means which themselves constitute offences (procuring fake IDs), the latter will also be concurrent with the former.

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[10] Pursuant to art. 367(1) of the Criminal Code.

[11] Pursuant to art. 367(6) of the Criminal Code.

[12] Pursuant to art. 367(3) of the Criminal Code.

[13] The High Court of Cassation and Justice, criminal section, decision no. 1543/2010, www.scj.ro; The High Court of Cassation and Justice, criminal section, decision no. 657/2014, www.scj.ro;

[14] Offence provided for and regulated under art. 262 of the Criminal Code.

Another issue that may arise in connection with trafficking refers to the situation where the illegal crossing of the state border is pursued in relation to persons who are victims of human trafficking or child trafficking. In such situations, the case law has found the solution of holding the concurrence of the migrant trafficking offence and human trafficking and/or trafficking of children[15]. In the legal literature[16], the fairness of this solution was appreciated, since the social values protected by criminalizing these acts are different and require, individually, protection under criminal law.

Placing the migrant trafficking offence among offences relating to state border crossing is not accidental or without important consequences. The social value protected by the criminalization of the migrant trafficking offence – the protection of the Romanian state border – represents the justification for holding the act in concurrence with other offences if, by committing migrant trafficking, certain fundamental rights of the person are infringed.

Conclusions

Therefore, migrant trafficking is not an isolated phenomenon and it is not a phenomenon that must be perceived separately from the context of commission. Migrant trafficking involves the performance of certain activities that may predict the content of other offences. The commission of these acts also prejudices other social values whose protection implies the sanctioning of those acts as offences. Setting up an organized criminal group, human trafficking, child trafficking, illegal crossing of the border, forgery of official documents, fake identity (in the phase of attempt or terminated) may be held along with migrant trafficking concurrently.

The discovery of the acts of migrant trafficking are linked to the discovery of some criminal groups and a complex of activities undertaken by them requiring proper classification of the acts – by relating to the identification of the prejudiced social values – and a punishment proportionate to the gravity of the acts committed. Suppression of this complex phenomenon seems impossible, what is possible is to decrease it by quick and appropriate punishment of the acts of migrant trafficking discovered and the whole complex of criminal activities carried out for the purpose of migrant trafficking.

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[15] The High Court of Cassation and Justice, criminal section, decision no. 1997/2014, www.scj.ro; The High Court of Cassation and Justice, criminal section, decision no. 1342/2014, www.scj.ro.

[16] V. Dobrinoiu, N. Neagu, *op. cit.,* p. 321.

Migrant work relations – pursuing balance of interests

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Abstract:

Europe is facing today a phenomenon called "mixed migration" where large numbers of different categories of migrants without travel or identity documents come together at state borders. There is significant inconsistency between migrant protection defined by international law and the one carried out in practice, due to factual, primarily economic, circumstances in receiving countries. After analyzing formal legal (non)recognition of different categories of migrants in international, and national laws, the author will indicate specifics in realization of migrants' right to work, and how it affects legal and economic systems of the receiving countries.

Keywords*: migrants, migration, right to work, migrant status, precarity, dependence, security risks.*

Migrations today, mostly due to increasing number of civil conflicts, consist of large number of persons who spill over international borders within hours or days and find their ways much further from their homeland then it was the case during and after World War II[1]. It is not uncommon to have more than 1.000 people arrive at international border per day, a situation which is considered by the UN Refugee Agency (UNHCR) as „massive influx"of migrants. For example, European Union solely has received more than 1 million migrants during 2014 and 2015.

What is today called "migration" and "migrants" considers different categories of persons, their legal and factual status conditioned by legal and social circumstances, without uniform legal regulation. There is significant inconsistency between migrant protection defined by international law and the one carried out in practice, due to factual, primarily economic, circumstances in receiving countries. Current situation indicates that migrants, because of their poor economic and existential conditions, present security risks for receiving countries, which, at the same time, lack proper humanitarian infrastructure for protecting migrants' rights, especially to provide migrants with essential living conditions, such as right to work.

After analyzing formal legal (non)recognition of different categories of migrants in international, and national laws, the author will indicate specifics in realization of migrants' right to work. We shall see that there is certain discrepancy between

[1] J. I. Goldenziel, Displaced: A Proposal for International Law to Protect Refugees, Migrants and States, forthcoming in *Berkeley Journal of International Law*, 2016, available at SSRN: http://ssrn.com/abstract=2768162 .

international and national levels of protection that goes to the detriment of migrants, resulting in their particularly precarious position turning migrants to committing crimes and contributing to other negative consequences for the receiving countries.

Migrants in international and national law

The term "migrant" usually denotes a person who crosses international borders due to various reasons, in legal (legal migrants) or illegal (illegal migrants) manner[2]. Migrants are persons involved in global migration process *i.e.* different modalities of temporary or permanent movement of individuals or groups in space. Migrations can be, due to various criteria, internal and external, forces of voluntary, labour, legal and illegal.

There are two basic principles applied to migrations in international law, but opposing each other. The principle of freedom of movement and residence within the borders of the state *i.e.* right of person to leave the country and returns, is guaranteed in numerous international conventions, starting with Universal Declaration of Human Rights (art. 13). On the other hand, every state has the right to pose certain limits for entering and leaving its territory, in accordance with human rights standards, as one of the sovereignty prerogatives. Therefore, international law guaranties to individual the right of free movement, but not the right of entering a state other that state of nationality.

International law doesn't attribute special meaning to the term "migrant", usually this term connotes inhomogeneous group of migrants that voluntarily and ones that forcibly leave part or the whole of their country's territory[3]. Global migration crises includes three primary groups of migrants: refugees, economic migrants and migrants fleeing violence. Lately, practice includes also migrants fleeing climate change. Not all these categories receive protection based on international law norms, nor the same level of protection. Refugees enjoy full protection based on international refugee law, while status of migrants fleeing from violence is not legally recognizable, therefore protection afforded to them is significantly lower.

International refugee law, based on 1951 Refugee Convention[4], protects only refugees – those who cross international borders due to well-founded fear of persecution on the basis of race, religion, national origin, political opinion or membership in a particular social group. Refugees are unable to avail themselves of the protection of their state, nor enjoy benefits of citizenship, therefore they have strong and just moral claim for international protection, especially because their migration is forced. Core provision of international refugee protection is that a refugee cannot be returned to a place where her life will be endangered (non-refoulment), followed by receiving states' obligation to provide legal personal and travel documents for refugee, also right to work, to housing and access to courts. Refugee has, according to 1951 Refugee Convention, the right to

[2] http://www.oxforddictionaries.com/definition/english/migrant (visited 15.05.2016).

[3] I. Krstić, Zaštita prava migranata u Republici Srbiji, priručnik za državne službenike i službenike u lokalnim samoupravama, Međunarodna organizacija za migracije – Misija u Srbiji, Projekat „Jačanje kapaciteta institucija Republike Srbije za upravljanje migracijama i reintegraciju povratnika" (CBMM), Beograd 2012, 12.

[4] Convention Relating to the Status of Refugees, Resolution 2198 (XXI), 1951, adopted by the United Nations General Assembly.

seek asylum, but no state has the legal obligation to grant it, because conditions and procedures for granting asylum are an expression of states' sovereignty[5].

Other categories of migrants, unlike refugees, do not, usually, have ties to their state of origin severed. In case of economic migrants, migrants fleeing violence and migrants fleeing climate change, state of origin can be, and usually is, very much interested in providing them with legal protection.

Economic migration considers leaving place of usual residence for settling outside in pursue for better living conditions. In includes, in addition to migrant workers, also students and season workers. This form of migration is usually voluntary, therefore moral claim for international protection is not as strong, especially because state of origin or usual residence is interested in preventing this kind of migration[6]. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990)[7], adopted under the auspices of the United Nations is the only international document that specifically names migrants as subjects, therefore international law recognizes the status of migrant workers[8].

People displaced by violent conflicts and fleeing from general violence and persecution, while their country of origin has no means to offer them protection, make for special category of migrants, whose status is not regulated by international law[9]. They have strong moral claim for international protection, as do refugees, especially because the violence they are fleeing from is usually one considered by international community as a threat to international peace and security in accordance with art. 1 of the United Nations Charter. Most of these displaced people cannot be legally qualified as refugees[10], even thou their position can be, basically, the same as position of people fleeing from persecution based on race, religion or other circumstance, and are left outside the scope of 1951 Refugee Convention[11]. Migrants fleeing climate change are also not recognized by international law, and face similar problems as migrants displaced by violence, both categories of migrants being victims of circumstances that affect them collectively, even thou state of origin or usual residence is willing to protect them, but lacks means.

As was already stated, international law recognizes, within international conventions, refugees and economic migrants. Other categories of displaced people are recognized by legal documents that are of lower coverage than international conventions and much less

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[5] Asylum seekers also fall under the broad term "migrant", but are categorized as political migrants, while asylum seeker status can be additional to other status, such as refugee or migrant fleeing violence.

[6] Economic migration is, from the state of usual residence's standpoint considered as "brain drain".

[7] International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, U.N.G.A. Res. 45/158, UN GAOR Supp. No. 49 A, UN Doc. A/45/49 (Dec. 18, 1990).

[8] In addition, there are also certain binding and nonbinding documents from the International Labor Organization, that refer to this category of migrants, see fn. 21.

[9] Unless they present the claim for asylum, in which case they become asylum seekers, or acquire refugee status in the meantime.

[10] For example, during 2015, out of 60 million people who have applied to UNHCR, only 13,7 million have been registered as refugees, see more in J. I. Goldenziel, *op. cit.*

[11] UNHCR practice seems to confront this statement, because today UNHCR is often accused of eroding international refugee protection by shifting the focus from legal protection of refugees to humanitarian aid. Agency justifies this shift in focus by the need to help as much migrants in need as possible. Therefore, UNHCR is also accused of politicizing its work, that it has made itself an agent of the world's major powers who are its most significant budget donors, see more in J. I. Goldenziel, *op. cit.*

ratified[12]. In 2011, European Union (EU) has adopted a set of Directives focused on curbing migration, but allowing for subsidiary protection for people fleeing generalized violence who do not qualify for refugee status[13]. Case law has showed that EU states weren't following Directives, and many states have opted out. In international community today there are initiatives for adoption of special international convention in order to regulate status and rights of displaced people, especially for protecting human rights of migrants while, at the same time, protecting interests of receiving states[14]. Currently, migrants applying for refugee status or asylum present significant burden for legal system and economy of receiving states, even ones that are considered economically strong.

People who come to European borders and territories in, so called, "migrant waves", mostly from Africa and Asia, should enjoy rights, as well as obligations, contained in international human rights law, being, *de facto*, under European states' jurisdiction, whether they entered that jurisdiction legally or not and whatever status they may hold. Hence, international human rights law relevant for migrants comprises guaranties in Universal Declaration of Human Rights (1948)[15], International Covenant on Civil and Political Rights (1966)[16], International Covenant on Economic, Social and Cultural Rights (1966)[17], as well as in International Convention on the Elimination of All

[12] Mostly of regional character, non-binding, states are not much interested in their adoption and implementation. Apart from European Union, these kind of documents exist in Organization for African Unity (Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969) and in Latin America (Cartagena Declaration on Refugees, 1984), see more in J. I. Goldenziel, *op. cit.,* fn. 32.

[13] EU Directive 2011/95/EU. These Directives afford subsidiary protection to people who can prove rasonable threat that returnig to country of origin or usual residence presents risk from serious injury preventing them from availing themselves of that country's protection. Therefore, economic migrants are left outside the scope of Directives, and included involuntary migrations, making Directives broader in scope than 1951 Refugee Convention.

[14] Peter Singer and Renata Singer, The Ethics of Refugee Policy, in Mark Gibney, ed., Open borders? Closed societies?: The ethical and political issues (1988), at 111- 30; James C. Hathaway & R. Alexander Neve, Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection, 10 Harv. Hum. Rts. J. 115 (1997); Peter H. Schuck, Refugee Burden-Sharing: A Modest Proposal, 22 Yale J. Int'l. L. 243 (1997), see more in J. I. Goldenziel, *op. cit.*

[15] The Universal Declaration of Human Rights, adopted by the United Nations General Assembly on 10 December 1948. Declaration guaranties right to life, freedom and security of person, forbids slavery, torture and other cruel treatments, forbids discrimination, forbids arbitrary arrest, detention or exile, right to a fair trial, right to family and private life, freedom of movement, right to a nationality, right to marry and to found a family, right to own property, right to freedom of thought, conscience and religion, right to freedom of opinion and expression and peaceful assembly, as well as political rights. Also, right to social security, right to work and rights associated with employment, right to education and free participation in the cultural life of the community. Article 14 guaranties right to seek and to enjoy in other countries asylum from persecution, unless prosecutions arise from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

[16] *International Covenant on Civil and Political Rights*, adopted by the General Assembly of the United. Nations on 19 December 1966. Covenant guaranties right to life and freedom from torture and slavery, right to liberty and security of the person, the right to habeas corpus, prohibits the use of imprisonment as a punishment for breach of contract, right to freedom of movement for legal aliens as well as citizens, right to a fair trial, forbids double jeopardy, right to be recognized as a person before the law, right of privacy, freedom of religion and freedom of expression, right to marriage, the rights of ethnic, religious and linguistic minorities, special protection of children.

[17] The International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, adopted by the General Assembly by its resolution 2200 A (XXI) of 16 December 1966. Covenant guaranties right to work, right to the enjoyment of just and favorable

Forms of Racial Discrimination (1969), Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, 1979), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), Convention on the Rights of the Child (1989), Convention on the Rights of Persons with Disabilities (2006) and International Convention for the Protection of All Persons from Enforced Disappearance (2007). Also, Treaty of Lisbon and Charter on Fundamental Rights, as well as European Convention for the Protection of Human Rights and Fundamental Freedoms, are relevant for European legal sphere.

Global Commission on International Migration (GCIM) obliges states to protect human rights of migrants by strengthening normative human rights framework and applying it in nondiscriminatory manner. Therefore, all states have responsibility to protect people who are on their territory, in order to reduce risks that induce migrations, protect migrants who are in transit over their territory and to protect human rights in destination countries[18].

Migrants who enter territory of any European state, reside in it longer or shorter period of time depending on request towards the receiving state. Expectedly, migrants who have gained the status of asylum seekers or ones that have their refugee request under consideration, will be present on the territory of receiving state for the (un)definite period of time. Migrants fleeing from violence that takes place in their home country fear from returning from borders as illegal migrants. In this respect, every migrant must enjoy certain existential security, provided either by the receiving state either on their own, usually in illegal manner. Aside from fundamental human rights, receiving state must provide migrants with accommodation and certain material support, which can come as burden for receiving state, depending on her economic strength. In these circumstances, temporary right to work for migrants or displaced people is considered as necessary and desirable for both parties. Starting premise is that every migrant, irrespectively of his status, can be temporary employed[19].

Working status of migrants

What Europe is facing today is phenomenon called "mixed migration" where large numbers of asylum seekers and economic migrants without travel or identity documents come together at state borders. The situation is aggravated by the

conditions of work, right to form trade unions and join the trade unions, right to social security, special protection of motherhood, children and family, right of everyone to an adequate standard of living for himself and his family, right to the enjoyment of the highest attainable standard of physical and mental health, right to education.

[18] Global Commission on International Migration, Migration in an Interconnected World: New Directions for Action (2005), 81, par. 24.

[19] Study conducted in the United Kingdom during 2010-2012 shows that there are several categories of migrant workers that can be identified due to immigration legal rules: asylum seekers (people who have made a claim for asylum and are awaiting a decision), refused asylum seekers (whose claim for asylum has been refused), refugees, then irregular migrants (people whose visa has expired or that have entered the country in illegal manner) and trafficked migrants, Economic and Social Research Council (ESRC), 'Precarious Lives: Asylum seekers and refugees' experiences of forced labour'.Economic and Social Research Council-funded project, see more in H. Lewis, L. Waite, Asylum, Immigration Restrictions and Exploitation: Hyper – precarity as a lens for understanding and tackling forced labour, Anti-Trafficking Review, Special Issue, Forced Labour and Human Trafficking, No. 5.; Criminal Justice, Borders and Citizenship Research Paper No. 2732893. Available at SSRN: http://ssrn.com/abstract=2732893, fn. 6.

impossibility of distinguishing in practice migrants who come from humanitarian reasons from those who come out of economic reasons, as the migrant can decide that, due to the long duration of the asylum procedure, remain as an illegal migrant.

Legal status of migrants, as people coming to the borders of one country for different reasons and in different ways, is situated at the intersection of immigration and labor law, and in the broader context of human rights. Immigration norms, in addition to regulating the entry and exit from the country, create certain legal status that affects the employment and housing of migrants in the country where they are located. On the other hand, the evolution of international and supranational legal framework governing the rights and obligations of the parties involved in migration, undermines the position of states as independent creators of immigration norms.

International Covenant on Civil and Political Rights, as well as International Covenant on Economic, Social and Cultural Rights both apply to migrant workers and their family members, regardless of their status. International Labour Organization (ILO), in terms of its two Conventions, No. 97 and 143, also does not distinguish immigrants by citizenship or legal status, and provides for additional standards of protection for migrant workers[20]. Based on these ILO Conventions, Convention on the Protection of the Rights of All Migrant Workers and Their Families[21] was adopted under the auspices of the UN, which provides economic, social, cultural and civil rights for migrant workers, both legal and illegal. The Convention sets general framework of the rights of migrants, in the context of work engagement: prohibition of confiscation and destruction of identification documents except by the competent authority, protection from collective extradition, right to send remittances, right to being informed. However, the Convention retains the distinction between legal and illegal migrants, predicting a wider scope of rights for legal migrants (such as, for example, right to family reunion). Also, the Convention does not threaten national sovereignty, preserving the freedom of receiving state to regulate acceptance of migrants in the form of immigration regulations.

Thus, international framework does not, in terms of employment status and general civil and political rights, differ between legal and illegal migrants, maintaining a slightly higher scope of rights for legal migrants.

When a migrant enters the territory of the receiving state, and wants to engage in employment, he falls within the Temporary Migrant Working Programs (TMWPs)[22].

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[20] Convention no. 97 envisages equal treatment for citizens and legal migrants with regard to labor and social rights. Convention no. 143 provides for the protection of migrant workers with unresolved status. These two conventions are poorly ratified, so the actual scope of the protection they predict is arguable.

[21] The Convention entered into force in 2003, with 43 ratifications, although without ratifications from countries marked as ones that receive the largest numbers of migrant workers. Article 2 defines a migrant worker as "a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national", International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, U.N.G.A. Res. 45/158, UN GAOR Supp. no. 49 A, UN Doc. A/45/49 (Dec. 18, 1990). Having regard to poor ratification of the Convention, ILO has adopted in 2011. Multilateral Framework on Labour Migration, to serve as guidelines for decision makers regarding the rights of migrant workers, as a non-binding document.

[22] These Programs are currently found in a number of advanced industrialized, liberal democratic countries, see more in M. Zou, The Legal Construction of Hyper-Dependence and Hyper-Precarity in Migrant Work Relations, International Journal of Comparative Labour Law and Industrial Relations, Vol 31 (2), pp.141-162, 2015; available at SSRN: http://ssrn.com/abstract=2747823.

Migrant's status is, in itself, precarious, and these Programs, by regulating legal status, additionally create specific vulnerabilities in their work relations. These vulnerabilities are, in theory, referred to as "hyper-dependence" and "hyper- precarity"[23]. In general, the work of migrants is marked as precarious, in terms of the combination of instability, lack of protection, social and economic uncertainties associated with employment-related engagement[24].

Hyper-dependence implies a relationship of subordination in the worker-employer relationship that goes beyond the usual framework of employment. The key segment TMWPs is attachment of legal work and residence permit in the host country to the sponsorship of the employer. So, it creates a special bond with the employer, which is one of the conditions of the legal status of the migrant[25]. TMWPs also provide for certain *de jure* and *de facto* restrictions on labor mobility within the host country – in relation to work, the employer, sectors, labor market and labor shortages *i.e.* TMWPs are usually limited to a particular employer, occupation or sector. Accordingly, in the event of termination of employment, TMWPs provides that a migrant can be left for a certain period of time to find another employer sponsorship.

Hyper-precarity means poor, legal and practical, reliance of the worker on the protection of social rights and the transition to permanent status of residence. The employment relationship depends on work permits and visas, with possible extensions, and it gives employer discretionary power over the duration or possible renewal of employment[26]. This allows the employer to violate terms of employment (changing working conditions outside terms of the visa, paying less than the agreed amount, providing immigration authorities with false documents). Also, migrants find it difficult to participate in representative organizations of employees (whether for reasons of administrative and legal restrictions, by the employer, or limited period of approved residence or high membership fees).

In addition, legal pressures that follow migrant status, such as lack of citizenship rights, labor rights and other protection rights and social freedoms, (in) directly reduce the ability of migrants to leave the employment relationship, while, on the other hand, freedom of migrant in terms of the possibility of returning to the country origin, depends on the availability and quality of employment in the country of origin or another host country.

Bearing in mind the particularly vulnerable status of migrants, especially with regard to the employment status, which is essential for one's existence, migrants most often appear as victims of extreme exploitive situations. Exploitation of migrant workers occurs in the context of forced labor and slavery-like situations. International, as well as national law, in such circumstances, balances between two objectives: to protect basic human rights of migrants and to prevent unfree labor[27].

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[23] M. Zou, *op. cit*; H. Lewis, L. Waite, *op. cit.*

[24] *Ibid.*

[25] This form of the relationship between employee and the employer is described as an extreme socio-economic dependency where all aspects of worker's life are dependent on the relationship with the employer, see more in M. Zou, *op. cit,* 146.

[26] The temporary nature of the work permit restricts the scope of such protection, for example for some rights it is necessary that the working relationship lasts certain period of time.

[27] As a result of the great attention given to the fight against forced labor in the United Kingdom, and the fact that migrants are persons who are most susceptible to exploitation in the form of forced labor, Modern Slavery Act was adopted in 2015, see more in H. Lewis, L. Waite, *op. cit.*

Thus, international law has, particularly in the field of human rights, created a corpus of standards and measures aimed at the protection of persons working and residing in a country other than their country of citizenship. However, most important instruments that protect the rights of migrants are not widely ratified, with additional major political resistance in host countries. Moreover, international instruments that guarantee rights of migrants at the same time maintain states' prerogatives to independently create and implement their own admission procedures, which are not uniform either in matters of labor nor in other rights of migrants[28]. Thus, for example, in Greece, the work permit can be issued to asylum seekers, while in Italy it is not the case. Germany provides monthly financial assistance for housing, instead of employment options, while Slovakia and Hungary provide small subsidies and do not give working permits[29]. It is indisputable that receiving countries are in bad position where they have to protect the rights of migrants while at the same time they must protect their own interests and security. Contemporary threat of terrorism, which is increasingly linked with migrant flows, certainly does not contribute to the successful achievement of this delicate balance. In this regard, illegal migrants are in particularly difficult situation, because they usually are reluctant or completely refuse to exercise certain rights out of fear of sanctions foreseen by immigration norms.

Consequences for receiving states

When faced with expected longer period of uncertain living conditions, primarily caused by (im)possibility of exercising the right to work, migrants are not offered many options other than accepting working conditions that can be defined in terms of forced labor or engaging in criminal acts. Even though the UN regards right to work as a key human right, in most EU countries, asylum seekers have no legal opportunities for employment, while persons with refugee status must also obtain a legal work permit and to find a job, in practice is even greater difficulty. Qualifications and higher education degrees acquired from most of the countries of origin are not recognized by European companies, and migrants are forced to look for, and accept, jobs below their level of qualification[30].

Refused asylum seekers and illegal migrants are quickly faced with poverty, due to lack of right to work and support from the state in which they are located, and it is the main cause that's 'pushing' them into employment which can be characterized as exploitative, since they have no social contacts nor permits and enter the labor market, mainly "informal" one, with practically no ability to influence the work conditions. Most often they engage in temporary jobs, undeclared, poorly-paid, with unpaid overtime or minimum wage work. On the other hand, migrants who have permission to stay, for example refugees, are confronted with obstacles in finding a decent or adequate job due

[28] For example, Spain has decided to legalize unregistered foreign workers without the consent of other EU countries, Laura Jakubowski, "International Commerce and Undocumented Workers: Using Trade to Secure Labour Rights" (2007) Vol. 14 #2 Indiana Journal of Global Legal Studies, 521, according to R. David, Human Rights of Migrant Workers: The vicious cycle of powerful state sovereignty, lack of ratification and weak enforcement, available at: http://ssrn.com/abstract=1593693, fn. 21, 6.

[29] V. Aggarwal, F. La China, L. Vaculova, Irregular Migration, Refugees and Informal Labour Markets in the EU: The ride of European Sweatshops?, European Institute for Asian Studies, http://www.eias.org/wp-content/uploads/2016/04/Irregular_Migration_Website-1.pdf.

[30] *Ibid.*

to language barriers, lack of recognition of qualifications and degrees, inability to explain gaps in CVs (for example, time for processing the asylum claim), and usually end up in low paid jobs under their qualifications.

On the occasion of the incidents that took place in Germany, in which were migrants from the "last" migration wave that struck Europe involved, a senior police officer said: "*They have no chance of gaining asylum, they cannot work here, they have no perspective , not here, not at home, so they have to make their living through crime.*"[31]. Statistics, unfortunately, confirmed this: that in 2015, 208,344 crimes were committed by migrants in Germany, of which 85,035 are criminal offenses of theft, a 52,167 are crimes against property and counterfeiting[32].

If the concept of "economic model of participation in criminal acts[33]," is introduced to this analyses, *i.e.* that individuals make rational choice between the commissions of criminal acts and engaging in employment depending on the potential benefits that each of the possibilities bears, this statistic is not surprising. Individual will engage in crime if the likelihood of being arrested and punished is smaller than the benefit he would receive as compensation for his work. Bearing in mind listed difficulties that migrants entering the labor market face, as well as unfavorable conditions when engaged in an employment relationship, it is not surprising statistic that appears not only in Germany but also in other European countries that have accepted migrants. Legal labour market opportunities are a driver of the decision as to whether to commit a crime, a model most obviously relevant for property related crimes, since motivation for violence is less susceptible to an economic factors[34].

Conclusion

Significant increase, at the global level, in international migration, influences today, among other things, the organization and structure of labor relations. Persons whose situation is governed by international, immigration and labor law standards, often not in harmony which makes their situation uncertain and presents burden for the receiving state, appear in labor markets in European countries. All this shades a new light on contemporary migrant crisis and require new solutions. International standards that could cover all categories of migrants, except refugees and economic migrants, are still missing, *i.e.* those that exist are short-range and scarcely ratified. International instruments for the protection of human rights constitute one possible way for greater protection of migrants, but the difficulty presents the fact that most of the countries where migrants stay shorter or longer periods of time, have low standards of human rights protection. On the other hand, national programs for the employment of migrants make their position vulnerable and insecure, and discourage migrants from participating in them. Also, almost all European countries on the so-called migrant route don't have sufficiently developed humanitarian infrastructure. All these factors,

[31] Immigrants beyond the law, http://www.dw.com/en/immigrants-beyond-the-law/a-19021457 (visited 23.05.2016).

[32] It is assumed that the actual numbers are even more serious, see more in Germany: Migrant Crime Skyrockets by Soeren Kern, February 21, 2016 at 5:00 am, http://www.gatestoneinstitute.org/7470/germany-migrants-crime, (visited 23.05.2016).

[33] B. Bell, S. Machin, F. Fasani, Crime and Immigration: Evidence from Large Immigrant Waves, Discussion paper no. 4996, Institute for the Study of Labor June 2010, http://ftp.iza.org/dp4996.pdf, 7.

[34] *Ibid.*

contribute to, among other things, the tendency of migrants to engage in crimes, what makes them a security risk for the receiving country. In this sense, it is necessary to find a way to protect human rights of refugees and other categories of migrants, while also protecting countries that receive migrants.

We expect to see what solutions will offer UN Global Summit, which is scheduled for September 2016 and which is planned to discuss the legal and political solutions for the global migrant crisis.

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Human trafficking and related criminal offences in the criminal legislation of the Republic of Serbia and Romania. From incrimination to present-day

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Abstract:

As a global contemporary phenomenon, the criminal offense of human trafficking, due to its complexity and varsity of the phenomena, as well as the numerous modalities of recruitment, control and exploitation of victims, is becoming drastic in scales.

The ever more severe consequences that impact the victims and the social community as a whole, demand an unequivocal, strong and synchronized response. Considering the fact that human trafficking, as a rule, is a regional or even a global problem that cannot be efficiently solved only on a national level, one of the most important roles in its efficient suppression is the international multilateral or bilateral cooperation between countries. In order for such cooperation to be possible, with the aim to successfully fight this extremely negative phenomenon, modern countries must primarily create an adequate and mutually coordinated legal framework.

Keeping this idea in mind, this paper will present the genesis of incrimination of socially negative behaviors such as human trafficking, and other related and similar behaviors, and the current provisions in the criminal legislature of the two neighboring countries – the Republic of Serbia and Romania, with the aim to possibly encourage the legislator of one country to analyze the legal solutions of another country and consider the possibility of implementing good and efficient solutions into its national legislature.

Keywords: *Human trafficking, Trafficking of minors for adoption, Trafficking in underage persons, Use of an exploited person's services, Criminal legislation, Republic of Serbia, Romania.*

1. Introduction

Amongst the forms of the organized crime[1] phenomenon, as one of the most dangerous social evils, the criminal offense of human trafficking stands out in the

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[1] "Organized crime represents those activities carried out by a group, organised for a long period of time out of three or more persons, that have corruptive liaisons or of any other nature with

amount of the illegal gain acquired from it[2], the high growth number, and unfortunately, in the disastrously harmful consequences. The existing modes of recruitment, control and exploitation of victims change daily and adapt to the new opportunities and situations, new forms are being permanently invented and used, which are, as a rule, far more perfidious, inhumane, brutal and cruel, and with even more severe consequences to the victims of the crime and the community as a whole[3].

Human trafficking is a global phenomenon that, in different ways and in different measures, affects almost all the countries of the modern world. This is why it is necessary to invent an unequivocal, strong and synchronized response of the international community. If the contrary is true, the nature of the phenomenon, the complex causes of its occurrence and existence, and the insufficient awareness regarding the problem, with insufficiently coordinated criminal and other suitable regulations of the jeopardized countries, will condition a significantly decreased level of efficiency of the measures aimed at preventing and suppressing this social malice.

Considering the fact that this is a regional, or a global problem that cannot be acted upon exclusively on the national level, the international multilateral and bilateral cooperation has one of the most important roles regarding efficient combat against human trafficking, particularly between the countries where different phases of human trafficking take place. Particularly because, in practice, strengthening the (repressive) response in one country can lead to a shift in the location where these criminal offenses are perpetrated into other, often neighboring countries.

In the attempt to change the cruel reality and deal with the various forms of human exploitation, the broader social community, via various international institutions, starts and conducts measures and activities focused on preventing and surprising human trafficking more frequently and with better organization. The

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state's authorities and are predisposed to use violence and other ways of intimidation, having as final purpose to obtain profits and/or power by committing crimes for which the legislation provides punishment with prison of minimum four years, by the group members that have précised and clearly determined assignments". – Darian Rakitovan, Raluca Colojoară, Ligia Mirişan, "Organized Crime and Similar Terminological Concepts. A Problem in Defining the Notion of Organized Crime", in *Journal of Eastern-European Criminal Law*, no. 1/2015, Law Faculties of the West University of Timişoara and the University of Pécs, Universul Juridic Publishing House, 2015, p. 179.

[2] As it is impossible, due to the secretive nature of organized crime, to obtain reliable and complete date, evaluations regarding the gain acquired in this manner vary. However, all of them evaluate the monetary amounts that acquisition of which is connected to human trafficking to be very high. So, for example, according to one such estimate, human trafficking in the world results in between 8.5 and 12 billion euros of profit (Report on the condition of organized crime in European Union from 2014); while according to other, exploitation of labor of men, women and children alone, victims of human trafficking, results in 32 billion US dollars per year. – International Labor Organization (ILO), A Global Alliance against forced labor, p. 42, according to: *Law Enforcement Manual for Combating Trafficking in Human Beings*, International Centre for Migration Policy Development (ICMPD), United Nations Development Program (UNDP), 2006, p. 15.

[3] Human (women) trafficking was first mentioned in XIX century during a public debate in Western European countries regarding taking of women from those countries into their colonies for the purpose of their prostitution. An international campaign was started against what was then known as "white slavery trafficking", which resulted in the first international treaty signed in Paris in 1904. The United Nation Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others was passed in 1949. The problem recaptured the attention of the public at the end of the XX century, due to the spreading of AIDS, the appearance of sex tourism and child prostitution, as well as new migrations. – Ivana Radović, et. al, *Trgovina ljudima – priručnik za novinare,* ASTRA, OSCE, Belgrade, 2003, p. 12.

efforts placed in this direction can be seen in providing a unique definition of the normative-legal framework that should enable a more effective accomplishment of these goals, as the interest of all the subjects of international community to efficiently combat illegal human trafficking and similar procedures is unequivocal and contained in numerous international documents.

Regardless, the response of the national legislators varies from country to country. Some of them put into effect special regulations that sanction human trafficking and passed a wide spectrum of additional regulations regarding this problem. On the other hand, other countries are in the process of defining or implementing these measures, while some countries still do not have regulations concerning the crime of human trafficking, or the plans for their implementation.

However, such situation cannot pertain for much longer. The lack of suitable legal regulation on a national level will cause not only decreased efficiency in preventing and suppressing human trafficking, but will surely attribute to an even larger scale of human rights violations. The consequences of such state will also manifest in a lack of trust of the victims in government authority and a lack of their cooperation in the criminal-operative and penal procedure, but also in the administrative persecution of victims (regarding foreign citizens and denial of residence). Of course, in this manner, the chances of a successful criminal prosecution and appropriate punishment of human traffickers are decreased. On the other hand, on the international level, these but also other serious consequences are caused by a lack of coordination or insufficient coordination between the laws and bylaws of origin countries, countries of transit or destination of the victims of human trafficking, which are aimed at proscribing the responsibility of the perpetrators and the procedure in such criminal affairs.

In an attempt to adapt their legislations to the needs of an efficient combat against human trafficking and coordination with international legal documents, which they are signatories of, the Republic of Serbia and Romania are now putting in serious efforts.

The continuation of this paper will firstly deal with the genesis of incrimination of criminal offence of human trafficking and other similar and related crimes, and afterwards a review and analysis will be given of the positive provisions in the criminal legislatures of these two countries.

2. Criminal legislation of the Republic of Serbia

2.1. Human trafficking

The criminal offense labeled as *human trafficking* was introduced into the national criminal legislature of the Republic of Serbia in the Law on amendments and additions of the Criminal Code of the Republic of Serbia, in 2003[4] (further as KZRS/03). The genesis of this incrimination is linked to the signing of the ratification of UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, particularly in women and children (adding to the UN Convention on Transnational Organized Crime – known as "Palermo Protocol").[5]

[4] "The Official Gazette of RS", no. 39/2003.

[5] The law on confirming the Convention of the United Nations on transnational organized crime and additional protocols, from 22.06.2001. "The Official Gazette of SFRJ" – International treaties, no. 6/2001.

Until the moment this criminal offense of human trafficking was introduced into the legislature of the Republic of Serbia, processing the offenders of this criminal act that included punitive sentences was possible by relying on the provisions of the Criminal Law of the Federal Republic of Yugoslavia (KZSRJ), namely the Basic Criminal Code (OKZ)[6] and the Criminal Code of the Republic of Serbia (KZRS)[7], which presupposed responsibility for other criminal offenses, primarily for: Holding in Slavery and Transportation of Enslaved Persons (Art. 155 of the KZSRJ/OKZ), Intermediation in the Exercise of Prostitution (Art. 251 of the KZSRJ/OKZ), Unlawful Deprivation of Liberty (Art. 63 of the KZRS), Kidnapping (Art. 64 of the KZRS), Rape (Art. 103 of the KZRS), Falsifying identification (Art. 233 of the KZRS). In the circumstances where the victims of human trafficking were not recognized as such, they were exposed to the risk of prosecution according to one of the following laws: The Law on Entry and Stay of Aliens[8] (Art. 106 and 107), The Law on Residency[9] (Art. 25), The Law on Identification Card[10] (Art. 18), and the Law on Public Peace and Order of the Republic of Serbia[11] (Art. 18).

The Article 111b, paragraph 1 of the KZRS/2003, presupposes responsibility for those who by force or threat, by deception or maintain deception, by abusing authority, trust, dependency relationship or difficult circumstances of another: recruit, transport, transfer, sell, buy, act as intermediary in sale or handing over, hide or hold other person, with the aim of acquiring personal gain by exploiting such person's labor, commission of criminal offenses, prostitution or mendacity, use for pornographic purposes, in order to remove parts of the body for transplant or use in armed confrontations. The legislator proscribed the punishment of imprisonment from one to 10 years for the aforementioned criminal behaviors[12].

The same punishment was proscribed in Article 4, for the offense from paragraph 1 that was committed against a person that is younger than 14 years old. This is under the condition that the offender did not use force, threat or any of the other listed manners of perpetration.

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[6] "The Official Gazette of SFRJ", no. 44/76, ... 61/2001. "The Official Gazette of RS", no. 39/2003.

[7] "The Official Gazette of SRS", no. 26/77, ... 21/90, "The Official Gazette of RS", no. 16/90, ... 67/2003.

[8] "The Official Gazette of SFRJ", no 56/80, ... 53/91, "The Official Gazette of SRJ", no. 16/93, .. 68/2002, "The Official Gazette of SCG", no. 12/2005. Foreign nationals who did not have valid identity documents or permission to stay in Serbia and Montenegro, who were in fact victims of human trafficking (predominantly women) were treated as illegal migrants in Serbia and Montenegro (SCG). In such defined status, the victims were additionally traumatized, prosecuted, and after being sentenced with security measure of expulsion of a foreigner from the country, they were deported (or to be more accurate, returned to the same situation they escaped from, and finally became unavailable for a possible testimony in the procedure against the persons that exploited them).

[9] "The Official Gazette of SRS", no. 42/77 (purified text), 25/89, "The Official Gazette of RS", no. 53/93, 67/99, 48/94, (17/99, 33/99), 101/2005.

[10] "The Official Gazette of RS", no. 15/74,... 40/88, "The Official Gazette of RS", no. 53/93,... 101/2005.

[11] "The Official Gazette of RS", no. 51/92, .. 101/2005. Foreign as well as national female citizens who were the victims of human trafficking for exploitation via forced prostitution were prosecuted for offence of prostitution.

[12] Saša Mijalković, *Trgovina ljudima kao oblik organizovanog kriminala – osnovna fenomenološka obeležja*, Nauka bezbednost policija, Kriminalističko policijska akademija, Belgrade, 2006, No. 1, p. 111.

Paragraph 2 of Article 111b predicted a larger number of alternatively defined qualifications of circumstances and a more strict punishment (imprisonment of at least 3 years)[13], if the act from para. 1 was committed against multiple persons, or by abduction while conducting official duty, as a part of a criminal organization, in a particularly cruel or humiliating manner, or in case of a serious bodily injury.

The heaviest form that predicted the possibility of sentencing the offender most severely (imprisonment of at least 5 years), was related to the cases where the offense from paragraph 1 was committed against a juvenile, or the cases of the death of the victim.

As an active subject of international relations, in order to make the practice of confronting human trafficking more efficient and to coordinate the procedure of the competent national institutions (government and non-government) with the efforts taken in this matter on the international plan, Serbia has, to a great extent, used and copied the provisions contained in the "Palermo Protocol" in order to define more precisely the elements of the criminal act of human trafficking. Despite this, the criminal act of human trafficking defined by Article 111b of the Criminal Code of the Republic of Serbia also contained such elements that indicated an insufficient understanding of the substance of the criminal act of human trafficking[14], meaning, the insufficiently precise definition of the position and the situation of the victim and their distinction from illegal immigrants. In other words, the existing legal definition enabled prosecution under the accusation for human trafficking of those persons that abused the difficulties of other persons and transported such in order to acquire some material gain, but without the intention of exploitation, meaning also those that smuggled such persons.

The visible deviations from the principles proclaimed by international conventions were the cause for a different normative definition of the criminal act of human trafficking in the Criminal Code of the Republic of Serbia[15] that became effective on January 1st, 2006 (in continuation KZRS/2006). Here, the criminal act of human trafficking was classified amongst the criminal acts against humanity and other property protected by international law. Article 388, para. 1, predicts responsibility for those that using force or threat, by deception or maintain deception, abusing authority, trust, dependency relations, difficult situation of others, by retaining identity papers or giving or accepting money or other benefit, recruit, transport, transfer, sell, hand over, act as intermediary in sales, hide or hold another person, for the purpose of sexual exploitation, mendacity, pornography, establishing slavery or a servitude, in order to remove organs or parts of the body or to use in armed conflicts. For this (basic) form of the criminal act of human trafficking the punishment can be imprisonment of two to ten years.

The legislative solution, which in the terms of increased legal protection of juveniles younger than 14 years old (children) was contained in the Article 111b para. 4 of KZRS/03, was extended to juveniles (persons younger than 18 years old) in

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[13] In accordance with then valid provisions, the general maximum imprisonment was defined to 15 years.

[14] In the Strategy of combatting human trafficking in the Republic of Serbia, passed then by the Government of the Republic of Serbia on December 7th, 2006, it is emphasized that Article 111b of KZRS consummated not only the cases of human trafficking, but also the cases of smuggling of humans.

[15] "The Official Gazette of RS", no. 85/2005, 88/2005, 107/2005.

accordance with the provisions of "Palermo Protocol". Therefore, Art. 388 para. 2 proscribed that for the punishment for the offense from para.1 of this article committed against a juvenile, the offender will be punished even if no force, threat, or any of the other listed manners of perpetration was used.

The indictable form and the heavier sanction (imprisonment of at least 3 years) were provided in Article 3 in case that the offense from para. 1 was committed against a juvenile[16]. The qualified form of human trafficking as a criminal offense was proscribed in paragraph 4 of that Article, and relates to the situation of the offenses from para.1 and 3 that resulted in a severe bodily injury of a person (the offender is to be punished by imprisonment from three to fifteen years). If death occurred to one or more persons as a result of this offense from para.1 and 3, the offender is to be punished by imprisonment of at least ten years (para. 5). The punishment of imprisonment of at least 5 years was proscribed in the case that the offender is engaged into committing the criminal offense from para. 1 to 3, meaning that the offense was committed by an organized group.

Apart from those already present, Article 388 also sanctions new manners of executing the offending action (confiscating personal identification or giving or receiving money or other goods) as well as new forms of victim exploitation (forced labor, other kinds of sexual exploitation, establishing slavery or a servitude). Compared with the solution from Article 111b, qualified forms were left out in case that the offense of human trafficking is committed against several persons, by kidnapping or in a particularly cruel or humiliating manner, while conducting official duty, or as a part of a criminal organization.

Following the logic of a necessary special protection of younger persons, while making the conditions for the responsibility of the perpetrator more precise, the legislator proscribed a stricter sanction for those who committed offense against a juvenile by using force, threat or in other manner, as indicated by law. Such solution was also present in Article 111b, however, the minimum limit was then set on the scale of up to five years imprisonment, while with the modifications from the year 2005, the minimum imprisonment was decreased to three years of imprisonment. Both regulations had the same solution in terms of the maximum sanction for this form of human trafficking offense and they employed the general maximum of imprisonment. Observing this issue through the prism of valid regulations, this would be 15 years according to KZSRJ valid on the territory of the Republic of Serbia in 2003, or 20 years according to KZRS/2006. To make the matter worse, for the more severe form of this offense qualified by a serious injury, the punishment was proscribed in the span of three to fifteen years. This is also in the case that the victim is a juvenile.

The Law on amendments and additions to the Criminal Code of the Republic of Serbia[17] in 2009 (KZRS/2009) significantly changed KZRS/2006. Article 173 of this law alters and adds to the provisions of Article 388 of the applicable CC that regulate the criminal offense of human trafficking. These alterations refer to making the proscribed punishments stricter, to implement a new heavier form (amendments in para. 6 and new para. 7 Art. 388 of CC) as well as two special forms (Art. 388, para. 8

[16] With the changes in the part regarding proscribing punishments for the committed acts, the indictable circumstances of human trafficking were set significantly differently by the legislator (those referring to criminal offenses against more persons, by abduction, in official duty, within a criminal organization, on a particularly cruel or humiliating manner were left out).

[17] "The Official Gazette of RS", no. 72/2009.

and 9 of CC) referring to exploitation of the victim's position or enabling the exploitation of the victim's position. A more precise definition was also introduced that the consent of the passive subject to exploitation or to establishing slavery or servitude mentioned in the basic form of the provision does not influence the existence of this criminal offense (Art. 388, para. 10 of the CC).

To be more precise, the severity of the possible sentence for the basic form of the offense that carried two to ten years was increased to imprisonment of three to twelve years, and for the heavier forms of the offense provided in para. 3 (criminal offense against a juvenile), or in para. 4 (in case of serious bodily harm), imprisonment of at least three years was increased to imprisonment of at least five years.

According to the solution from the year 2006, Art. 388, para. 6 of the CC stated: "Whoever habitually engages into offenses specified in para. 1 to 3 of this Article, or if the offense is committed by an organized group, shall be punished by imprisonment of at least five years." Amendments of the Art. 173, para. 4 of the Law on Amendments and Additions of the Criminal Code from the year 2009, state that the word "organized" is to be removed from this paragraph, so that the heavier form of this criminal offense, after these amendments, exists when the offense is committed by a persons that engages into criminal offense from para. 1 to 3 or when it is committed by a group.[18] However, even after the amendments, conducting this criminal offense by an organized criminal group could not remain nondiscriminatory, so the legislator provided this form in para. 7 of Article 388, and proscribed for it imprisonment of at least 10 years.

A new amendment of the provisions of Article 388 occurred in the year 2012. Namely, the Law on amendments and additions to the Criminal Code[19] from that year proscribed that para. 4 of this article is changes so that it is: "If the offense referred to in para. 1 and 2 of this article resulted in severe bodily harm, the perpetrator shall be punished with imprisonment from five to fifteen years, and in case of severe bodily harm to a juvenile person due to the offense referred to in para. 3, the perpetrator shall be punished with minimum five years' imprisonment."

After all these amendments and additions, the criminal offense of human trafficking from Art. 388 in now valid CC of the Republic of Serbia is regulated as follows:

(1) Whoever by force or threat, deception or maintaining deception, abuse of authority, trust, dependency relationship, difficult circumstances of another, retaining identity papers or by giving or accepting money or other benefit, recruits, transports, transfers, hands over, sells, buys, acts as intermediary in sale, hides or holds another person with intent to exploit such person's labour, forced labour, commission of offences, prostitution, mendacity, pornography, removal of organs or body parts or service in armed conflicts, shall be punished by imprisonment of three to twelve years.

(2) When the offence specified in paragraph 1 of this Article is committed against a minor, the offender shall be punished by the penalty prescribed for that offence even if there was no use of force, threat or any of the other mentioned methods of perpetration.

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[18] According to the provisions of Art. 112, para. 22 of KZRS/2009, the phrase "group" includes at least three persons connected for the purpose of permanent or occasional conducting of criminal offenses that that does not need to have defined roles of its members, a continuity of membership or a developed structure.

[19] "The Official Gazette of RS", no. 121/2012.

(3) If the offence specified in paragraph 1 of this Article is committed against a minor, the offender shall be punished by imprisonment of minimum five years.

(4) If the offence referred to in paras 1 and 2 of this article resulted in severe bodily harm, the perpetrator shall be punished with imprisonment from five to fifteen years, and in case of severe bodily harm to a juvenile person due to the offence referred to in para 3, the perpetrator shall be punished with minimum five years' imprisonment.

(5) If the offence specified in paragraphs 1 and 3 of this Article resulted in death of one or more persons, the offender shall be punished by imprisonment of minimum ten years.

(6) Whoever habitually engages in offences specified in paragraphs 1 and 3 of this Article or if the offence is committed by a group, shall be punished by imprisonment of minimum five years.

(7) If the offence referred to in paragraphs 1 through 3 hereof has been perpetrated by an organized crime group, the offender shall be punished with imprisonment of minimum ten years.

(8) Whoever knows or should have known that a person is a victim of human trafficking and abuses their position or allows another to abuse their position for the purpose of exploitation referred to in paragraph 1 hereof shall be punished with imprisonment of six months to five years.

(9) If the offence referred to in paragraph 8 hereof has been committed against a person whom the offender knows or should have known is a minor, the offender shall be punished with imprisonment of one year to eight years.

(10) Person's consent to be exploited or held in slavery or servitude referred to in paragraph 1 hereof shall not prejudice the existence of the criminal offence stipulated under paragraphs 1, 2, and 6 hereof.

Therefore, according to the valid legal solution in the Republic of Serbia, criminal offense of human trafficking has a basic form, four severe forms, two forms indictable by a severe consequence and two special forms.

The guilty act of the basic form of the criminal offense is defined alternatively and consists of recruiting, transporting, transferring, handing over, selling, buying, acting as intermediary in sales, hiding or holding a person captive. In order for the offense to exist, it is necessary that the action is realized by one of the also alternatively determined *manners*, and those are: by use of force or threat, deception or maintain deception, abusing authority, trust, dependency relations, difficult circumstances of another, retaining identity papers or giving or receiving money or other benefit. Apart from that, it is necessary that the offending act has a *functional character*, meaning, that these actions are committed for the *purpose* of exploiting a person's labor, forced labor, conducting criminal offenses, prostitution or other kinds of sexual exploitation, mendacity, use for pornographic purposes, establishing slavery or servitude, in order to harvest organs or parts of the body or to use persons in armed conflicts.

Both *active* and *passive subject* can be any person. However, when the offending act is committed by abusing authority, trust or dependency relations, in such cases the act can only be committed by a person with appropriate authority, meaning, someone with whom the passive subject has a certain relationship of trust, or is in dependency relation.

The offense can be committed in any *place* or at any *time*.

Human trafficking can only be *directly premeditated*. "It can be contested whether intent of the perpetrator aimed at achieving one of the listed goals is demanded as a

special subjective element, or is the knowledge of the perpetrator that the passive subject will be exploited for one of the listed purposes sufficient."[20]

It was previously mentioned that the basic form of this criminal offense carries the sentence of three to twelve years of imprisonment.

Due to the severity of the possible sentence, *the attempt* of committing human trafficking is punishable, considering that the provisions of Art. 30 from the general section of the CC presuppose that the person that begins committing the criminal offense with intent, but does not complete the offense, shall be punished for the attempt of the criminal offense that can carry a five year imprisonment or a more severe punishment.

Prosecution for this criminal offense can be conducted exclusively on servant duty, and its processing is in the *authority* of higher court.

As previously listed, apart from the basic, there are four *severe forms*.

The *first severe form* is described in para. 2, Art. 388 of the CC. According to this provision, the perpetrator shall be punished by the penalty prescribed for the basic form even if there was no use of force, threat or other mentioned method of perpetration, and the offense was committed against a juvenile. Even though some authors argue the issue why is it that due to the particular nature of the passive subject "incriminates that which would normally not be a criminal offense"[21], what needs to be pointed out is that the existing legal solution is completely in accordance with the basic principles of international legal documents that also pay close attention to persons younger than eighteen years old, and that the criminal offense of human trafficking the victims of which are children are connected to a specific action of perpetration aimed at their exploitation. This is independently of the manner a specific act is perpetrated.

The *second severe* form, described in para. 3 exists when the basic offense, as it is fully defined in para.1 (meaning, with the use of force, threat or other methods of perpetration), is committed against a juvenile. This form of the offense carries imprisonment of at least five years.

Paragraph 4 distinguishes the *first indictable form*, and it exists when the offense from para. 1 and 2 resulted in severe bodily harm of a person (the perpetrator can be punished by imprisonment from five to fifteen years). If the offense from para. 3 resulted in a severe bodily harm of a juvenile, the perpetrator can be punished by imprisonment of at least five years.

The *second form indictable by a severe consequence* was proscribed by paragraph 5, and it exists when the basic form from para.1 and the severe form from para. 3 of this article (referring to a juvenile) results in the death of one or more persons. In the case of perpetration of this qualified form of human trafficking, the perpetrator will be punished by imprisonment of at least 10 years.

For both of these indictable forms of the offense, in accordance with the general regulations of the Criminal Code (Art. 27 of the CC)[22], in relation to a grave

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[20] Zoran Stojanović, *Komentar Krivičnog zakonika*, fourth edited and revised edition, Službeni glasnik, Belgrade, 2012, p. 1014.

[21] *ibidem*.

[22] When a graver consequence has resulted from a criminal offence due to which a more severe punishment is provided by law, such punishment may be imposed if the consequence is attributable to the offender's negligence, as well as if he acted with premeditation if this does not establish elements of another criminal offence.

consequence *negligence* must exist, considering that in the case the perpetrator inflicted the severe bodily harm with intent, or deprived the passive subject of their life, there will be joinder of the criminal offense of bodily harm and the criminal offense of human trafficking, or of murder and human trafficking.

The *third severe form* of human trafficking was presented alternatively in para. 6, and it states: 1) when the perpetrator engages in the offenses from para. 1 to 3, Art. 388 of the CC; and 2) when this offense is committed by a group[23]. This form of the offense carries minimum imprisonment of five years.

The *fourth and the most severe form* of the criminal offense of human trafficking exists when the offense from para. 1 to 3 of this article was committed by an organized criminal group[24]. In this case, the perpetrator shall be punished by minimum imprisonment of ten years.

The two special forms of the criminal offense of human trafficking were introduced into Serbian legislature in the Law on amendments and additions to the Criminal Code from September of 2009. The cause for the implementation of these forms are the provisions of Art. 16 of the Council of Europe Convention on Action against Trafficking in Human Beings[25]. *First such form* is perpetrated by a person that had the knowledge or could have had the knowledge that the offended party is a victim of human trafficking, and therefore uses their position or enables other to use the victim's position for exploitation predicted by the basic form of this criminal offense. In this case, the perpetrator shall be punished by imprisonment of six months to five years.

The *second special form* is in fact a severe form of the first special form, and it exists when this form of the offense is committed against a person that the offender knew or could have known is a juvenile. For committing this form of the offense, the perpetrator shall be punished by imprisonment of one to eight years.

These two norms are "very haphazardly formulated"[26], and are not completely in accordance with the provisions of the general section of the CC relating to intent and negligence[27], and therefore require revision.

Provisions of Art. 4, para. b of the Council of Europe Convention on Action against Trafficking of Human Beings are implemented (although not in the most adequate manner) in para. 10 of Art. 388 of the CC. "It has as its aim to not permit a possibility of excluding the existence of a criminal offense on the account of the damaged party's consent, i.e. of the victim of human trafficking. That provision refers to the exploitation or establishing slavery or servitude even when the means listed in the description of the basic form were not employed, and that indisputably exclude consent (force, threat, etc.).[28]

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[23] According to provisions of Art. 112, para. 22 of CC, *Group* must be at least three persons connected for the purpose of permanent or occasional conducting of criminal offenses that does not need to have defined roles of its members, a continuity of membership or a developed structure.

[24] Art. 112, para. 35 of the CC: An organized crime group shall mean a group comprising three or more persons, existing a certain amount of time, and acting in concert with the aim of committing one or more criminal offenses punishable with a term of imprisonment of four years or more the purpose of which is acquiring direct or indirect financial or other type of gain.

[25] "The Official Gazette of RS" – International treaties, no. 19/09.

[26] Milan Škulić, *Organizovani kriminalitet – Pojam, pojavni oblici, krivična dela i krivični postupak*, Službeni glasnik, Belgrade, 2015, pg. 302.

[27] See: Zoran Stojanović, *op.cit.*, p. 129-140 and p. 1016.

[28] *ibidem,* p.1016.

2.2. Trafficking of minors for adoption

Apart from human trafficking, KZRS/2006 particularly distinguishes the criminal offense of *trafficking of children for adoption*. Within its framework, Art. 389 predicts criminal responsibility: for whoever abducts a child under the 14 years of age for the purpose of adoption contrary to laws in force, for whoever adopts such a person or mediates in such adoption or whoever for this purpose, buys, sells or hands over to another a person under 14 years of age, or transports, provides accommodation or conceals such person. This criminal offense carries the punishment of imprisonment from one to five years. The indictable form of the criminal offense from Art. 389 (for persons that habitually engage in these actions or if the offense was committed in an organized manner by multiple persons) predicts the punishment of minimum three years imprisonment.

The Law on amendments and additions to the Criminal Code from the year 2009 introduced novity to the existing provisions of Art. 389 of the CC that incriminate trafficking of children for adoption. So, among other things, the very title of the criminal offense was changed to "*Trafficking of minors for adoption*", which in fact enabled to lift the age limit of the persons traded for adoption from 14 years up[29].

The criminal offense of Trafficking of minors for adoption from Art. 389 of the KZRS/2009 is now determined as follows:

(1) Whoever abducts a child under sixteen years of age for the purpose of adoption contrary to laws in force or whoever adopts such a child or mediates in such adoption or whoever for that purpose buys, sells or hands over another person under fourteen years of age or transports such a person, provides accommodation or conceals such a person, shall be punished by imprisonment of one to five years.

(2) Whoever habitually engages in activities specified in paragraph 1 of this Article or if the offence is committed by a group, shall be punished by imprisonment of minimum three years.

(3) If the offence referred to in paragraph 1 hereof has been perpetrated by an organized crime group, the offender shall be punished with imprisonment of minimum five years.

The guilty act – this criminal offense can be perpetrated in several manners: 1) by abducting a person under the age of sixteen for the purpose of their adoption contrary to the laws in force (by person that has the legal right and the obligation to look after the minor); 2) by adopting or mediating such adoption, which means that this criminal offense will also result in the punishment of the person that adopted the taken child under the age of sixteen, as well as the person that mediated this illegal adoption; 3) by buying, selling, handing over, providing accommodation or concealing a person under the age of sixteen for the purpose of their adoption.

The *active subject* can be any person, while the *passive subject* can only be a person under the age of sixteen.

This criminal offense can only be *premeditated*, and it has to include the *awareness* that the guilty act is committed for the purpose of adoption of a person under the age of sixteen contrary to the laws in force.

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[29] Although in the legal system of the Republic of Serbia minors are considered to be persons under the age of 18, the legislator decided to make the special protected object of this criminal offense only persons under the age of 16.

The *prosecution* for this offense is done according to official duty, and in accordance with the provisions of Art. 23, para. 1 p. 3 of the Law on Court Organization[30] higher courts have the authority to proceed with these cases.

The severe form of this criminal offense is alternatively provided in para. 2 of Art. 389 of the CC, and it exists when the basic form of the offense was committed by a person that habitually engages in trading of minors, or when the offense was committed by a group. The punishment for this form is minimum three year imprisonment.

The most severe form, which carries imprisonment of minimum five years, exists when the offense is committed by an organized criminal group.

The importance attributed in the legislature of the Republic of Serbia to finding solutions for a more adequate punishment of criminal offenses in general, as well as those that perpetrated the criminal offense of human trafficking, is visible in the amendments of the provisions regarding the limits that moderate imprisonment sentences introduced on September 3rd, 2009 (KZRS/2009). Primarily, the legislator introduced a new limitation if for the criminal offense, as the smallest measure of punishment, imprisonment of ten or more years is proscribed. In this case, the punishment can only be decreased to seven years of imprisonment (Art. 57, para. 1 p. 1). Even in such more severe conditions for moderating the sentence, the legislator excluded the possibility of decreasing the sentence in the case of numerous criminal offenses, as well as for the criminal offense of human trafficking (Art. 57, para. 2).

3. Criminal legislation of Romania

3.1. Human trafficking

Even in the accession period, the process of European integrations of Romania included harmonizing their legislature with the provisions of international conventions that Romania has signed, and after becoming a member of the European Union on January 1st, 2007, the obligation to include and carry out *acquis communautaire* in its national legislature, i.e. the legal instruments developed on the level of the EU.

Singing of the so called "Palermo Convention"[31] by Romania on December 14th, 2000, had an effect on the legislature of this country in the sense that the phenomenon of human trafficking is incriminated as a special criminal offense, which is why on November 21st, 2001, a Law no. 678/2001 has been passed regarding the prevention and suppression of human trafficking[32] that regulated this issue in its whole. This law has been "tweaked" several times, primarily in order to coordinate it with the criteria on the international level and the level of the EU.

The Law no. 678/2001 was divided into seven chapters: The first chapter contains general provisions and defines the term of human exploitation; The second

[30] "The Official Gazette of RS", no. 116/2008, 104/2009, 101/2010, 31/2011 – st. law, 78/2011 – st. law, 101/2011, 101/2013, 106/2015, 40/2015 – st. law and 13/2016.

[31] Ratified by Romania on December 4th, 2002, by Law no. 565/2002, published in "The Official Gazette of Romania", Section I, no. 813, from 08.11.2002.

[32] "The Official Gazette of Romania", no. 783/2001.

chapter refers to preventing human trafficking and proscribes the jurisdiction of government; The third chapter contain(ed) the definitions of criminal offenses regarding human trafficking, trafficking of minors and connected criminal offenses; The fourth chapter consists of special procedural provisions; The fifth chapter is dedicated to the protection and assistance to the victims of human trafficking; Chapter six- international cooperation; and final provisions from the seventh chapter refer to, among others, giving special authority to Ministry of Internal Affairs to identify the victims of human trafficking.

Due to limited space, only the provisions of Art. 12 of this Law that proscribes the criminal offense of human trafficking will be presented in the paper (in the text and the form that was applied until the New Criminal Code of Romania came into force):

"(1) Whoever recruits, transports, transfers, harbors or receives a person, through the use of threats or violence or the use of other forms of coercion, through kidnapping, fraud or misrepresentation, abuse of power or by taking advantage of that person's inability to defend him-/herself or to express his/her will by giving or receiving money or other benefits in order to obtain the agreement of a person who has control over another person with the intent of exploiting the latter, commits a criminal violation of this Law and shall be punished with 3 to 12 years imprisonment and denial of a number of rights.

(2) Whoever engages in trafficking in human beings under the following circumstances:

a) traffics two or more persons at the same time;

b) causes the victim to sustain serious bodily harm or serious health problems, shall be punished with 5 to 15 years imprisonment and denial of a number of rights.

(3) If the violation of this Article has resulted in the victim's death or suicide, the offender shall be punished by 15 to 25 years imprisonment and a denial of a number of rights."

Starting from February 1st, 2014, the New Criminal Code[33] is being applied in Romania (in continuation NCC). Passing NCC had as its aim to create a unified legal framework, simplify criminal regulations, without necessary duplication, in order to ease their application and enable quick transposition of criminal justice regulations adopted on the level of the EU into national legislature and a complete harmonization of Romanian criminal law with the criminal jsystems of other EU member states. At the same time, there was a need to include criminal offenses into the New Code that were previously proscribed in special laws. In this manner, criminal offense of human trafficking, trafficking of minors and other related criminal offenses were included into the New Criminal Code, and provisions of Law no. 678/2001 that defined these criminal offenses ceased to be in force. What needs to be mentioned is that most of the other provisions of this Law are still in force.

Besides the fact that by being implemented into the NCC these regulations gained a position in a basic material criminal regulation of this country, the basic forms of the substance of these criminal offenses could not essentially change compared to how they were proscribed in the Law no. 678/2001.

Criminal offense of human trafficking, in Art. 210, Chapter VII "Trafficking in, and exploitation of vulnerable persons", Title I "Criminal offenses against the person" [34], from the Special section of the valid NCC, is proscribed in the following manner:

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[33] "The Official Gazette of Romania", no. 510 from 24th of July 2009.

[34] Apart from the criminal offense of human trafficking (Art. 210), this Title of NCC includes also the criminal offense of Slavery (Art. 209), Trafficking in underage persons (Art. 211), Pressing into

(1) Recruitment, transportation, transfer, harboring or receipt of persons for exploitation purposes:

a) by means of coercion, abduction, deception, or abuse of authority;

b) by taking advantage of the inability of a person to defend themselves or to express their will or of their blatant state of vulnerability;

c) by offering, giving and receiving payments or other benefits in exchange for the consent of an individual having authority over such person,

shall be punishable by no less than 3 and no more than 10 years of imprisonment and a ban on the exercise of certain rights.

(2) Trafficking in human beings committed by a public servant in the exercise of their professional duties and prerogatives shall be punishable by no less than 5 and no more than 12 years of imprisonment.

(3) The consent expressed by an individual who is a victim of trafficking does not represent an acceptable defense.

What can be noticed is that with the basic form, apart from the reformulation of certain terms and new systematization of the text, there are no significant changes. What is significantly altered refers to abolishing two severe forms of this criminal act that were proscribed in para. 2 and 3 of Art. 12 of the Law no. 678/2001. Now, what remains is the possibility that in the case of infringement of bodily integrity or health, i.e. in case of death of the victim, to apply institute of joinder of offences, and in the case that human trafficking is committed by multiple persons (at least three persons), that, during sentencing, "conducting criminal offense by three or more persons" proscribed by Art. 77, p. a) of NCC[35] to be taken as an aggravating circumstance.

The positive novelty is also the implementation of provision para. 4 p. b of the Council of Europe Convention on Action against Trafficking of Human Beings.

A short analysis of the criminal offense of human trafficking from Art. 210 NCC of Romania consists of the following:

The guilty act of this criminal offense is defined alternatively and it consists of recruiting, transporting, transferring, harboring or receiving persons. In order for this offense to exist, it is necessary that the act is conducted using one of the also alternatively defined manners: a) using coercion, abduction, deception or abuse of authority; b) by taking advantage of the inability of a person to defend themselves or to express their will or of their blatant state of vulnerability; c) by offering, giving or receiving payments or other benefits in exchange for the consent of an individual having authority over that person, and also it is necessary that the guilty act is committed for *the purpose* of exploitation of the victim.

According to the provisions of Art. 182 of the NCC, *exploitation of persons* includes:

a) forcing a person to conduct a certain business or task;

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forced or compulsory labor (Art. 212), Pandering (Art. 213), Exploitation of Beggary (Art. 214), Use of Underage Persons for Mendicancy (Art. 215) and Use of an exploited person's services (Art. 216).

[35] Art. 78 of NCC predicts that: "(1) In case aggravating circumstances exist, sentencing can go up to the special maximum. If the special maximum is insufficient, in the case of a prison sentence an addition of up to 2 years can be added that cannot exceed one-third of the maximum, and in the case of a fine one-third of the maximum can be added at most. (2) Increasing the threshold of the maximum penalty can only be done once, irrespective of the number of aggravating circumstances found."

b) keeping a person in slavery or servitude that deprives them of liberty and imposes submissiveness;

c) forcing a person to prostitution, using for pornographic purposes with the aim to produce and spread pornographic material or other kinds of sexual exploitation

d) forced beggary;

e) unlawful taking of organs, tissue or cells of human origin.

The *active subject* can be any person. However, if the guilty act is committed by abusing power, i.e. authority, such act can only be committed by a person with corresponding legal power, namely, that person that has a certain authority over the passive subject.

The *passive subject* can be any adult.

The offense can be committed in any *place* at any *time*.

Human trafficking can only be *premeditated*, that needs to include the *awareness* of the fact that the guilty act is committed for exploitation.

For the basic form of this criminal offense the proscribed punishment is three to ten years.

This criminal offense has a *severe form* that exists when human trafficking is committed by a public servant during official duty. For this form the proscribed punishment is imprisonment from five to twelve years.

In accordance with the provisions of Art. 217 of NKZ, *the attempt* is punishable.

3.2. Trafficking in underage persons

Similarly to the criminal offense of human trafficking, the criminal offense of trafficking in underage persons was first introduced into Romanian legislature by the Law no. 678/2001 about the prevention and suppression of human trafficking.

After numerous alterations, the final definition of this criminal act in the aforementioned law stated:

"(1) Whoever recruits, transports, transfers, harbors or receives underage persons, with the intent of exploiting that persons, commits the crime of trafficking in underage persons and shall be punished by 3 to 12 years imprisonment and denial of a number of rights.

(2) If the violation within paragraph (1) was committed with the use of threats or violence or other forms of coercion, abuse of power or by taking advantage of the inability of the underage person to defend him-/herself, or by offering, giving or receiving money or other benefits in order to obtain the agreement of a person who has control over another person, the punishment shall be imprisonment from 7 to 18 years and a denial of a number of rights.

(3) If the violations from para. (1) and (2) of this Article have been committed in the conditions of Art. 12 para. (2) of this Law, or by a family member, the punishment is imprisonment from 7 to 18 years and a denial of a number of rights for the violation from para. (1) of this Article, and imprisonment from 10 to 20 years and a denial of a number of rights for the violation from para. (2) of this Article.

(4) If the violations in this Article have resulted in the victim's death or suicide, the punishment is imprisonment from 15 to 25 years and a denial of a number of rights."

Today, according to the provisions in force of the New Criminal Code in Art. 211, this criminal offense is regulated as follows:

(1) Recruitment, transportation, transfer, harboring or receipt of a juvenile for the purpose of their exploitation shall be punishable by no less than 3 and no more than 10 years of imprisonment and a ban on the exercise of certain rights.

(2) If such act was committed under the terms of Art. 210 para. (1) or by a public servant while in the exercise of their professional duties and prerogatives, it shall be punishable by no less than 5 and no more than 12 years of imprisonment and a ban on the exercise of certain rights.

(3) The consent expressed by an individual who is a victim of trafficking does not represent a acceptable defense.

From the above quoted legal definitions, it can be concluded that, similarly to the case of the criminal offense of human trafficking, the basic form of the criminal offense of trafficking in minors was not significantly altered during suspending the corresponding provisions of Law no. 678/2001 and the implementation of this criminal offense into the NCC. Apart from the reformulation of certain terms ("harboring" – "concealing") and a complete different systematization of the text, the change in the basic from was only committed in relation to the severity of the punishment, which was decreased from 3-12 years of imprisonment to 3-10 years. The punishments were significantly decreased compared to other forms of this criminal offense as well. However, a significant alternation consist in no longer proscribing the severe form of the criminal offense related to the violation being committed by a family member, nor the special form indictable by a severe offense – when the violation results in death or suicide of the victim.

The rule from Art. 4 p. b of the Council of Europe Convention on Action against Trafficking of Human Beings is also valid for this criminal offense, regardless of the fact that the minor gave consent for his/her exploitation, it will not exclude the existence of the criminal offense.

The *guilty act* of the basic form of this criminal offense consists of: recruitment, transportation, transfer, harboring or receipt of a juvenile, and it must be committed for *the purpose of* exploiting the juvenile in any of the forms specified in Art. 182 of the NCC.

The *active subject* can be any person, considering that when the guilty act predicted by para. 2 is committed by abusing authority, then such act can only be committed by a person with corresponding professional authority, i.e. a person that has some sort of authority over the passive subject, while when the act is committed by abusing official duty, the active subject can only be a public servant.

The *passive* subject can be any minor[36].

This criminal offense can be committed in any *place* at any *time*.

As far as *guilt* is concerned, trafficking in minors can be only be committed with *premeditation* that must include *awareness* that the guilty act is committed for the purpose of exploiting a minor.

For committing the basic form of the criminal offense the proscribed punishment is three to ten years.

The criminal offense of trafficking minors also has a *special form* in the NCC of Romania, which is alternatively defined in para. 2 of Article 211. This form exists when recruiting, transporting, transferring, harboring or receiving a minor for the

[36] As in the legal system of the Republic of Serbia, in Romania under the phrase "underage person" means a person that is under the age of 18.

purpose of his/her exploitation was committed: 1) a) using coercion, abduction, deception or abusing authority; b) by taking advantage of the inability of a person to defend themselves or to express their will or of their blatant state of vulnerability; c) by offering, giving and receiving payments or other benefits in exchange for the consent of an individual having authority over such person; or 2) if it is committed by a public servant in the exercise of their professional duties. The perpetrator that commits the criminal offense of trafficking in minors in any of these manners shall be punished by imprisonment from 5 to 12 years and a ban on the exercise of certain rights.

The *attempt* of this criminal offense is also punishable according to the provisions of Art. 217 of the NCC.

3.3. Use of an exploited person's services

The criminal offense that is closely connected with the previous two criminal offenses from the Romanian NCC and for which it can be conditionally said that in certain sense completes the other two, is the criminal offense of *Use of an exploited person's services.*

This criminal offense was introduced into the Romanian criminal legislature on December 9th, 2010, by passing the Law no. 230/2010 on the amendments and additions of the Law no. 678/2001 on the prevention and combat against trafficking in human beings[37].

The old legal solution regarding the prescription of this criminal offense was also contained in Art. 216 of the valid NCC, and is as follows:

The action of using the services listed under Art. 182 of this Code, provided by a person about whom the beneficiary knows they are a victim of trafficking in human beings or trafficking of underage persons, shall be punishable by no less than 6 months and no more than 3 years of imprisonment or by a fine, unless such action is a more serious offense.

The guilty act of this criminal offense consists of using services listed in Art. 182 of this Code, and that are provided by the victims of human trafficking, or the victims of trafficking in minors. It must be repeated that the provisions of Art. 182 of the NCC proscribe that exploitation of minors includes: a) forcing a person to carry out work or a task; b) enslavement or other similar procedures to deprive of freedom or place in bondage; c) forcing persons into prostitution, pornography, in view of obtaining and distributing pornographic material or any other types of sexual exploitation; d) forcing into mendicancy; e) illegal removal of body organs, tissues or other cells.

The *active subject* of this criminal offense can be any person that uses the aforementioned services provided by the victim that they know is a victim of human trafficking or trafficking in minors.

The *passive subject* can be an adult that is a victim of human trafficking, or a minor that is a victim of trafficking in minors.

As far as guilt is concerned, this offense can be committed only with *premeditation*, direct or indirect, that must include the *awareness* of the perpetrator that they are using the services of persons who are victims of human trafficking or trafficking in minors. We believe that it is not necessary that the perpetrator of this

[37] "The Official Gazette of Romania", Section I, no. 812, from 06.12.2010.

offense to be familiar with who committed the offense of human trafficking, or trafficking in minors, or even whether someone was held criminally responsible for such acts, but that it is sufficient that in the moment they began using a specific service, they were aware or had to be aware that such service is being provided by a person who is a victim of human trafficking, or trafficking in minors. However, if during the course of criminal proceedings (conducted due to the criminal offense from Art. 216 of NCC, meaning for the criminal offense of trafficking in humans or trafficking in minors) it is proven that the provider of the services is not a victim of such trafficking, due to the lack of an important element of substance of the criminal offense, the beneficiary of such services will not be held responsible for the criminal offense of using the services of an exploited person.

The *attempt* of this criminal offense, although possible, is not punishable.

4. Conclusion

Without a doubt, in the terms of the criminal-justice definition of human trafficking, the attempts of the legislative authority of both countries resulted in quality normative solutions, however, the road to the final definition is very dynamic and still open.

This particularly refers to the criminal-justice legislation of the Republic of Serbia. Amendments and additions to the existing legal solutions went in two directions. The first was focused on accepting those normative solutions that are a part of international legal documents ratified by the Republic of Serbia (provisions regarding the responsibility of the beneficiary of the services of a human trafficking victim), and the second was on making the possible punishments more severe (the evidence of these intentions is the implementation of the provision regarding the exclusion of the possibility of commuting a sentence in cases of human trafficking offences).

Although specific normative solutions are somewhat different, the significance attributed to the activities and suppression measures of human trafficking is also clearly visible in the legislature of Romania. This conclusion can be made not only based on the fact that the legislator attempted to define the normative framework and the framework of combating human trafficking within a special law, but also from the later amendments of the existing solution and the defining of the element of human trafficking crime and similar offenses in the Criminal Code. The legislator defines and very strictly sanctions various forms of human trafficking recognized in practice, and the determination to protect persons younger than 18 years old from victimization through measures of criminal justice prevention and repression is clearly pointed out in the special legal provision that defines the criminal offense of trafficking in minors.

Although, despite the numerous initiatives, the criminal offense of trafficking in minors (persons younger than 18 years old)[38], is not singled out, the legislator in the Republic of Serbia has defined a series of significant specifications for constituting the substance of a crime within the frame of the provisions defining the basic and the

[38] More detailed in: Milan Žarković, Radmila Dragičević-Dičić, Snežana Nikolić-Garotić, Gordana Jekić-Bradajić, Miodrag Majić, Mioljub Vitorović, *Krivičnopravni sistem i sudska praksa u oblasti borbe protiv trgovine ljudima u Srbiji*, A joint program of UNHCR, UNODC and IOM, for combatting human trafficking in Serbia, Belgrade, 2011, p. 72-74.

indictable forms of human trafficking (using force, threat or other legally defined manner of realization of the guilty act is not listed as a necessary element for the existence of a crime), meaning more severe punishments in case that these persons are the passive subjects of human trafficking.

We believe that despite the obvious comparison of the existing legal solutions, and the particular characteristics of national legal systems, they can be mutually considered, and then those solutions that have proven to be relevant by the established effects and still not recognized by the legislator, implemented into national legislatures. This particularly refers to defining various forms and manners of human trafficking, but also to a more wholesome and more consistently defined indictable forms of this criminal offense.

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L'exception terroriste dans la procedure pénale française*

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1. On ne surprendra personne en disant que la procédure pénale applicable au terrorisme est placée sous le signe de l'exception; il s'agirait presque d'un truisme. Mais, il y a là peut-être un danger à banaliser l'exception en la matière au risque de ne plus véritablement la percevoir comme telle et, à terme, en venir à suggérer de «véritables mesures d'exception» où la fin justifierait tous les moyens.

2. « L'exemple » américain. – Traversons l'Atlantique pour en juger. Au lendemain des attentats du 11 septembre 2001, les Etats-Unis ont changé de paradigme en matière de lutte anti-terroriste en adoptant une véritable logique de guerre («*the war on/of terror*»)[1]. Le terroriste n'est alors plus véritablement considéré comme un criminel, mais comme un « combattant ennemi », qui, à ce titre, ne mérite pas les garanties offertes par le droit pénal interne. Pour autant, les terroristes ne peuvent pas non plus être véritablement assimilés à des combattants appartenant à une armée régulière, si bien qu'ils sont qualifiés de « combattant ennemi illégal »[2] et ne peuvent, à ce titre, bénéficier du droit international humanitaire, en particulier la Convention de Genève sur le statut des prisonniers de guerre. En paraphrasant Madame le Conseiller Caron et Madame le professeur Delmas-Marty, on peut dire que « ce brouillage des concepts entre logique de guerre et logique de crime »[3] est à l'origine d'une sorte de « déconstruction du système pénal »[4] qui a conduit progressivement les Etats-Unis à soumettre les terroristes non pas seulement à un « droit d'exception » mais plus radicalement à un « état ou statut d'exception »[5]. Pour s'en tenir à quelques manifestations saillantes, nous pouvons citer la possible détention illimitée d'une personne présumée terroriste sans contrôle par un juge, ni des motifs, ni des conditions de détention, ou bien l'instauration de commissions militaires de jugement, ou enfin le transfert de détenus à l'étranger pour y être interrogés de façon plus « énergique »… Cet état d'exception a franchi toutes les limites d'un Etat de droit jusqu'à admettre (au moins implicitement) le recours à la torture et les traitements inhumains. L'expérience américaine montre ainsi les dangers de ce changement de paradigme dans la lutte contre le terrorisme qui, faisant du criminel « un ennemi », dérive inévitablement vers la négation même de ce qui fait une grande démocratie et les fondements d'un Etat de droit.

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[1] Nous reprenons ici les très riches développements de D. Caron, *La bellicisation de la lutte contre le terrorisme : un défi au droit*, in Mélanges R. Koering-Joulin, Anthémis, 2014, p. 113 ; v. également, D. M. Amann, *Le dispositif américain de lutte contre le terrorisme*, RSC 2002, p. 745.

[2] V. J. Cantegreil, *La doctrine du « combattant ennemi illégal »*, RSC 2010, p. 81.

[3] D. Caron, art. préc.

[4] M. Delmas-Marty, *Le paradigme de la guerre contre le crime : légitimer l'inhumain ?*, RSC 2007, p. 461.

[5] D. Caron, art. préc.

3. L'équilibre européen. – Retraversons l'Atlantique. Fort heureusement, l'Europe et la France n'en sont pas là et résistent aux tentations de l'instauration d'un « droit pénal de l'ennemi » pourtant conceptualisé sur son continent bien avant les attentats du 11 septembre 2001[6]. Certes, il ne faut pas nier les évolutions répressives des législations nationales et instruments supranationaux de lutte contre le terrorisme. Pour autant, on peut encore parler en Europe de « droit d'exception » et non « d'état d'exception ». Les terroristes sont considérés comme des criminels bénéficiant des garanties minimales du procès pénal à commencer par l'interdiction absolue de la torture plusieurs fois rappelée par la Cour européenne des droits de l'homme[7], au point même de justifier le refus de toute extradition d'un présumé terroriste dès lors qu'il risque de subir des tortures ou un traitement inhumain de la part de l'Etat requérant[8]. Pour autant, la Cour européenne, elle-même, a bien conscience de la gravité des actes terroristes et des difficultés que peuvent rencontrer les Etats pour lutter contre leurs auteurs. C'est pourquoi, elle autorise largement le recours aux règles dérogatoires du droit commun[9], à l'instar du Conseil constitutionnel comme nous le verrons un peu plus loin, tout en posant néanmoins certaines limites sur lesquelles nous ne nous étendrons pas[10].

4. Etat d'urgence en France. – Les récents attentats du 13 novembre 2015 commis à Paris ont certes conduit la France à instaurer l'état d'urgence[11] permettant ainsi à l'autorité administrative à ordonner des assignations à résidence[12] et à procéder à des perquisitions en tout lieu et à toute heure sans contrôle judiciaire préalable[13]. S'il est vrai que le régime de l'état d'urgence se rapproche dangereusement d'un état d'exception, il semble encore être dans le giron d'un état de droit. On en veut pour preuve les recours exercés récemment devant le Conseil constitutionnel contre la loi du 3 avril 1955 relative à l'état d'urgence[14].

5. Le régime français/évolutions législatives. – Indépendamment de l'état d'urgence, la compréhension de la procédure pénale (d'exception) applicable en matière

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[6] G. Jakobs, *Aux limites de l'orientation par le droit : le droit pénal de l'ennemi*, RSC 2009, p. 7 ; v. également, G. Giudicelli-Delage, *Droit pénal de la dangerosité - Droit pénal de l'ennemi*, RSC 2010, p. 69.

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[9] V. D. Caron, art. préc. et la jsp citée p. 131.

[10] Ces aspects étant traités par nos collègues, Ch. Pouly, *Lutte contre le terrorisme et vie privée*; J.-M. Larralde, *Lutte contre le terrorisme et droit à un procès équitable*.

[11] Décr. n° 2015-1475, 14 nov. 2015, portant application de la loi n° 55-385 du 3 avril 1955 relative à l'état d'urgence (JORF 14 nov. 2015, p. 21297). Cet état d'urgence a été prorogé successivement par la loi n° 2015-1501 du 20 novembre 2015 pour 3 mois (JORF 21 nov. 2015), la loi n° 2016-162 du 19 février 2016 pour 3 mois (JORF 20 févr. 2016) et par la loi n° 2016-629 du 20 mai 2016 jusqu'au 26 juillet 2016 (JORF 21 mai 2016).

[12] Art. 6, Loi n° 55-385, 3 avril 1955, relative à l'état d'urgence.

[13] Art. 11, Loi n° 55-385, 3 avril 1955, relative à l'état d'urgence.

[14] Sur lesquels, v. J. Alix, *Politique criminelle : les ultimes leçons d'un Conseil constitutionnel*, RSC 2016, p. 163 ; C. Haguenau-Moizard, *La législation sur l'état d'urgence - une perspective comparative*, RSC 2016, p. 655.

terroriste implique d'en dresser un panorama, dont la lisibilité n'est pas toujours aisée et ce, pour plusieurs raisons. Le premier facteur de complexité est quantitatif et résulte d'un empilement de réformes législatives depuis la première grande loi du 9 septembre 1986 instaurant un régime dérogatoire du droit commun en matière terroriste[15]. Passée une période relativement stable de dix ans, le rythme des réformes ayant conduit à renforcer l'arsenal répressif contre le terrorisme va brutalement s'accélérer à raison d'une réforme quasiment tous les deux ans (et parfois tous les ans) et ce, malheureusement parfois, en réaction à de nouveaux attentats perpétrés sur le sol français ou à l'étranger (attentats du métro parisien en 1995 ; attentats du 11 septembre 2001 ; attentats de Madrid en 2004 et Londres 2005) :

- Loi n° 95-125 du 8 février 1995 relative à l'organisation des juridictions et à la procédure civile, pénale et administrative (JORF 9 févr. 1995) ;
- Loi n° 96-647 du 22 juillet 1996 tendant à renforcer la répression du terrorisme et des atteintes aux personnes dépositaires de l'autorité publique ou chargées d'une mission de service public et comportant des dispositions relatives à la police judiciaire (JORF 23 juill. 1996) ;
- Loi n° 96-1235 du 30 décembre 1996 relative à la détention provisoire et aux perquisitions de nuit en matière de terrorisme (JORF 1er janv. 1997) ;
- Loi n° 97-1273 du 29 décembre 1997 tendant à faciliter le jugement des actes de terrorisme (JORF 31 déc. 1997) ;
- Loi n° 2001-1062 du 15 nov. 2001 relative à la sécurité quotidienne (JORF 16 nov. 2001) ;
- Loi n° 2002-1094 du 29 août 2002 d'orientation et de programmation pour la sécurité intérieure, « LOPPSI 1 » (JORF 30 août 2002) ;
- Loi n° 2003-239 du 18 mars 2003 pour la sécurité intérieure (JORF 20 mars 2003) ;
- Loi n° 2004-204 du 9 mars 2004 portant adaptation de la justice aux évolutions de la criminalité (JORF 10 mars 2004) ;
- Loi n° 2006-64 du 23 janvier 2006 relative à la lutte contre le terrorisme et portant diverses dispositions relatives à la sécurité et aux contrôles frontaliers (JORF 24 janv. 2006) ;
- Loi n° 2008-1245 du 1er décembre 2008 visant à prolonger l'application des articles 3, 6 et 9 de la loi n° 2006-64 du 23 janvier 2006 (JORF 2 déc. 2008) ;
- Loi n° 2011-267 du 14 mars 2011 d'orientation et de programmation pour la sécurité intérieure, « LOPPSI 2 » (JORF 15 mars 2011) ;
- Loi n° 2012-1432 du 21 décembre 2012 relative à la sécurité et à la lutte contre le terrorisme (JORF 22 déc. 2012) ;
- Loi n° 2014-1353 du 13 novembre 2014 renforçant les dispositions relatives à la lutte contre le terrorisme (JORF 14 nov. 2014).

Cette liste a été récemment complétée par la loi n° 2016-731 du 3 juin 2016 renforçant la lutte contre le crime organisé, le terrorisme et leur financement, et améliorant l'efficacité et les garanties de la procédure pénale (JORF 4 juin 2016), adoptée en réaction aux attentats de Paris du 13 novembre 2015.

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[15] Loi n° 86-1020 du 9 septembre 1986, relative à la lutte contre le terrorisme et aux atteintes à la sûreté de l'Etat (JORF 10 sept. 1986).

6. Eclatement de la matière. – S'il est vrai que toutes ces lois ne sont pas spécifiquement dévolues au terrorisme, puisque certaines d'entre elles concernent plus largement la sécurité, elles ont toutes plus ou moins modifié la procédure pénale applicable au terrorisme. On perçoit déjà là la dispersion du régime procédural applicable au terrorisme qui est un régime d'exception « éclaté ». C'est le second facteur, et non des moindres, de complexité de la matière. En effet, la procédure pénale applicable au terrorisme dispose d'un corpus spécifique contenu aux articles 706-16 et suivants du Code de procédure pénale formant le Titre quinzième du Livre Quatrième de ce code rassemblant selon son intitulé « quelques procédures particulières »… Mais, outre ces règles dérogatoires propres au terrorisme, il faut également compter avec les règles procédurales applicables à la criminalité organisée (art. 706-73 et s. CPP) qui par un mécanisme de renvoi s'appliquent également au terrorisme, ainsi que quelques règles procédurales empruntées aux infractions militaires et d'atteintes aux intérêts fondamentaux de la nation, notamment pour le jugement des crimes (art. 689-6 CPP).

Les liens législatifs entre terrorisme et criminalité organisée ne sont pas contestables et répondent à des exigences internationales conventionnelles qui envisagent la lutte anti-terroriste de manière globale en y incluant la lutte contre le trafic de stupéfiant, le trafic d'armes et plus largement la criminalité organisée qui nourrissent le terrorisme. La loi du 9 mars 2004 portant adaptation de la justice aux évolutions de la criminalité a constitué, à cet égard, un effort important d'unification des régimes entre le terrorisme et la criminalité organisée, mais sans pour autant mettre un terme aux spécificités propres aux terrorismes[16]. Il en résulte donc toujours un relatif éclatement « matériel » de la matière qui se double d'un éclatement « formel » puisque les textes applicables à la procédure pénale terroriste se trouvent, pour l'essentiel, à la fois dans le Titre XV du Code de procédure pénale relatif au terrorisme et le Titre XXV relatif à la criminalité organisée, et parfois dans les textes relevant du droit commun de la procédure pénale (fouilles de véhicules par exemple).

7. Plan. – Comment décrire cet ensemble relativement dispersé ? Au-delà de l'existence de règles d'exception propres au terrorisme ou partagées avec d'autres infractions (comme la criminalité organisée), l'ensemble de ce droit procédural d'exception applicable au terroriste tend à deux objectifs majeurs correspondant en même temps à la chronologie de la procédure pénale ; l'impunité au regard des conditions préalables au procès pénal (I) et l'efficacité lors de la mise en œuvre du procès pénal (II).

I – L'exception terroriste au soutien de l'impunité au regard des conditions préalables au procès pénal

1. Temps et espace. – Au regard des conditions préalables à la mise en œuvre du procès pénal, l'exception terroriste permet de lutter contre les éventuelles causes d'impunité découlant du temps et de l'espace. En ce sens, l'exception terroriste justifie tant l'allongement du délai de prescription de l'action publique (A) que l'extension de la

[16] Cette interaction formelle entre terrorisme et crimT org. n'est pas sans conséquence sur le fond des règles, car le terrorisme restant symboliquement sans doute au sommet de l'échelle de gravité de ces infractions pénales, il joue parfois un rôle de moteur de nouvelles règles dérogatoires qui sont ensuite étendues à l'ensemble de la crimT org., v. *infra*

compétence extraterritoriale de la loi française (B). Il s'agit par là d'affirmer que les terroristes ne peuvent compter sur le temps ou les frontières pour espérer une quelconque forme d'impunité.

A- L'exception terroriste justifiant l'allongement du délai de prescription de l'action publique

2. Délai de prescription en matière terroriste. – Le terrorisme fait partie des premières catégories d'infractions à avoir bénéficié d'un régime dérogatoire en matière de prescription de l'action publique[17]. Ainsi, l'article 706-25-1 du Code de procédure pénale prévoit que l'action publique des crimes terroristes se prescrit par trente ans et celle des délits terroristes se prescrit par vingt ans. Cet allongement du délai de prescription est remarquable par rapport aux délais de droit commun qui sont de dix ans en matière criminelle et seulement de trois ans en matière délictuelle. En allongeant de la sorte les délais de prescription en matière de terrorisme, le législateur entend signifier sa volonté de toute impunité à l'encontre des auteurs d'infractions terroristes en permettant leur poursuite même longtemps après les faits[18].

3. Comparaison avec autres régimes dérogatoires. – Il faut reconnaitre, néanmoins, que cet allongement exceptionnel du délai de prescription de l'action publique n'est pas réservé au seul terrorisme puisque les mêmes délais sont prévus en matière de trafic de stupéfiants[19], de crimes de guerre[20] et de crimes de disparition forcée[21]. Par ailleurs, on rappellera que les crimes et délits sexuels ou de violences commis à l'encontre de mineurs se prescrivent par vingt ans, étant précisé que ce délai court à compter de la majorité du mineur[22]. Si l'on est d'avis que le délai de prescription est, tout comme le quantum de la peine, le reflet juridique de l'expression sociale de la réprobation à l'égard de telle ou telle infraction, ce noyau d'infractions dont le terrorisme fait partie se situe à un stade intermédiaire de réprobation sociale entre les infractions de droit commun et les crimes contre l'humanité qui sont imprescriptibles selon l'article 213-5 du Code pénal[23].

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[17] Depuis la loi n° 95-125 du 8 février 1995 relative à l'organisation des juridictions et à la procédure civile, pénale et administrative.

[18] A cet égard, une proposition de loi portant réforme de la prescription en matière pénale, déposée à l'Assemblée nationale le 1er juillet 2015, prévoit un allongement des délais de prescription de droit commun et est de nature à atténuer cette différence de traitement entre les infractions de droit commun et celles de terrorisme : http://www.senat.fr/dossier-legislatif/ppl15-461.html.

[19] V. CPP, art. 706-31 (Loi n° 95-125 du 8 février 1995).

[20] V. CP, art. 462-10 (Loi n° 2010-930 du 9 août 2010). Il est à noter que le législateur français n'a pas souhaité s'aligner sur les textes internationaux prévoyant l'imprescriptibilité des crimes de guerre et notamment le statut de la Cour pénal internationale, sur ce point v. les très instructifs développements de C. Hardouin-Le Goff, th. préc., n° 938 et s.

[21] V. CP, art. 221-18 (Loi n° 2013-711 du 5 août 2013).

[22] V. CPP, art. 7, al.3, art. 8, al.2 et art. 706-47.

[23] N'atteignant pas la gravité des crimes contre l'humanité, la qualification d'infraction terroriste, fut-elle criminelle, ne peut justifier une mise à l'écart de l'immunité de juridiction dont bénéficie les chefs d'Etats étrangers et leurs agents diplomatiques, v. Cass. crim. 13 mars 2001, Bull. n° 64 et Cass. 1re civ. 9 mars 2011, Bull. n° 49. Mais, cette possible mise à l'écart de l'immunité politique en matière de crimes contre l'humanité et crimes de guerre ne résulte pas seulement de leur gravité intrinsèque mais également de la compétence supra-étatique des juridictions internationales compétentes pour en juger

4. Si le terrorisme partage donc avec d'autres catégories d'infractions des règles dérogatoires en matière de délai de prescription de l'action publique, il bénéficie de règles plus particulières en matière de compétence extraterritoriale de la loi française.

B- L'exception terroriste justifiant l'extension de la compétence extraterritoriale de la loi française

5. Rappel des règles de compétence territoriales. – Le terrorisme fait encore partie des quelques catégories d'infractions à pouvoir bénéficier de règles dérogatoires de compétence de la loi pénale française lorsque l'infraction a été commise à l'étranger. Il convient de rappeler que la loi pénale française n'est en principe applicable qu'aux infractions commises sur son territoire[24]. Toutefois, notre droit pénal s'autorise l'application de la loi pénale française à des crimes ou délits commis à l'étranger lorsque l'auteur[25] ou la victime[26] est de nationalité française et sous réserve de respecter certaines conditions[27]. L'application de la loi pénale française est donc toujours tributaire d'un lien réel ou personnel avec la France.

6. Compétence universelle. – Or, en dehors même de tels liens, il est possible de poursuivre en France et sur le fondement de la loi pénale française un terroriste étranger ayant commis des actes terroristes à l'étranger en application de la compétence universelle. Cette compétence universelle ne peut découler que d'une convention internationale qui autorise la justice pénale française à juger l'auteur de l'une des infractions visées par la convention dès lors qu'il se trouve sur le sol français ; le critère de compétence se réduit ainsi au seul lieu d'arrestation[28]. On comprend qu'une telle extension de compétence découlant d'engagements internationaux ne peut être réservée qu'à des matières particulièrement graves. On peut en ce sens évoquer la Convention de New-York du 10 décembre 1984 contre la torture et autres traitements cruels, inhumains ou dégradants[29], la Convention de Vienne et New-York du 3 mars 1980 sur la protection physique des matières nucléaires[30], ou bien encore le Statut de la Cour pénale internationale signé à Rome le 18 juillet 1998 pour le jugement des crimes de guerres et des crimes contre l'humanité[31]. Le terrorisme, quant à lui, figure en bonne place au sein de cette liste de conventions internationales prévoyant une compétence universelle. Ainsi, la Convention européenne du 27 janvier 1977 pour la répression du

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et devant qui la souveraineté étatique est inopposable, v. D. Rebut, *Droit pénal international*, Dalloz, 2e éd., 2015, n° 76.

[24] V. CP, art. 113-2. A cet égard, la récente loi n° 2016-731 du 3 juin 2016, renforçant la lute contre le crime organisé et le terrorisme, a inséré dans le Code pénal un nouvel article 113-2-1 précisant que *« tout crime ou tout délit réalisé au moyen d'un réseau de communication électronique, lorsqu'il est tenté ou commis au préjudice d'une personne physique résidant sur le territoire de la République ou d'une personne morale dont le siège se situe sur le territoire de la République, est réputé commis sur le territoire de la République »* ; v. déjà en ce sens, VA Limoges, 8 juin 2000, BICC 2001, p. 210 ; TGI Paris, 13 nov. 1998, Gaz. pal. 2000, 1, doctr. p. 697, obs. Manseur-Rivet.

[25] V. CP, art. 113-6.

[26] V. CP, art. 113-7.

[27] V. CP, art. 113-8 et 113-9.

[28] V. CPP, art. 689-1.

[29] V. CPP, art. 689-2.

[30] V. CPP, art. 689-4.

[31] V. CPP, art. 689-11.

terrorisme et la Convention de New-York du 12 janvier 1998 pour la répression des attentats terroristes prévoient la compétence universelle pour juger les auteurs d'actes de terrorisme attentatoires aux personnes ou aux biens ainsi que les actes de terrorisme écologique[32]. En outre, la Convention de New-York du 10 janvier 2000 pour la répression du financement du terrorisme étend la compétence universelle en matière de terrorisme aux actes de financement d'une infraction terroriste[33]. Cet ensemble conventionnel consacré à la répression du terrorisme montre la volonté de la communauté internationale de réprimer les auteurs d'actes terroristes où qu'ils se trouvent et d'éviter que les frontières ne soient source d'impunité.

7. Extension de compétence propre au terrorisme. – Mais, outre la compétence universelle, le terrorisme bénéficie désormais d'une autre règle d'extension de compétence de la loi pénale française très exceptionnelle. En effet, la loi du 21 décembre 2012 relatif à la sécurité et à la lutte contre le terrorisme a inséré dans le Code pénal un article 113-13 selon lequel *« la loi pénale française s'applique aux crimes et délits qualifiés d'actes de terrorisme et réprimés par le titre II du livre IV commis à l'étranger par un français ou par une personne résidant habituellement sur le territoire français »*. Pour bien mesurer l'intérêt et le caractère dérogatoire de cette nouvelle règle de compétence, il est nécessaire d'analyser rapidement son régime. Tout d'abord, la référence (nouvelle) au seul critère de résidence habituelle en France est remarquable et autorise l'application de la loi française à des étrangers ayant commis des actes terroristes à l'étranger dès lors qu'ils ont séjourné suffisamment longtemps en France pour y être considérés comme résidants[34]. C'est sans doute moins des actions terroristes violentes qui seront concernées que des actions d'entrainement au terrorisme commis à l'étranger par des « formateurs ou élèves terroristes » étrangers séjournant périodiquement en France. Ensuite et surtout, cette compétence territoriale d'exception n'est soumise à aucune des restrictions habituelles que l'on connait en matière d'application extraterritoriale de la loi pénale française. En effet, s'agissant des délits, la condition de la double incrimination n'est pas exigée, contrairement à ce qui est prévue par l'article 113-6 pour la répression d'un français ayant commis un délit à l'étranger. En outre, l'éventuel jugement de la personne par l'Etat étranger du lieu de commission des faits n'interdit pas à la justice pénale française de rejuger les mêmes faits. En d'autres termes, cette nouvelle compétence extraterritoriale de la loi pénale française en matière de terroriste écarte le principe *non bis in idem*. Une telle exception est remarquable lorsque l'on sait que ce principe est respecté même en application de la compétence universelle et pour des infractions tout aussi graves (crimes de guerre ou crimes contre l'humanité).

8. Nouvelle compétence réelle ? – Certains auteurs y voient en ce sens l'expression d'une nouvelle forme de « compétence réelle » que l'on connait en matière d'atteintes aux intérêts fondamentaux de la nation et qui revient à appliquer la loi pénale française comme si l'infraction avait été commise en France alors qu'elle a été réalisée intégralement à l'étranger[35]. Cette extension de compétence serait justifiée par la nature particulière des infractions en cause qui portent atteintes aux intérêts

[32] V. CPP, art. 689-3 et 689-9.

[33] V. CPP, art. 689-10.

[34] Cette notion devra immanquablement être précisée par la jurisprudence.

[35] V. Y Mayaud, Rép. Pén. Dalloz, *V° Terrorisme*, n° 550; D. Rebut, *Droit pénal international*: Dalloz, 2e éd., 2015, n° 111.

fondamentaux de la nation « française », dont on peut supposer qu'elles ne seront pas poursuivies par un Etat étranger peu enclin à se mêler des intérêts fondamentaux d'un autre Etat… Le terrorisme apparaitrait donc lui aussi comme une forme d'atteinte aux intérêts fondamentaux de la nation ce que conforte du reste son emplacement dans le Code pénal au début du Livre IV, justifiant une compétence de principe de la France comme si l'infraction avait été commise sur son territoire. Il nous semble néanmoins que ce rapprochement entre terrorisme et atteintes aux intérêts fondamentaux de la nation est contestable du point de vue des règles de compétence extraterritoriale. En effet, l'extension de compétence prévue par l'article 113-13 en matière de terrorisme repose davantage sur un critère personnel, à savoir la nationalité ou la résidence de l'auteur, que sur un critère réel tenant à l'objet de l'infraction. D'ailleurs, la dimension internationale de certains groupes terroristes rend pour le moins difficile le rattachement de leurs actions à l'étranger aux seuls intérêts fondamentaux de la France. C'est pourquoi, il est bien plus probable en matière de terrorisme, qu'en matière d'atteintes aux intérêts fondamentaux de la nation, qu'un autre Etat ait à connaître de faits terroristes commis sur son territoire par un français ou un résident français. Il nous semblerait alors contestable qu'un terroriste ayant exécuté sa peine dans cet Etat, puisse à nouveau être condamné en France sans égard pour la condamnation étrangère. La Chambre criminelle a d'ailleurs récemment décidé que le juge pénal français, lorsqu'il condamne un étranger ayant commis une infraction en France, devait tenir compte de la peine éventuellement déjà exécutée dans son pays pour les mêmes faits[36]. Cette prise en compte partielle du principe *non bis in idem* en application du principe de territorialité devrait *a fortiori* s'imposer à l'égard de la nouvelle extension de compétence prévue en matière de terrorisme.

9. Quoi qu'il en soit, on constate ainsi que les infractions terroristes sont non seulement soumises à des règles dérogatoires, de prescription et de compétence territoriale de la loi pénale, partagées avec d'autres catégories d'infractions en raison de leur gravité, mais elles sont en outre soumises à des règles dérogatoires propres au service de leur répression. On perçoit déjà là, au seul stade des conditions préalables au procès pénal, que le terrorisme constitue un régime d'exception particulier. Cette impression ne peut qu'être renforcée lorsqu'on examine les conditions de mise en œuvre du procès pénal.

II – L'exception terroriste au soutien de l'efficacité lors de la mise en œuvre du procès pénal

10. La mise en œuvre du procès pénal en matière de terrorisme est guidée par un principe d'efficacité justifiant le recours à des règles procédurales largement dérogatoires du droit commun de la procédure pénale. L'exception terroriste se manifeste ainsi tant au cours de la mise en état de l'affaire (A) qu'au cours de son jugement (B).

[36] Cass. crim. 23 oct. 2013, Bull. n° 201 ; D. 2013, p. 2950, note D. Rebut ; RSC 2014, p. 857, obs. D. Boccon-Gibod ; AJ pén. 2014, p. 127, obs. Th. Herran; Gaz.-pal. 9-11 févr. 2014, p. 25, obs. E. Dreyer; v. également, Cass. crim. 15 avril 2015, n° 15-90001: Dr. pén. 2015, n° 119, obs. E. Bonis-Garçon.

A- L'exception terroriste soutenant l'efficacité de la mise en état de l'affaire

11. Exclusion des interceptions de sécurité. – La mise en état de l'affaire est ici entendue dans un sens large comme recouvrant toute la phase d'enquête policière et, le cas échéant, d'instruction préparatoire[37]. Pour autant, nous n'évoquerons pas ici les quelques spécificités du terrorisme en matière d'interception de sécurité issues de la loi n° 2015-912 du 24 juillet 2015 relative au renseignement[38], puisqu'elles sont indépendantes de tout procès pénal et relèvent de la police administrative, comme l'a d'ailleurs rappelé le Conseil constitutionnel[39]. On signalera simplement à la marge que cette même loi du 24 juillet 2015 a créé un fichier national automatisé des auteurs d'infractions terroristes[40], ce fichage pouvant s'avérer très utile dans le cadre d'une enquête ou information judiciaire pour identifier rapidement les auteurs d'actes terroristes. Pour les mêmes raisons, nous ne nous attarderons pas sur les assignations à résidence pouvant être ordonnée par l'administration à l'encontre des personnes ayant séjournés à l'étranger dans des lieux où opèrent des groupements terroristes, depuis la récente loi du 3 juin 2016[41].

12. Compétence concurrente des juridictions parisiennes. – Sur un plan strictement judiciaire, le régime d'exception en matière terroriste ressort d'ores et déjà des acteurs de l'enquête et de l'instruction, puisque le procureur de la République et le juge d'instruction de Paris disposent d'une compétence « concurrente » à celle des procureurs ou juges territorialement compétents[42]. Cette centralisation si elle n'est pas automatique permet en matière de terrorisme à dimension nationale et internationale de centraliser les enquêtes et informations judiciaires sous la direction d'enquêteurs et de magistrats spécialisés pour des raisons d'efficacité bien comprises.

13. Mesures privatives de liberté/garde à vue. – Ces règles procédurales dérogatoires en matière terroriste se manifestent tout autant lorsque l'on examine l'encadrement des actes de procédure attentatoire à la liberté ou à la vie privée. S'agissant des mesures privatives de liberté, la garde à vue en matière de terrorisme bénéficie des mêmes prolongations exceptionnelles que celles prévus en matière de criminalité organisée[43]. Concrètement, au-delà de la durée maximale de droit commun de quarante-huit heures (en cas de prolongation), la garde à vue peut encore être prolongée pour une durée de quarante-huit heures si nécessaire sur autorisation du juge des libertés et de la détention (JLD) ; la durée totale de la garde à vue atteint alors quatre-vingt-seize heures, soit quatre jours[44]. Mais, outre cette prolongation exceptionnelle partagée avec la criminalité organisée, le terrorisme bénéficie d'un allongement supplémentaire du délai de la garde vue qui peut alors atteindre

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[37] Sur cette conception de « la mise en état de l'affaire » en matière pénale, v. F. Desportes et L. Lazerges-Cousquer, *Traité de procédure pénale*, Economica, 3e éd., 2013, n° 1482.

[38] V. CSI, art. 821-1 et s.

[39] V. Cons. const. 23 juill. 2015, n° 2015-713 DC (§§18 et 20) ; RFDA 2015, p. 1195, obs. A. Roblot-Troizier et G. Tusseau, l'argument n'étant pas incontestable, v. J. Alix, art. préc.

[40] V. CPP, art. 706-25-3, fichier dont sont exclus les auteurs de « délits de presse terroristes ».

[41] V. CSI, art. L. 225-1 et L. 225-1.

[42] V. CPP, art. 706-17.

[43] V. CPP, art. 706-88.

[44] Sont toutefois exclus de ces durées exceptionnelles les délits de provocation et d'apologie du terrorisme (art. 706-24-1 CPP) et les délits informatiques (art. 706-72 CPP).

cent-quarante-quatre heures, soit six jours, à la condition qu'il existe *« un risque sérieux de l'imminence d'une action terroriste en France ou à l'étranger ou que les nécessités de la coopération internationale le requièrent impérativement »* et bien évidemment toujours sous le contrôle du JLD[45]. Il est important de souligner ici que cet allongement très exceptionnel du délai de la garde à vue ne tient pas simplement à la nature terroriste de l'infraction, mais aussi et surtout à l'imminence d'une attaque terroriste en France ou à l'étranger, ou bien encore à la dimension internationale de l'enquête. C'est précisément au regard de cette finalité toute particulière que le Conseil constitutionnel a validé cette prolongation jusqu'à six jours de la garde à vue en matière de terrorisme[46].

14. Détention provisoire. – Un parallèle mérite d'être fait ici avec les règles dérogatoires en matière de détention provisoire, récemment modifiées par la loi du 3 juin 2016 (art. 7). En effet, outre l'allongement du délai initial de la détention provisoire[47], ainsi que l'allongement du délai butoir en cas de renouvellement de la mesure[48], il est possible d'envisager une prolongation exceptionnelle de quatre mois supplémentaires après comparution devant la chambre de l'instruction dès lors que la libération de la personne est susceptible de causer un risque grave pour les biens et les personnes[49]. Cette prolongation exceptionnelle fondée sur des motifs de sécurité n'est certes pas exclusivement réservée au terrorisme mais la menace terroriste en constitue indéniablement l'une des hypothèses majeures.

15. Intervention de l'avocat. – On ajoutera que l'allongement du délai de la garde à vue en matière de terrorisme s'est assez naturellement accompagné d'un report de l'intervention de l'avocat à la soixante-douzième heure de garde à vue en matière terroriste[50]. Le Conseil constitutionnel a eu l'occasion de valider un tel report[51]. La solution n'était pourtant pas évidente à la lumière de sa décision retentissante du 30 juillet 2010 qui a censuré la garde à vue de droit commun au motif essentiel qu'elle méconnaissait les droits de la défense parce que l'assistance de l'avocat n'était pas assez « effective »[52]. Il a néanmoins estimé qu'au regard de la « particulière gravité ou complexité de certaines infractions commises par des personnes agissant en groupe ou réseau » le report de l'assistance de l'avocat peut apparaître nécessaire pour permettre le recueil ou la conservation des preuves ou prévenir une atteinte aux personnes[53]. En revanche, il a estimé que la restriction au libre choix de l'avocat en matière terroriste au motif d'un possible risque de « fuite d'information » était excessive[54]. Dans le sens du

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[45] V. CPP, art. 706-88-1.

[46] V. Cons. const. 22 sept. 2010, n° 2010-31 QPC.

[47] Désormais de six mois (art. 706-24-3 CPP).

[48] Ce délai butoir a été maintenu à deux ans pour les délits terroristes et trois ans pour le délit d'association de malfaiteur terroriste (art. 706-24-3 CPP) et trois à quatre ans pour les crimes terroristes (art. 145-2 CPP).

[49] V. CPP, art. 706-24-3 et 145-1, dernier alinéa.

[50] V. CPP, art. 706-88. Report de l'avertissement d'un proche jusqu'à la 96ème h (706-88-1, al. 4)

[51] Cons. const. 21 nov. 2014, n° 2014-428 QPC : D. 2014, p. 2344 ; RPDP 2014, p. 880, obs. A. Botton.

[52] Cons. const. 30 juill. 2010, n° 2010-14/22 QPC ; D. 2010, p. 2254, obs. J. Pradel ; RSC 2011, p. 139, obs. A. Giudicelli, et p. 165, obs. B. de Lamy ; RPDP 2010, p. 649, obs. E Verny.

[53] Cons. const. 21 nov. 2014, préc.

[54] Cons. const. 17 févr. 2012, n° 2012-223 QPC : AJ Pén. 2012, p. 342, obs. J.-B. Perrier ; RPDP 2012, p. 384, obs. C. Ribeyre.

Conseil constitutionnel, on observera que la règle du report de l'intervention de l'avocat jusqu'à la soixante-douzième heure est déjà censée couvrir ce risque[55].

16. Mesures attentatoires à la vie privée/dynamique législative. – S'agissant des mesures attentatoires au respect de la vie privée, la matière terroriste ne dispose plus désormais de beaucoup de règles spécifiques et partage la plupart des règles dérogatoires avec la criminalité organisée. Pour autant, il est frappant de remarquer que cet état du droit d'exception en la matière est le fruit d'une évolution qui, bien que non coordonnée, repose sur une même dynamique où le terrorisme fut le « moteur » de l'exception.

17. Perquisitions. – L'évolution du régime des perquisitions en est une parfaite illustration. Alors que le consentement de l'intéressé à la perquisition est en principe requis dans le cadre d'une enquête de préliminaire, la loi du 9 septembre 1986 avait prévu une exception en matière de terrorisme sur autorisation du président du Tribunal de grande instance[56] (puis du JLD lors de la réforme du 15 juin 2000). Par la suite, le législateur a étendu, dans un premier temps, cette exception aux infractions de trafic d'armes et de trafic de stupéfiants à l'occasion de la loi du 15 novembre 2001 (art. 24), pour enfin la généraliser à l'ensemble des crimes et délits punis d'au moins cinq ans d'emprisonnement[57]. Quant à la dérogation au respect des horaires de perquisitions au seul motif des nécessités de l'enquête[58], elle fut introduite en matière de terrorisme en 1996[59] avec néanmoins une restriction en matière d'enquête préliminaire aux seuls lieux n'étant pas d'habitation, selon les directives du Conseil constitutionnel[60]. Puis, ce dispositif fut étendu à l'ensemble de la criminalité organisée à l'occasion de l'adoption de la loi du 9 mars 2004[61]. On perçoit ainsi une dynamique législative qui d'une certaine manière fait du terrorisme le moteur du droit procédural d'exception. Il ne serait donc pas surprenant que la nouvelle dérogation aux horaires de perquisitions introduit par la récente loi du 3 juin 2016 pour les seules infractions terroristes « *lorsque leur réalisation est nécessaire afin de prévenir un risque d'atteinte à la vie ou à l'intégrité physique* »[62] soit à l'avenir étendue à l'ensemble de la criminalité organisée.

18. Fouille de véhicules. – A un degré moindre, on pourrait encore en ce sens évoquer l'évolution du régime des fouilles de véhicules. A l'occasion de l'adoption de la

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[55] Cette vigilance du Conseil s'est encore manifestée à l'occasion de la censure des dispositions qui avaient exclu, en matière de terrorisme, criminalité organisée et d'atteintes aux intérêts fondamentaux de la nation, l'obligation d'enregistrement audiovisuel des interrogatoires de garde à vue en matière criminelle, v. Cons. const. 6 avril 2012, n° 2012-228/229 QPC : RPDP 2012, p. 384, obs. C. Ribeyre ; RSC 2013, p. 441, obs. B. de Lamy.

[56] V. CPP, ancien art. 706-24.

[57] V. CPP, art. 76, al. 4.

[58] De telles dérogations existaient en effet déjà en matière de trafic de stupéfiant et de proxénétisme, mais à la condition que le lieu abrite la réalisation d'une infraction, v. CPP, art. 706-28 et 706-35.

[59] Loi n° 96-647 du 22 juillet 1996 et Loi n° 96-1235 du 30 décembre 1996.

[60] V. Cons. const. 16 juill. 1996, n° 96-377 DC : D. 1997. 69, note Mercuzot ; JCP 1996. II. 22709, note Nguyen Van Tuong.

[61] V. CPP, art. 706-89, pour l'enquête de flagrance ; art. 706-90, pour l'enquête préliminaire ; art. 706-91, pour l'instruction. Toutefois, les anciens délits de « presse terroristes » ainsi que délits informatiques en sont exclus, v. CPP, art. 706-24-1 et 706-72.

[62] CPP, art. 706-90, al.2 ; v. également, CPP, art. 706-91, 4°.

loi du 15 novembre 2001 relative à la sécurité quotidienne et faisant suite aux attentats du « 11 septembre », le législateur a permis aux enquêteurs la fouille de véhicules sans le consentement de son conducteur sur simple réquisition du procureur de la République en matière de terrorisme ainsi que de trafic d'armes et de stupéfiants, ces dernières infractions pouvant alimenter le terrorisme[63]. Puis, quelques années plus tard, le législateur a étendu cette dérogation aux infractions de vol et de recel, à l'occasion de la loi du 18 mars 2003 pour la sécurité intérieure[64]. On conviendra que l'on s'éloigne quelques peu de l'objectif initial de lutte contre le terroriste. A cet égard, il convient de préciser qu'une loi du 22 mars 2016 a étendu le régime de la fouille des véhicules à celui des bagages se trouvant dans les véhicules et espaces publics affectés aux transports de voyageurs[65], avant que la loi du 3 juin 2016 n'étende cette possibilité à la fouille des bagages se trouvant dans tous les espaces publics[66].

19. « Cyber-infiltration ». – Un dernier exemple mérite d'être évoqué pour illustrer le rôle moteur du terrorisme en matière de régime procédural d'exception. Il s'agit de la « cyber-infiltration » ou enquête sous pseudonyme, qui autorise les enquêteurs à agir sous couverture sur les réseaux de communication en ligne ou sur des sites internet. Cette « cyber- infiltration » (ou « infiltration qualifiée »[67]) fut introduite par la loi du 5 mars 2007 sur la prévention de la délinquance en matière de traite des êtres humains et de proxénétisme[68]. Elle a ensuite été étendue aux infractions commises à l'occasion de jeu en ligne en 2010[69], avant d'être également étendue aux délits de provocation au terrorisme et d'apologie du terrorisme par la loi du 14 mars 2011, dite « LOPPSI 2 »[70]. Cette extension législative de la « cyber-infiltration » s'est achevée avec la loi du 13 novembre 2014 renforçant les dispositions relatives à la lutte contre le terrorisme qui en autorise le recours à l'ensemble de la criminalité organisée[71]. Il est vrai que cette fois-ci le terrorisme n'a pas été à l'initiative de ce nouveau procédé d'enquête intrusif. Mais, il aura été à tout le moins le « véhicule » principal de son extension à l'ensemble de la criminalité organisée, qui résulte d'une loi dont l'objet et l'exposé des motifs est bien de « renforcer les dispositions relatives à la lutte contre le terrorisme ». On ajoutera que la récente loi du 3 juin 2016 offre aux enquêteurs de nouveaux procédés informatiques intrusifs en matière de criminalité organisée où cette fois-ci le rôle moteur de la lutte anti-terroriste est évident[72].

20. Qu'il soit « moteur ou véhicule » de règles dérogatoires en matière d'enquête et d'information judiciaire, c'est toujours en considération d'une exigence d'efficacité que

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[63] Article 22 de la loi.

[64] V. CPP, art. 78-2-2.

[65] Loi n° 2016-339 du 22 mars 2016, relative à la prévention et à la lutte contre les incivilités, contre atteintes à la sécurité publique et contre les actes terroristes dans les transports collectifs de voyageurs, sur laquelle, v. notre commentaire, Dr. pén. 2016, étude n° 9.

[66] V. CPP, art. 78-2-2 et 78-2-4 (modifiés par l'article 47 de la loi).

[67] Y. Mayaud, Rép. pén. Dalloz, préc., n° 571.

[68] V. CPP, art. 706-35-1 et 706-47-3.

[69] Loi n° 2010-476 du 12 mai 2010 relative à l'ouverture à la concurrence et à la régulation du secteur des jeux d'argent et de hasard en ligne (art. 59).

[70] V. CPP, ancien art. 706-25-2.

[71] V. CPP, art. 706-87-1.

[72] Il s'agit de l'interception de données informatiques archivées (art. 706-95-1 et 706-95-2 CPP) et de données informatiques de connexion (art. 706-95-4 CPP).

le législateur recours à l'exception terroriste. Il en va de même, à un degré moindre, des règles gouvernant la phase de jugement.

B- L'exception terroriste soutenant l'efficacité du jugement de l'affaire

21. Exclusion du jury populaire. – La principale règle dérogatoire du droit commun en matière de jugement des affaires terroristes est indiscutablement celle de l'éviction du jury populaire décidée par la loi du 9 septembre 1986. Plus précisément, le législateur n'a pas souhaité créer une Cour d'assises spéciale propre au jugement des crimes terroristes. Mais, il a préféré emprunter le dispositif déjà existant pour le jugement des crimes militaires et d'atteintes aux intérêts fondamentaux de la nation lorsqu'ils sont commis en temps de paix, à savoir une Cour d'assises spéciale composée de sept magistrats professionnels en premier ressort et neuf magistrats professionnels en appel[73]. On a pu dire de cet emprunt au régime des infractions militaires et des atteintes aux infractions aux intérêts fondamentaux de la nation qu'il pouvait signifier symboliquement « une forme d'assimilation de la violence terroriste à un acte de guerre commis en temps de paix »[74]. Sans vouloir contester cette analyse qui contient sans doute une part de vérité, il faut bien avoir à l'esprit que la raison bien comprise de ce dispositif est d'éviter toute tentative d'intimidation envers les jurés de la part des auteurs présumés de crimes terroristes. C'est d'ailleurs en référence à un tel motif que le Conseil constitutionnel a validé cette différence de traitement entre les crimes terroristes et ceux de droit commun[75]. Quant au choix de l'emprunt d'un système déjà existant, il avait sans doute le mérite de ne pas devoir en créer un nouveau. On ajoutera en ce sens que le même emprunt est opéré par le Code de procédure pénale pour le jugement des crimes en matière de trafic de stupéfiants[76], où il semble moins évident de pouvoir parler ici « d'actes de guerre ».

Il est à noter par ailleurs que, outre la composition de cette Cour d'assises spéciale, son fonctionnement même est guidé par l'efficacité répressive, puisqu'elle rend ses décisions à la majorité simple et ce, même lorsqu'elles sont défavorables à l'accusé[77]. La Chambre criminelle a refusé de transmettre une question prioritaire de constitutionnalité (QPC) portant sur la conformité de cette exception en matière terroriste aux articles 6 et 9 de la Déclaration des droits de l'homme et du citoyen de 1789, qui garantissent l'égalité devant la loi et le respect de la présomption d'innocence[78]. Elle a considéré que cette QPC n'était pas suffisamment sérieuse pour être transmise au Conseil constitutionnel, dès lors que ce dernier avait déjà validé lors de l'examen de la loi du 9 septembre 1986 sur le terrorisme ce renvoi au dispositif existant en matière d'infractions militaires et d'atteinte aux intérêts fondamentaux de la nation. La motivation de ce rejet est pour le moins ambiguë, car s'il s'agissait vraiment de refuser le renvoi de la QPC en raison de la validation antérieure de la disposition contestée par le Conseil, il était alors inutile de se référer au défaut de sérieux de la

[73] V. CPP, art. 706-25 et 689-6.

[74] V. Th. S. Renoux, *Juger le terrorisme?*, Cah. const. 2003, n° 14, p. 1.

[75] Cons. const. 3 sept. 1986, n° 86-213 DC (§24) ; v. également, Crim. 24 nov. 2004, n° 03-87.855, Bull. crim. n° 296 ; D. 2005. 460, estimant cette dérogation conforme aux articles 6 et 14 de la CSDHLF.

[76] V. CPP, art. 706-27.

[77] V. CPP, art. 689-6.

[78] V. Crim. 19 mai 2010, n° 09-82.582, D. 2010. 1352.

question[79]. Pour autant, on peut en effet penser qu'une telle QPC n'aurait sans doute pas prospéré, car l'exigence d'une majorité qualifiée en matière criminelle est aussi la contrepartie de la présence du jury populaire sans doute un peu plus aléatoire dans ses jugements qu'un collège de magistrats professionnels. Dès lors qu'une Cour d'assises est composée seulement de magistrats professionnels, on peut estimer qu'il n'est plus nécessaire d'exiger une majorité qualifiée.

22. Jugement des délits de « presse terroristes ». – Quant au jugement des délits, il convient de dire quelques mots sur les effets du récent transfert des délits de provocation au terrorisme et d'apologie du terrorisme de la loi du 29 juillet 1881 sur la presse[80] vers le Code pénal[81], opéré par la loi du 13 novembre 2014. L'enjeu de ce transfert est avant tout procédural[82], puisqu'il a consisté à exclure du régime très protecteur de la loi de 1881 ces deux « délits de presse terroristes ». Ces délits sont donc soumis désormais pour l'essentiel aux règles de procédure pénale du droit commun, puisque la plupart des règles dérogatoires applicables en matière de terrorisme sont expressément exclues[83]. Ce retour exceptionnel au droit commun des délits de presse terroristes n'est pas sans incidence sur leur jugement et l'efficacité répressive pouvant en découler. Il sera désormais possible, en effet, de juger l'auteur de provocation au terrorisme ou d'apologie du terrorisme par la voix de la comparution immédiate ou bien encore de la comparution sur reconnaissance préalable de culpabilité (CRPC), alors que ces procédures simplifiées sont exclues pour les délits de presse relevant de la loi du 29 juillet 1881[84]. Cette possibilité a d'ailleurs bien été perçue au lendemain des évènements tragiques de janvier 2015, puisque certains journaux ont fait état de plus d'une centaine de condamnations pour apologie du terrorisme un mois après les attentats dont la moitié ont été prononcées en comparution immédiate[85].

23. En un mot pour conclure, on peut dire que la procédure pénale en matière de terrorisme, même lorsqu'elle revient formellement au droit commun, ce n'est que dans un esprit d'exception!

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[79] Puisqu'il s'agit de deux critères cumulatifs de recevabilité de la QPC, v. Const., art. 61-1.

[80] Ancien article 24, al.6.

[81] V. CP, art. 421-2-5.

[82] Même s'il est vrai qu'il s'est accompagné d'un léger alourdissement des peines: 5 ans d'emprisonnement et 75 000€ d'amende, contre 5 ans d'emprisonnement et 45 000€ d'amende auparavant.

[83] V. CPP, art. 706-24-1 (garde à vue et perquisitions); art. 706-25-1 (prescription); art. 706-25-3 (inscription au fichier national automatisé des auteurs d'infraction terroriste).

[84] V. CPP, art. 397-6 (comparution immédiate) et 495-16 (CRPC). Ce retour au droit commun procédural pour les seuls délits de presse terroristes n'est manifestement pas contraire au principe constitutionnel d'égalité devant la loi selon la Cour de cassation, v. Cass. crim. 1er déc. 2015, n° 15-90017.

[85] http://www.lefigaro.fr/actualite-france/2015/03/18/01016-20150318ARTFIG00007-depuis-les-attentats-la-justice-a-prononce-132-condamnations-pour-apologie-du-terrorisme.php.

The Hungarian criminal law on financing of terrorism

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Abstract:

In order to stop terrorist attacks and the growing number thereof it is not enough to study the phenomenon of terrorism and terrorist persons independently, we have to dig deeper and find the crucial interconnected points and alliances that are realised in financing terrorism.

Financing of terrorism is problem of great importance that cannot be solved on the basis of biased and marginal opinions. Only complex view can guarantee a better understanding of the elements of terrorism and thus help the prevention thereof. Such complex view can be obtained by studying the criminalized behaviours of financing of terrorism more comprehensively. To this effect, this essay introduces the criminal elements of financing of terrorism – as part of a comprehensive problem solving method -, and also informs the reader about the legal history, aspects and features of this criminal act.

Present terrorism and the financing thereof constitute such a negative social and political influence which presents a new kind of challenge and demands a consistent solution. The main question is what kind of tools of international and nation criminal law we can protect the public security with besides the civil, administrative and operative responses, meaning that it should be defined how much the legal, in particular the criminal norms should interfere with the lives of the citizens.

Keywords: *financing of terrorism, terrorist act, providing funds, collecting funds, providing material assistanc, supports the activities of the terrorist group.*

1. The history of the regulation on financing of terrorism

The Hungarian criminal law has been criminalising financing of terrorism since 1st of March 2003. The former Criminal Code (Act IV of 1978, hereinafter: former CC) included this punishable act as part of the criminal offence of terrorist act and not independently[1], but as a sui-generis (punishable for itself) criminal act.[2] The Hungarian Parliament promulgated the International Convention for the Suppression of the Financing of Terrorism adopted by the General Assembly of the United Nations in resolution 54 of 9 December 1999 by Act LIX of 2002 (hereinafter: Convention). Article 18 of this Convention says:

[1] See: R. Bartkó: *A terrorizmus elleni küzdelem kriminálpolitikai kérdései* [The criminal political questions of the fight against terrorism], UNIVERSITAS - Győr Nonprofit Kft., Győr, 2011.

[2] M. Tóth: *A terrorcselekmény büntetőjogi szabályozásának és gyakorlatának változásai* [Changes in the criminal regulation and practice of terrorist act] In: HADTUDOMÁNY: A Magyar Hadtudományi Társaság és MTA Hadtudományi Bizottság Folyóirata. XXIII. évfolyam, 2013/1-2, p. 30-40.

"States Parties shall cooperate in the prevention of the offences set forth in article 2 by taking all practicable measures, inter alia, by adapting their domestic legislation, if necessary, to prevent and counter preparations in their respective territories for the commission of those offences within or outside their territories, including:

(a) Measures to prohibit in their territories illegal activities of persons and organizations that knowingly encourage, instigate, organize or engage in the commission of offences set forth in article 2;

(b) Measures requiring financial institutions and other professions involved in financial transactions to utilize the most efficient measures available for the identification of their usual or occasional customers, as well as customers in whose interest accounts are opened, and to pay special attention to unusual or suspicious transactions and report transactions suspected of stemming from a criminal activity. For this purpose, States Parties shall consider:

(i) Adopting regulations prohibiting the opening of accounts the holders or beneficiaries of which are unidentified or unidentifiable, and measures to ensure that such institutions verify the identity of the real owners of such transactions;

(ii) With respect to the identification of legal entities, requiring financial institutions, when necessary, to take measures to verify the legal existence and the structure of the customer by obtaining, either from a public register or from the customer or both, proof of incorporation, including information concerning the customer's name, legal form, address, directors and provisions regulating the power to bind the entity;

(iii) Adopting regulations imposing on financial institutions the obligation to report promptly to the competent authorities all complex, unusual large transactions and unusual patterns of transactions, which have no apparent economic or obviously lawful purpose, without fear of assuming criminal or civil liability for breach of any restriction on disclosure of information if they report their suspicions in good faith;

(iv) Requiring financial institutions to maintain, for at least five years, all necessary records on transactions, both domestic or international."[3]

Recognising the connection between the numbers and seriousness of international terrorist attacks and the financial funds attainable by terrorists, the Convention took measures to prevent and eliminate the funding of terrorists and terrorist groups. The contracting parties considered it important to connect the system of reporting and identifying provisions aimed at preventing money laundering with the impairment of the financial foundations of terrorism. To that end they encouraged the states acceding to the Convention to – irrespective of whether the financing is direct or indirect (e.g. with the help of organisations which actually or allegedly aim to realise charity, social or cultural purposes), or it is a result of an illegal activity (e.g. trade in arms or drugs, or blackmail) – adopt regulations preventing and eliminating the transfer of funds intended to be used for terrorism, also to enhance the exchange of information on the international transactions of such funds. For this reason the Hungarian rules also connect financing of terrorism with money laundering.

The preamble of Act CXXXVI of 2007 on the prevention and combating of money laundering and terrorist financing highlights the importance of the fight against financing of terrorism:

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[3] International Convention for the Suppression of the Financing of Terrorism. Adopted by the General Assembly of the United Nations in resolution 54/109 of 9 December 1999.

"The objective of this Act is to effectively enforce the provisions on combating money laundering and terrorist financing with a view to preventing the laundering of money and other financial means derived from criminal activities through the financial system, the capital markets and other areas exposed to potential money laundering operations, as well as to help combat the flow of funds and other financial means used in financing terrorism."

Section 261 (4) ad (5) of the former CC on terrorist act included the provisions on the Hungarian criminal rules on financing of terrorism. With regard to this, section 261 also provided provisions on the obligation to report a terrorist act and thus obliged every citizen to report the preparation of any terrorist act. Moreover, according to Act CXXXVI of 2007, any suspicious circumstance indicating terrorist financing should be reported (as it is even today), similarly to the suspicion of money laundering. Thus the failure to report money laundering[4] is also connected thereto as a related criminal offence.

The report of 2010 of the Committee of Experts on the Evaluation of Anti-money Laundering Measures and the Financing of Terrorism listed as a shortcoming that the Hungarian Criminal Code did not provide for an offence of a terrorist financing in the form of provision or collection of funds with the unlawful intention that they should be used or in the knowledge that they are to be used by an individual terrorist for any purpose. Besides, it was unclear whether the financing of terrorist organisations' day to day activities are incriminated and provision or collection of funds for terrorist organisations' day to day activities is covered. The provisions of the former CC did not cover cases where for example someone funded the training of a terrorist or with regard to this someone funded the living of the family of a future terrorist.[5]

When the new Criminal Code (Act C of 2012, hereinafter: CC) was adopted financing of terrorism constituted a new criminal offence, thus since 1 July 2013 it is punishable independently to provide or collect funds with the intention to be used in order to carry out terrorist acts and also to provide material assistance to a person who is making preparations to commit a terrorist act.

2. Terrorist Financing – Section 318

"(1) Any person who provides or collects funds with the intention that they should be used in order to carry out an act of terrorism, or who provides material assistance to a person who is making preparations to commit a terrorist act or to a third party on his behest is guilty of a felony punishable by imprisonment between two to eight years.

(2) Any person who commits the criminal offense referred to in Subsection (1) in order to carry out an act of terrorism in a terrorist group, or on behalf of any member of a terrorist group, or supports the activities of the terrorist group in any other form is punishable by imprisonment between five to ten years.

(3) For the purposes of this Section 'material assistance' shall mean the assets specified in Point 1 of Article 1 of Council Regulation (EC) No. 2580/2001 of 27 December

[4] See: I. L. Gál: *A pénzmosással és a terrorizmus finanszírozásával kapcsolatos jogszabályok magyarázata* [Interpretation of Statutory Regulations on Money Laundering and Financing of Terrorism], HVG-ORAC Lap- és Könyvkiadó Kft, Budapest, 2012.

[5] According to the Reasoning of Act C of 2012.

2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, including legal documents and instruments in any form."[6]

2.1. Legal subject

The legal subject[7] of the crime is public safety just like in the case of the criminal offence of terrorist act. Considering its content this includes the social interest in the uninterrupted functioning of state, state bodies, international organisations, the interest in public safety, also in life, health, personal freedom and the immunity of material goods. [8] The perpetrator actually endangers public safety by their accomplice-like behaviour when supporting terrorists or terrorist groups with financial means.

2.2. Subject of perpetration

The subject of perpetration is the material assistance. Material assistance is determined by section 318 (3) of the CC, according to this material assistance shall mean assets specified in point 1 of Article 1 of Council Regulation (EC) No. 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, including legal documents and instruments in any form.

This Council Regulation constitutes the background for the criminal offence and it defines the exact meaning of material assistance. According to this funds, other financial assets and economic resources shall mean: assets of every kind, whether tangible or intangible, movable or immovable, however acquired, and legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such assets, including, but not limited to, bank credits, travellers' cheques, bank cheques, money orders, shares, securities, bonds, drafts and letters of credit.

2.3. Acts of perpetration

Acts of perpetration of the criminal offence are as follows:
- providing funds,
- collecting funds,
- providing material assistance,
- providing any other kind of support.

Providing funds should mean the handing over the possession, the disclosure and the delegation of right of disposal of any financial asset listed as subject of perpetration of the crime. In the view of realisation of the crime, providing the funds can take place directly or indirectly, but also secretly or openly.

The crime is realised, if the financial asset leaves the possession of the perpetrator and another natural or legal person obtains the right of disposal in order to ensure the necessary conditions of a terrorist attack. Thus, the criminal offence is committed by the handing over of the financial fund in any kind of manner, thus by transferring the

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[6] Act C of 2012 on the Criminal Code.

[7] See: J. Földvári: *Magyar büntetőjog. Általános rész* [Hungarian Criminal Law General Part], Osiris publisher, Budapest, 2002, p. 91-96.

[8] E. Belovics, M. G. Molnár, P. Sinku: *Büntetőjog II. - Különös Rész* [Criminal Law II – Special Part]. Negyedik, hatályosított kiadás, [editor: B. Busch], HVG-ORAC Lap- és Könyvkiadó Kft., Budapest, 2015, p. 524-525.

exercise of the right of disposal. According to this, it is not a necessary requirement to realise the criminal offence to use the funds to actually commit the terrorist act. Typical means of perpetration is to transfer funds or hand over cash to a terrorist group. [9]

It is also irrelevant whether the financial asset comes from legal or illegal source, it does not affect the realisation of the criminal offence. The features of forms[10] of terrorism and the covering up of the functions and existence of terrorist acts justified the decision of the legislator to pay special attention to legally obtained financial means used for the support of terrorism and regard it as an enhanced danger. In many cases terrorists get the major part of their financial support from legal sources, like for example the donations of charitable organisation and legitimate businesses, but individual offers are typical as well.[11]

Collecting financial means include every kind of act that is intended to create a financial base and support for terrorist organisations and for the commission of terrorist acts. Collecting financial means should be aimed at giving the necessary means to commit a terrorist attack. Thus, in order to be able to realise the criminal offence it is enough for the perpetrator to collect financial assets for realising terrorist goals so these financial assets does not actually have to reach the recipient. In this case the realisation of the statements of facts, thus the completion of the criminal offence only depends on this. The special feature of the act of perpetration is that the financial assets actually do not leave the possession of the perpetrator. The perpetrator collects the financial assets with an active behaviour, typically from other persons and the competition of the criminal offence can be established, if the financial assets are received from at least one person.

Besides the perpetrator who collects financial assets those commit the crime of terrorist financing as well who are aware of the purpose for what they give their support, in particular, according to the aforementioned act of perpetration, namely according to "providing funds". However, if the person is not aware of the purpose of their financial support, or the perpetrator succeeds deceiving them, then their error – as a ground for preclusion of punishability – precludes their criminal liability and only the perpetrator collecting the financial assets can be called to account. On the other hand, if the perpetrator forwards the received financial assets then they can be punished because of providing funds.

The third act of perpetration is providing material assistance for a person preparing to commit a terrorist act or another person on behalf of such a person. Providing material assistance means a guarantee to use, apply and enjoy the material assets. However, the assistance must be connected to the person preparing to commit a terrorist attack or another person on behalf of such person (e.g. relative, friend). The other person can actually be anybody who the person preparing to commit a terrorist act is in a dependent, supporting or emotional relationship with and the terrorist

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[9] I. L. Gál: *A közbiztonság elleni bűncselekmények* [Offenses Against Public Security]. In: Új Btk. kommentár 6. Különös rész [Comentaries on the New Criminal Code. Volume 6. Special Part], [editor in chief: P. Polt], Nemzeti Közszolgálati és Tankönyv Kiadó, Budapest, 2013, p. 21.

[10] L. Korinek: *A terrorizmus* [Terrorism]. In: K. Göncöl, K. Kerezsi, L. Korinek, M. Lévay: Kriminológia – Szakkriminológia [Criminology - Specialized Criminology]. Complex Kiadó Jogi és Üzleti Tartalomszolgáltató Kft., Budapest, 2006, p. 447-465.

[11] I. Görgényi, J. Gula, T. Horváth, J. Jacsó, M. Lévay, F. Sántha, E. Váradi: *Magyar Büntetőjog - Különös Rész* [Hungarian Criminal Law - Special Part], [editors: T. Horváth, M. Lévay], Complex Kiadó Jogi és Üzleti Tartalomszolgáltató Kft., Budapest, 2013, p. 428-429.

considers it important to support this third person with financial assets (e.g. the person planning a suicide attack can be greatly motivated by knowing that the people important to them are in financial security after the commission of the attack). As a matter of fact, this is an indirect but very important kind of support for the person preparing to commit a terrorist act.

The assistance can be only a one-time deal or can also be periodic. The act of perpetration also includes providing the material assistance for the training of a terrorist person, but the act meets the requirement of the statement of facts even if the assistance actually ensures the terrorist person enough to live on. It is not a condition for establishing the criminal offence that the terrorist attack is committed or attempted by using the received assistance. It is enough to establish the completion of the crime that the material assistance reaches the person preparing to commit a terrorist act or another person on behalf of such person since the acceptance of the material assistance for the purpose of perpetration puts the criminal offence in the preparatory phase for the person preparing to commit a terrorist act.

Section 318 (2) provides the rules for the act of perpetration realised by providing any other kind of support to the terrorist group's activity. The essence of this act of perpetration is the act of the perpetrator has to be connected to an already existing terrorist group, however, this act cannot be connected to being part of the group but only to the maintenance of the activities thereof. The perpetrator is a person who does not belong to the terrorist group and whose participation is only indirect. Their act can include any kind of behaviour that is intended to support the activities of the terrorist group and it can be any kind of help with the exception of material assistance: e.g. documents, hiding-place, and vehicle. Besides, it can include information service, logistic and telecommunication support helping the activities of the terrorist group.

2.4. The perpetrator

The perpetrator and the conspirator can be anybody. The perpetrator of the crime of terrorist financing can also be the perpetrator of a terrorist act, if they supports other terrorists or terrorist groups with material assistance. Due to the lack of direct connection to the perpetration of the terrorist act, with regard to the distant criminal connection, the perpetrator of terrorist financing cannot be accomplice to a terrorist act even if the act is committed.

2.5. Immaterial criminal offence

Terrorist financing is an immaterial criminal offence; the statement of facts does not require achieving a specific result.

2.6. Criminal liability

The crime can only be committed intentionally, in particularly, for the sake of the given purpose, thus, only by direct intention (dolus directus). The perpetrator has to be aware of the fact that their action is going to enable a terrorist act. Thus, the perpetrator collects and provides the material assets for the purpose of guaranteeing that the conditions of the terrorist act are met, or for the sake of the person preparing to commit a terrorist act or another person on behalf of such a person. The perpetrator has to know the terrorist character of the person or organisation or the aims thereof, since for

the lack of such knowledge the criminal offence of terrorist financing cannot be established. [12]

2.7. Phases

Attempt of the crime can be established from the moment the act is commenced but it is only theoretically possible. It is completed, if the act of perpetration is realised entirely.

2.8. Unity and cumulation

The counts of the criminal act depend on how many persons or terrorist groups preparing to commit terrorist acts were given financial funds to. However, giving assistance to the same terrorist act or terrorist group several times falls under the term of continuing offence. Formal cumulation of the criminal offence is apparent in connection with the preparation of the terrorist act, since due to the identical penalty and with regard to the principle of speciality only terrorist financing can be established. If the act of the perpetrator is in formal cumulation with money laundering, only terrorist financing can be established due to the principle of consumption, since this bears a more serious penalty. However, if the perpetrator participates in the commission of the terrorist act after committing terrorist financing, then they can only be called to account for the terrorist act since in this case terrorist financing, according to the rules of apparent material cumulation, is qualified as an unpunished preparation-like act because of the smaller violation regarding the protected legal subject.

Assistance given for different terrorist acts or to different terrorist groups is considered as perpetration of several crimes by the same offender (cumulation).

The CC punishes more severely if the perpetrator commits the act of perpetration prescribed in section 318 (1) with the aim of committing a terrorist act in a terrorist group or to support a member of a terrorist group, or supports the activities of a terrorist group in any other form. The criminal political reason behind this aggravating circumstance lies within the fact that the more organised the crime is the more danger it poses to the society and thus it deserves a higher penalty. This means that the imprisonment of two to eight years that is prescribed for the basic case of the criminal offence is increased to imprisonment of five to ten years regarding the qualified case of the offence.

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J. Földvári: *Magyar büntetőjog. Általános rész* [Hungarian Criminal Law General Part], Osiris publisher, Budapest, 2002, p. 91-96;

[12] M. Tóth, Z. Nagy: *Magyar büntetőjog. Különös rész* [Hungarian Criminal Law. Special Part]. Osiris publisher, Budapest, 2014, p. 335-339.

I. L. Gál: *A közbiztonság elleni bűncselekmények* [Offenses Against Public Security]. In: Új Btk. kommentár 6. Különös rész. [Comentaries on the New Criminal Code. Volume 6. Special Part], [editor in chief: P. Polt], Nemzeti Közszolgálati és Tankönyv Kiadó, Budapest, 2013, p. 21;

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L. Korinek: *A terrorizmus* [Terrorism]. In: K. Göncöl, K. Kerezsi, L. Korinek, M. Lévay: *Kriminológia – Szakkriminológia* [Criminology - Specialized Criminology]. Complex Kiadó Jogi és Üzleti Tartalomszolgáltató Kft., Budapest, 2006, p. 447-465;

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Rehabilitating terrorists

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Abstract:

Can Jihadis be rehabilitated? Is it possible to 'de-radicalize' terrorists? This article will look at what some prison systems around the world are doing to answer those questions. The research, like the programs, is still in its infancy, so no firm conclusion is possible. However, initial signs indicate that correctional systems have a part to play in the de-radicalization of terrorists and thus could be a contributor to the fight against terrorism.

Keywords: *terrorists, prison systems, correctional systems, fight against terrorism.*

Definitions

Organized world bodies and individual governments have great difficulty defining what is meant by terrorism and, thus, who is a terrorist. This article will not get into that political/philosophical debate, but will use the definition established by the U.S. Federal Bureau of Investigation: *Terrorism is the unlawful use of force or violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives."*

"Rehabilitation" in this article is defined as the process where individuals or groups cease their involvement in organized violence and/or terrorism. The process can involve de-radicalization and/or disengagement. While de-radicalization aims for substantive changes in individuals' ideology and attitudes, disengagement concentrates on facilitating behavioral change.[1] "The disengaged terrorist may not be 'de-radicalized' or repent at all. Often physical disengagement may not result in any concomitant change or reduction in ideological support"[2]

The difference, according to Nikos Passas[3], between politically motivated offenders and 'ordinary' criminals lies in the intention. While 'ordinary' criminals commit crimes in pursuit of selfish and/or personal goals, politically motivated offenders believe that they are acting on behalf of a certain group, society or humanity as a whole. Politically motivated offenders commonly distinguish between 'legality' and 'legitimacy', arguing that breaking the law is justified when a particular policy or the entire political or legal system are illegitimate.

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[1] The Centre for the Study of Radicalisation and Political Violence (ICSR), Kings College, London, UK.

[2] John Horgan, 'Individual disengagement: a psychological analysis' in Tore Bjorgo and John Horgan (eds.), *Leaving Terrorism Behind* (London and New York: Routledge 2009), p. 27.

[3] 'Political Crime and Political Offender: Theory and Practice', *Liverpool Law Review, 8(1) (1986).*

Lisa Andrews, writing in the Developmental Psychology Student Newsletter from Mesa Community College's Psychology Department[4], based on her studies, provided a very good overview of what motivates terrorists. "In reading some of the research that has been done on terrorism, I have come to understand that every terrorist act has a specific, premeditated goal, with a predicted outcome." The categories she identified were:

Change: These acts of terrorism are motivated by the achievement of a goal. This goal may be related to social, religious, or political change.

Religious: This group believes it is justified because of religious commands found in the Bible, Torah, Koran, and they use these same religious beliefs to recruit more followers.

Social: Other groups are motivated by purely social causes. Its object will be to overthrow not governments, but the economic and technological basis of the present society.

Political: The leaders of the given idea or movement come together, in the form of a militia or rebel group, and bring about political change in order to rid society of an undesired ruling power.

Revenge: There have been many instances where terrorism has been used as a means to avenge what is considered an unjust or offensive act.

Attention: Terrorism has been used as an effective means of gaining attention from the public eye using fear.

Symbolism: One thing that is important to acknowledge when speaking of terrorism is the importance of symbolism. Every terrorist act is designed to convey a specific message. Even randomly seeming terrorist acts are conveying a specific message, "We can get you anywhere, at any time. There is no one to protect you" (The Center for Mental Health Services, 1996).

Ms. Andrews summarized her paper, "Most terrorists have several motives for committing terrorist acts and several, if not all, of those mentioned above can be used in order to try to explain their motives. The only true way to determine their motives is to ask the terrorists themselves."

Nations involved in rehabilitation programs

Programs to rehabilitate/de-radicalize terrorists are in operation in several nations including Saudi Arabia, Egypt, Jordan, Iraq, Afghanistan, Indonesia, Pakistan, Yemen, United States, United Kingdom, Netherlands, Singapore, Northern Ireland, Israel, Phillippines, Spain, Algeria, Canada, Malaysia, Nigeria, and Sweden.

The programs vary in terms of methods, audience, support and funding. For example, some nations (Egypt, Algeria, Israel) look at the terrorists as a group where other nations (Saudi Arabia, Singapore, Afghanistan) work with the terrorists in their prisons[5] on an individual by individual basis. Another area of difference between correctional systems is whether to separate violent extremists from other inmates or to integrate them. Israel has separate prisons or wings designated for *security prisoners*, the Netherlands has a 'terrorism wing' in the Vught high security prison for their small number of inmates classified as terrorists whereas the the UK and Spain disperse their terrorist prisoners and place them in any of their high security prisons.

[4] http://www.mesacc.edu/dept/d46/psy/dev/Fall01/terrorism/motivation.html.

[5] "terrorists in their prisons" is used as opposed to convicted terrorists because the individuals involved in the programs range from detainees to convicted to those being held without charge.

Saudi Arabia

A comprehensive counseling/education program is the heart of the Saudi program "designed to combat the intellectual and ideological justification for violent extremism." The program uses intensive religious debates and psychological counseling. It is based on the belief that those recruited by terrorist groups often have little formal religious education, and while they are in prison, they are encouraged to discuss and debate Islamic law with sheiks and scholars. This type of religious counseling seeks to correct the detainees' interpretation of Islam through open dialogue.[6]

Though the program begins in prison, it continues at the Care Rehabilitation Center, located in a former resort, just outside the capital city of Riyadh. Typically, the stay at the Center is eight to 12 weeks and the prisoners participate in a wide variety of activities from Koranic studies to art therapy. There is a swimming pool on the grounds and other recreational activities. The correctional staff do not wear uniforms and inmates have 24-hour access to telephones. After leaving the Care Rehabilitation Center, the Saudi government monitors the progress of the inmates and offers support. Christopher Boucek wrote in his paper for the Carnegie Endowment for International Peace, "One an individual satisfactorily renounced his previous beliefs, assistance is provided in locating a job, and receiving other benefits, including additional government stipends, a car, and an apartment. Success of the program . . . is based in part on the recognition that being a radical is not inherently a bad thing. Acting on radical beliefs with violence, however, is, and that is the behavior that needs to be modified."

As of February 2010, nearly 300 men completed the Saudi rehabilitation program. Of that, nearly 80 percent have been absorbed into normal society without any incidents. However, one failure that made news was Mohamed al-Awfi who, after six years of detention in Guantanamo by the United States, was released to Saudi Arabia, and entered the Center's program, taking classes in anger management, Islamic law, history and art therapy. During his time at Guantanamo, Awfi claimed he was tortured and mistreated. Shortly after his release from the Center, Awfi decided to take revenge on the United States and fled to Yemen. Saudi officials visited Awfi's family and instead of threatening them, the officials told the family that they did not hate Awfi, only his behavior and though he made a mistake by running to Yemen, if he came back he would receive help. The family began to call Awfi in Yemen and not long after Awfi turned himself in.

The Saudi "soft" approach to the rehabilitation of terrorists has been copied by other nations, but few have equaled the Saudi's in the investment of time, talent and money and their initial success rates appear less impressive.

Egypt

Unlike the Saudi program that was initiated by the State, Egypt's program of terrorist rehabilitation began in May 1997 when the leadership of *a-Gama'a al-Islamiya*[7] declared an initiative to denounce the use of violence in Jihad except in self-defense. In November 2007, *al-Jihad al-Islamiya*[8] adopted the already successful model established

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[6] "Saudi Arabia's 'Soft' Counterterrorism Strategy: Prevention, Rehabilitation, and Aftercare" by Christopher Boucek, Carnegie Papers, 2008. Carnegie Endowment for International Peace, Washington, D.C.

[7] One of the largest and most violent extremist Islamic movements in Egypt.

[8] The second most important Egyptian Islamist Jihadi movement, whose former leader was Ayman al-Zawahiri, purported to be the number 2 man in Al-Qaeda after Osama bin Laden.

by *a-Gama'a al-Islamiya.* Though the Egyptian security authorities were initially skeptical and hesitant to support the inmate initiated program, they have come to accept and support it. The leadership of *a-Gama'a al-Islamiya*, after consulting with Islamic scholars from Al-Azhar University, released twenty-five volumes of revisions to their initial philosophy, entitled *Tashih al-Mafahim* (Corrections of concepts). The revisions include arguments that Islam does not permit killing or terrorizing non-Muslim civilians and discusses the dangers that Al-Qaeda poses to Muslims worldwide.[9]

Iraq

The *Munasaha*[10] program began on March 9, 2011 to rehabilitate prisoners in Anbar and Baghdad. Much like the Saudi program it is designed to educate inmates about the damage terrorism causes to Iraqi society and that terrorism violates the law and is considered a sin by all religions.[11] Previously, Task Force 134, the United States unit charged with overseeing coalition detainee operations in Iraq utilized an approach of segregating extremists, nurturing moderates and ensuring good care and custody for each detainee. Beginning with a classification process[12] to separate recruiters[13] from other inmates, the program includes religious discussions conducted by U.S.-vetted Iraqi imams, basic literacy education, and work programs. According to U.S. authorities, the education component is particularly effective.[14]

Singapore

With 16% of the inmates Muslims, Singapore established the *Religious Rehabilitation Group* (RRG) to de-radicalize terrorists.[15] Nearly forty Islamic scholars and religious leaders make up a group dedicated to "deprogramming" detainees. By approaching the jihadists on religious terms, the RRG seeks to treat the problem at its root. As one security officer explained, "Once you take an oath to God, it will take another man of God to undo it."[16]

Singapore is also home to the Behavioural Sciences Unit (BSU), Home Team Academy[17] which conducts research into terrorism and programs to counter it. The BSU, in addition to its own research, holds conferences and publishes books, newsletters and practical guides for academics and practitioners.

Observations and Conclusions

Though programs in other nations differ in various ways, the above programs provide the general approach most follow. New programs and variations continue to

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[9] *www.Islam Online.net*, July 9, 2007.

[10] *Munasaha* (Advisory Committee) is also the name of the 2004 Saudi terrorist de-radicalization initiative.

[11] Mohammed al-Qaisi, *www.Al-Shorfa.com* 12 March 2011.

[12] Background check, psychological evaluation, analysis of education, skills, motivation and religiosity.

[13] Inmates who look for other prisoners to radicalize.

[14] Jeffrey Azarva, "Is U.S. Detention Policy in Iraq Working?" *Middle East Quarterly,* Winter 2009, pp. 5-14.

[15] In 2001-02, more than 30 members of the Southeast Asian branch of *Jemaah Islamiyah* (Islamic community) were arrested for plotting attacks on diplomatic missions in Singapore.

[16] Katherine Seifert, *Middle East Quarterly*, Spring 2010, pp. 21-30, Philadelphia, PA USA.

[17] Training institute, under the Ministry of Home Affairs, for the Singapore Police, Civil Defense Force, Central Narcotics Bureau, Prisons Service, Immigration and Checkpoints Authority and the Internal Security Department.

emerge as new research arrives and is evaluated. Using summaries of the reports and research of others, following are some generally accepted conclusions[18]:

- ***Prisons matter***. They have played an enormous role in the narratives of every radical and militant movement in the modern period. They are 'places of vulnerability' in which radicalization takes place. Yet they have also served as incubators for peaceful change and transformation.
- Much of the current discourse about prisons and radicalization is negative. But prisons are not just a threat – they can play a positive role in tackling problems of radicalization and terrorism in society as a whole. Many of the examples in this report demonstrate how prisons can become net contributors to the fight against terrorism.
- Terrorists are not 'ordinary' offenders. They often use their time in prison to mobilise outside support, radicalise other prisoners, and – when given the opportunity – will attempt to recreate operational command structures.
- There are no hard and fast rules about whether terrorist prisoners should be concentrated together and/or separated from the rest of the prisoner population. Most of the countries that were included in the sample practice a policy of dispersal and (partial) concentration, which distributes terrorists among a small number of high security prisons. Even within such mixed regimes, however, it rarely seems to be a good idea to bring together leaders with followers and mix ideologues with hangers-on.
- The 'security first' approach of most countries results in missed opportunities to promote reform. Many prison services seem to believe that the imperatives of security and reform are incompatible. In many cases, however, demands for security and reform are more likely to complement than contradict each other.

[18] The Centre for the Study of Radicalisation and Political Violence, *Prisons and Terrorism: Radicalisation and De-radicalisation in 15 Countries,* Kings College, London, UK, 2010.

Terrorism and human rights

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Abstract:

In determining the legal framework of the battle against terrorism, there are decisively two prevailing viewpoints that are excluding each other in principle. According to one, the phenomenon cannot be dealt with in the normal framework of constitutional democracy, and thus, it requires an exceptional legal order and the waging of war. The representatives of the other viewpoint claim the opposite.

We need to insist on our moral judgment that the perpetrators of acts of terrorism are not belligerents, but criminals – although the motivation behind their acts is usually not the desire for profit, ruthlessness or something similar, that we usually connect to everyday crimes, but typically a political motivation of some kind.

The aim of the policies against terrorism is to prevent terrorist attacks, defeat the terrorists and finally to eliminate terrorism.

The primary system of instruments to prevent and overcome regional and international terrorism lies in a more democratic distribution of the authoritative, so the cultural, political and economic licenses and chances on a local, regional and international level.

Keywords: *terrorism, human rights, torture.*

1. On the relation between terrorism and human rights

The relation of terrorism and human rights cannot be considered as a decidedly new problem in the disciplines of criminal sciences (and the constitutional law), as many studies have been written previously in this topic. However, one can sense a legislative activity of such volume and nature in many states of the world since the New York attacks of 2001 in terms of the war on terror that fundamentally reformulates those opinions on human rights which were formerly considered as standards, and this counts as such a novelty that raises the attention of researchers.

In determining the legal framework of the battle against terrorism, there are decisively two prevailing viewpoints that are excluding each other in principle. According to one, the phenomenon cannot be dealt with in the **normal framework of constitutional democracy**, and thus, it requires an exceptional legal order and the waging of war.[1] The representatives of the other viewpoint claim the opposite. Actually, there is even more to it than that, as the proclaimers and appliers of the "**warlike**"

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[1] Cindy C. COMBS: *Terrorism in the Twenty-First Century,* Upper Saddle River, Prentice Hall, 2003, pp. 236–237.

conception do not even wish to comply with the rules of international military law and humanitarian law, as a terrorist cannot be considered a warrior in a legal sense.[2]

By the way, this is the legal basis for keeping the people at Guantanamo Naval Base imprisoned even today for several years without any court sentence, and torturing them in some cases, as, according to the legal viewpoint of the USA flaunting in the role of "the policeman of the world," they do not qualify as prisoners of war, so the directives of the Geneva Convention are applicable on them, so they can be "legally" injured. I am of course not arguing for the sake of terrorists, I am only emphasizing the importance of the guarantees of the government of laws, as what happens for example in the case, when a person assumed to be a terrorist turns out to be innocent?

According to István Szikinger, it is not an overstatement to say that the difference between the two viewpoints above – at least in their extreme, but rather consequently carried-out form – is that one tries to realize the battle against terrorism **inside the law**, while the other **outside the law.** Those who advertise the exceptional nature of the battle against terrorism end necessarily up **denying basic values of law** even when they otherwise intend to make concessions for the sake of protecting the remnants of these very values.[3]

As for me, I share the opinion of Zoltán Miklósi, who says that the war on terrorism may result in unacceptable consequences regarding the restriction of freedom rights and the demolition of legal state norms, furthermore, our moral attitudes toward belligerents are not in accordance with what we are thinking of the acts of terrorists. We need to insist on our moral judgment that the perpetrators of acts of terrorism are not belligerents, but criminals – although the motivation behind their acts is usually not the desire for profit, ruthlessness or something similar, that we usually connect to everyday crimes, but typically a **political** motivation of some kind.[4]

2. On the dogma of the "new type" of terrorism

2.1. Difficulties of definition

According to public opinion – and also to several researchers of this topic – the history of terrorism entered into a new, previously unknown phase with the New York attacks. As far as I am concerned, I agree with those who question this notion. After September 11th, 2001, we much rather need to re-evaluate our notion regarding safety. We received **new kind of glasses of safety politics:** we see much clearer and understand problems better, which had previously emerged. The attack against the World Trade Center and the Pentagon is not epoch-marking, but rather means that terrorists also adapt to the general trends of development in the world, meaning that in a world of globalization, terrorism is also becoming **globalized** as a rule.[5]

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[2] Tonay Bunyan: *The War on Freedom and Democracy statewatch,* http://www.statewatch.org/news/2002/sep/analysis13.htm; Conor A. Gearty: *Terrorism and Human Rights,* European Human Rights Law Review, 2005/1, pp.1–6;

[3] Szikinger, István: Terrorizmus és jogkorlátozás [Terrorism and restriction of rights]. Fundamentum 2005/3. p.73

[4] Miklósi Zoltán: *A terrorizmus elleni „háború" és az emberi jogok* [„War" against Terrorism and Human Rights]. Fundamentum 2004/3. p. 48.

[5] Tálas Péter: *A terrorizmusról hét évvel 9/11 után* [*On terrorism, seven years after 9/11*]. Európai Tükör 2008.október. pp. 69-80.

The available special literature on terrorism could fill a whole library. It is a fundamental issue during the fight against terrorism that terrorism does not have an **internationally accepted legal definition.** Although during the more than three decades of modern international terrorism the special literature discussing this topic formed and published more than a hundred definitions of terrorism, none of them were agreed on on a wide international scale.[6]

In the absence of a consensual definition, the international community uses two methods **on the global level** at the moment to define terrorism. According to Péter Tálas, it strives on the one hand to define **what does not describe terrorism** (thus, the fight for national liberation and independence against foreign occupation is not considered an act of terrorism by international law; furthermore, the international community also emphasizes that terrorism cannot be bound to any religion, nationality or culture, and this cannot be validated by committing such crimes in the name of these either; also, it prevents the criminalization of steps taken for the sake of creating or re-establishing democracy and constitutionality, and for the sake of the assurance of human rights – thus, excluding them from under the scope of acts of terrorism). On the other hand, they are trying to describe the notion based on those **characteristics of the terrorist acts**, which are regularly condemned by the international community (so the all-out violent attacks, mostly which result in innocent civilian victims, or any forms of all-out violence executed by sub-national groups or secret agents).

In this sense – according to Tálas – there is a relative consensus formed regarding the question of what we can consider – or what the Criminal Codes of the specific countries consider **in a general sense of criminal law** – as **acts committed by terrorist methods** (manslaughter, taking hostages, hijacking planes, rigging cars with bombs, suicide bombings, assassinations and mass-murder etc.), or **terrorist activities** (participation in a terrorist group as a member or leader, supporting terrorist activity and organizations financially or in any other way, intimidating or threatening the public, damaging public or private services and systems of vital importance etc.). It is worth to point out in this regard that mostly those acts are considered as terrorist activity which would otherwise also qualify as criminal acts.[7]

2.2. What do the numbers show?

After surveying the databases of different organizations and institutes[8] on the status and dynamics of terrorism, we can state that compared to the level of 2001, the situation has undoubtedly **worsened globally** (e.g. the increase in the number of death tolls). So when the politicians who campaign for the war on terror speak about the increase in the volume of the threat of terror on the world, usually utilize this type of argumentation.[9]

Further analysis of the numbers will refine the picture, as when the above data is broken down into specific areas, it shall become obvious that the threat of terror has

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[6] Tálas, Péter: *A nemzetközi terrorizmus és a szervezett bűnözés hatása a nemzetközi biztonságra és Magyarország biztonságára* [*The effect of international terorrism and organized crime on international security and the safety of Hungary*]. ZMNE Stratégiai Védelmi Kutatóintézet Elemezések 2007/1. p. 5.

[7] Tálas (2007) p. 6.

[8] *E.g.* National Memorial Institute for the Prevention of Terrorism (MIPT).

[9] Tálas, Péter: *A terrorizmus elleni küzdelem néhány dilemmájáról* [*On some dilemmas of the fight against terrorism*]. Hadtudomány 2005/4. p. 4.

increased **in certain areas** of the world (e.g. on the Middle East, South Asia and the post-Soviet area), but in other places, it significantly **decreased** (so in the United States, East Central Europe, and considering its tendency, also in Western Europe).

Based on the data of the National Counter-Terrorism Center, it can be clearly demarcated, in which countries are the most attacks committed (e.g. in Iraq, in areas occupied by Israel, in Kashmir, Columbia, Thailand, Afghanistan) and where do the attacks result in the highest death tolls (e.g. in Iraq, Russia, Kashmir, Columbia, Pakistan etc.).[10]

I agree with the opinion of Péter Tálas, in that not even these numbers represent the real extent of **terrorist threat,** as although 11th September, 2001 really had a high death toll, but following that, the number of attacks resulting in deaths in the United States decreased significantly.

The extent of the terrorist threat is largely affected also by what type of terrorism does a certain country or area have to face. The majority of the terrorist groups today are only active on a **local, national** or sub-regional level. Another part of them is regional all right, and may have an inter-regional scope, but in most cases, the areas threatened by these groups can also be located relatively precisely as well (e.g. the Turkish-Kurd, Iranian, Palestinian militant groups). And finally, there are the representatives of the new type of terrorism, the global one, who became known for the public in September 2001, but they already committed attacks before that, only these were not covered to such an extent by the media.[11]

2.3. Characteristics of the "new type" of terrorism

The early type of terrorism formulated concrete **political goals.** As opposed to that, a brand new type of terrorism appeared in the nineties, which is fundamentally different from the previous one, because its groups are not preoccupied only with terrorism. They maintain schools, hospitals or enterprises, so that they can gain the support of the society. Although the claims of terrorists are many times legitimate, the methods with which they are trying to realize them are illegal. While early terrorism had claims that mostly could be fulfilled in practice, the new type of terrorism has irrational claims. For example, Islamic organizations have been demanding the United States ever since the 1990s to withdraw from the Middle East. It is hardly possible that the greatest power in the world would decide on leaving after a demand from any terrorist organization.

The new type of terrorism does not have clearly tangible goals, they have an all-out war on the Western civilization.

The trio of authors Péter Tálas, László Póti and Judit Takács[12] – relying on the research results of Garth Whitty – summarize the different characteristics of the old and new type of terrorism in the following table:

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[10] Counterterrorism 2016 Calendar

[11] Tálas Péter: „…A szabadságjogok korlátozásával a terroristák céljait teljesítjük be magunkon" [„ … By limiting the freedom rights, we are fulfilling the aims of the terrorists on ourselves"] Fundamentum 2005/3., p. 60,

[12] Tálas Péter – Póti László – Takács Judit: *A terrorizmus elleni küzdelem fogalmi és tartalmi keretei, különös tekintettel annak katonai dimenziójára* [*The notional and content framework of the battle against terrorism, with special attention to its military dimension*]. ZMNE Stratégiai Védelmi Kutatóközpont Elemezések 2004/3, p. 2.

Old type of terrorism	New type of terrorism
Realizable goals (every party is ready to negotiate and to compromise)	Non-realizable goals (requires full surrender)
Self-restraint	Attack options are unrestrained
Differentiated targets (security forces, politicians, economy)	Differentiated targets on macro-level (symbolic objects), undifferentiated targets on micro-level (civilians)
Conventional weapons (guns, explosives)	Conventional and unconventional weapons
Localized effect	Effect on a large area
State-level (although attacks can happen on foreign land as well)	International
Coded warnings	No warning
No suicide attacks	Suicide attacks

3. The superweapon against terrorism: torture

According to the principle of „**nemo trenetur prodere seipsum**", nobody is obligated to give a damning testimony against themselves; thus, nobody can be forced to contribute to their own conviction by providing evidence against themselves.

The aim of the policies against terrorism is to prevent terrorist attacks, defeat the terrorists and finally to eliminate terrorism. But it can only try to realize these goals with restricted means, as democratic states have to adhere to the rules upon which their political system is built, even if they make it difficult for themselves to reach their goals with this.[13]

One must ask the question, whether it is more important to be faithful towards law, or the global and total war against terrorism?[14] Are we allowed to throw basic human rights that had been fought out after centuries, out the window for the sake of the alleged or actual effectiveness of the investigation against terrorism?

Respecting human rights during the planning and execution of the policies against terrorism is undoubtedly a difficult task.

Terrorists who are acting in a conspiring way must often be fought with secret service methods (e.g. tapping phones), but can all this provide legal basis for certain authorities to keep anyone under surveillance and to map their network of friends and relatives in their own right, as opposed to any preliminary judicial decision?

Well, those interpreting terrorism as "war" come forth in these cases with their "super tip," the revival of a good old, effective method: torture.

The arguments of those accepting the torturing of terrorists is relatively simple. A terrorist is not a soldier, thus they do not fall under the directives of the Geneva Convention, they do not qualify as **prisoners of war,** so their torturing is not forbidden.

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[13] Vadai, Ágnes: *A terrorizmus elleni fellépés és az emberi jogok tiszteletben tartása* [*Fighting against terrorism and respecting human rights]*. Fundamentum 2001/4. p. 132.

[14] Levinson, Sanford (ed.): *Torture A Collection*. Oxford University Press. Oxford, 2004. pp. 23-29.

Basically, this is the summary legal basis of reference for what happened at Guantanamo Naval Base.

Naturally, in such cases there are always theoreticians whose views are easily adopted by politicians. I am thinking of the "criminal law of the enemy" concept of Günter Jakobs. According to him, an enemy is someone who ignores the rules of civilization and against these people, torture is allowed.[15]

But the questioning of the right **for the accused to remain silent** (enlisted as a guarantee of **due process**) also arises. Although according to the principle of **nemo tenetur**, nobody can be forced to confess against themselves in a criminal case[16], but what if a confession extorted from a terrorist could save the life of a thousand people, by revealing the defusing code of an armed bomb?

Unfortunately, it happened a lot that although the person suspected of being a terrorist had been tortured, the lives of the innocent could not be saved based on the confession. It is also doubtful to what extent is a confession obtained in such a way acceptable in the formulation of the judicial conviction.[17]

Terrorism is the **Trojan horse** of the democratic political establishment. Trying to stop the terrorists, who stealthily emerge from this horse to raze the democratic establishment, by methodically curtailing the freedom rights can turn any avid promoter of the war on terror into a dictator.

The Rubicon between lawfulness and unlawfulness can even be crossed unnoticed. Torture is only allowed in the case of terrorists in the beginning, then with the perpetrators of pedophile crimes, then with burglars, then with bicycle thieves, and then with those who beat the red traffic light... as they obviously wanted to severely violate the traffic order of a democratic society...

4. Constitutionality is the right answer to terrorism

The phenomenon of international terrorism[18] is necessarily born in the international economic, political, social and cultural systems and sub-systems of the globalized world which are based on imbalanced power relations, when certain weaker participants of these systems, in search for solutions to actual problems, for the sake of their specific political and social goals, in an organizational framework of conspiracy, utilize an irregular armed force that is illegal in the given system but considered legitimate by them, when going against the dominant parties who make the rules of the system.[19] The public security, national security and **military measures** currently utilized are not suitable, or

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[15] Nagy Ferenc: *Az ellenség-büntetőjogról, a jogállami büntetőjog eróziójáról* [*On criminal law of the enemy, and the erosion of constitutional penal law*]. In: Ad futuram memoriam – Tanulmányok Cséka Ervin professzor 85.születésnapja tiszteletére (Szerk.: Nagy Ferenc). Pólay Elemér Alapítvány Könyvtára 13.. Szegedi Tudományegyetem Állam-és Jogtudományi Kar Büntetőjogi és Büntető Eljárásjogi Tanszék - Pólay Elemér Alapítvány. Szeged, 2007. pp. 244-259.

[16] Bárd Károly: *A hallgatás ára* [*The price of remaining silent*]. Fundamnetum 2005/3. p. 5.

[17] Elek Balázs: A jogerő a büntetőeljárásban. [*Legal force in criminal procedure.*]DEÁJK, Debrecen, 2012, pp.46-52.; Elek Balázs: A bírói meggyőződés és a megalapozott tényállás összefüggései. [*Relations of the judicial conviction and the grounded statement of facts.*] JURA, 2014/1. pp. 40-55.

[18] Gál István László – Dávid Ferenc: *A terrorizmus büntetőjogi oldala: a terrorcselekmény és a terrorizmus finanszírozása* [*Terrorism in relation to penal law: financing terrorist acts and terrorism.]*. Belügyi Szemle 2015/7-8. pp. 91.93.

[19] Gál István László – James Park TAYLOR: *Financing Terrorism: Afghanistan and the Haqqani*. International Enforcement Law Reporter 2012.10. pp. 346-351.

suitable **only in a limited way,** to overcome this phenomenon. The primary system of instruments to prevent and overcome regional and international terrorism lies in a more democratic distribution of the authoritative, so the cultural, political and economic licenses and chances on a local, regional and international level.[20]

As far as I am concerned, I consider perceiving terrorism as war a faulty approach, and I consider the solution of this damaging phenomenon as something that should belong under the competence of **criminal investigation** and **criminal jurisdiction**.

Research conducted in the subject of effectiveness of law verified that in case the legislator stands up too strictly against the violator of the law, then, after a certain level of strictness, the retaining force of legal provisions is not applicable anymore. This can basically be observed in the war against terrorism as well, as when even only the suspicion of preparation of a terrorist act already deserves torture and death, then the principle of gradual severity of legal provisions fails, obviously along with the preventive nature of penal law.

Human rights must be respected, and fair trials must be conducted[21], otherwise we might step onto such shaky grounds which could degrade citizens, who are law-abiding in "normal" conditions, to the level of terrorists [22] both mentally and in their deeds.

If the concept of the "criminal law of the enemy" prevails, those ideas and practices familiar from the Middle Ages would and will return, which would degrade our whole society to an age we could already leave behind us, owing to the ideas of Renaissance and Enlightenment.

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[20] Póczik Szilveszter: *A nemzetközi terrorizmus fontosabb összetevőiről* [*On the more important components of international terrorism.*]. Magyar Tudomány 2005/10. p. 1277.

[21] Elek Balázs: *Bizonyítási teher az eljárási funkciók megosztásának tükrében* [*Verificational burden in light of the sharing of procedural functions.*]. Jogtudományi Közlöny 2016/1. pp. 31-41.

[22] Finszter Géza: *Az alkotmányos jogállam esélyei a terrorizmus elleni küzdelemben* [*The chances of the constitutional state in the fight against terrorism.*]. Belügyi Szemle 2002/6-7. pp. 156-166.

THE DANGER OF ISLAMIC TERRORISM IN ROMANIA

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Motto:

"Romanian army went to Iraq, Afghanistan, with weapons, to fight. It's clear that Romanian soldiers did not go to Afghanistan to give people ice cream. I do not think the Romanian army has come such long way to the Gulf to distribute ice cream. They gave people bombs! They went to fight. If you keep yourselves away from fights with Muslims, Romania will be God's earth and people will be free to follow Jesus, Moses, Abraham or Muhammad or to follow Obama and your prime ministers." - OMAR BAKRI Sheikh interview - TVR 2012[1]

1. Why in Romania, too?

The question is rhetorical, if we consider the above mentioned statements of the Sheikh. And, should there be only such statements, there would not be grounds for great concern.

The migration from Middle East, driven by the wars in Syria and Iraq, opened Pandora's box, by unleashing a wave of terrorist attacks, which have terrified civilian population and all political factors in the European Union.

In Romania, there are over 70,000 practitioners of the Sunni Islam cult, officially recognized and placed under the authority of a mufti. Most of them are Turkish-Tatar, sedentarised and integrated into Romanian society, and practicing a peaceful and tolerant Islamism[2].

About 5,000 people, citizens coming from the Arabic states, live in Romania today, most of them being Syrians, Iraqis, Lebanese and Jordanians.

After the armed conflicts in the Near East, many Arabs fled to Romania together with their wives of Romanian origin, and the most important waves of refugees were in 2006 (from Lebanon), 2012 (from Syria) and 2014 (from the Gaza Strip).

With the migration of the population of Arab origin, there have appeared dozens of unauthorized mosques and Islamic foundations in Romania. In Bucharest only there are 17 mosques, built after 1990, unauthorized by a mufti[3].

There is the suspicion that these mosques, unauthorized by a mufti, are engaged in proselytism and are promoting an Islam that is considering jihad as a form of violent promotion of the teachings of the Koran.

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1 http://stiri.tvr.ro/terorismul-o-amenintare-reala-interviu-in-exclusivitate-pentru-tvr-cu-seicul-radical-omar-bakri_28649.html (visited on 19.06.2016).

2 stirile.rol.ro/ce-crede-muftiul-din-romania-despre-atentatele-din-belgia-si-islamul-pur (visited on 06.06.2016).

3 stirile.rol.ro/ce-crede-muftiul-din-romania-despre-atentatele-din-belgia-si-islamul-pur (visited on 06.06.2016*).*

A first case of terrorism was discovered in Romania in 2006, when said F.L. was surprised by the police while carrying in his own car two gas cylinders connected to an explosive device consisting of a mobile phone and a stove lighter, which he planned to detonate in a high-traffic area of Timisoara. The investigating bodies found that he has converted to Islam, and has participated in religion training camps organized in Romania, where he made contact with members of the "Muslim Brotherhood" extremist terrorist organization, and intended to detonate the bomb in order to sanction the pro-Western policy of Romania[4].

In another case, in 2015, a 17 years old young man, attending a mosque, showed "willingness" on the social networks to become a martyr for the Islamic State, both by moving to the areas where ISIS acts, to fight alongside the group members, and by sacrificing himself in a European country, at the order of the Islamic State members. For this purpose, he searched to inform himself how to acquire AK weapons, grenades, bullet-proof vests, and studied how to make a homemade bomb, which is why his activity is under investigation by the Directorate for the Investigation of Organized Crime and Terrorism (DIICOT)[5].

Another terrorist attack, also foiled by the prosecutors, occurred in 2015, when two Romanian citizens of Hungarian ethnic origin, members of the nationalist-extremist organization, HVIM Hungary, intended to detonate a homemade bomb at the celebration of the National Day of Romania. In that case, said S.Z., chairman of HVIM Transylvania, asked B.I. to manufacture an explosive device which he was supposed to detonate in public, so that the latter's attitude could rather be understood as one of submission to a superior's order, with the purpose of committing terrorist acts, and of "martyrdom" to allow him to become a member of the terrorist organization.

Official statistics of The Romanian Intelligence Service (SRI), disclosed at the request of HotNews, show that, between 2009-2013, a total of 41 foreign nationals have been declared undesirable and have been expelled from the territory of Romania, based on court decisions, as a result of preventive measures taken by The Romanian Intelligence Service[6]. Such preventive measures are taken under Article 44 of the Law no. 535/2004 on combating and preventing terrorism: "against foreigners or stateless persons about whom there are reliable data or indications that they intend to commit terrorist acts or to encourage terrorism, who will be declared undesirable in Romania or their staying in Romania will be stopped, whether they have not been placed under interdiction to exit Romania, according to the law on the legal status of foreigners in Romania".

According to Mediafax, militants of the Islamic State terror network transited Romania on their way to Syria.

Since 2004, Romania has a National System for Terrorist Alert (SNAT) to support the process of planning anti-terrorist activities, at the national level, as well as that of informing the population about the terrorist alert level. So far, since the establishment of SNAT in Romania, the terrorist alert level was SAFE (BLUE), except for a short period, occasioned by the conduct in Bucharest (2008) of the NATO Summit, when the level was raised to YELLOW -MODERATE[7].

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[4] Timişoara Court of Appeal, file no. 7459/59/2006.

[5] www.ziare.com › Stiri › justitie (visited on 06.06.2016).

[6] www.HotNews.ro, January 12, 2015.

[7] www.sri.ro/sistemul-national-alerta-terorista.html.

2. The safety and security *versus* fundamental rights and freedoms dilemma

It is undisputed that the uncertainty generated by terrorism and the other forms of organized crime will change many paradigms of classic criminal law. Organised crime has led to a broadening of the scope of inchoate offences that are criminalized independently or as attempted offences, particularly in the case of terrorist offences and other forms of organized crime[8]. Fighting organized crime determined the regulation of special procedures for obtaining evidence through a pro-active investigation, with important restrictions of fundamental rights.

The transfer of terrorist methods to the new frontier of the online environment[9] requires new legislative measures, parts of which are interfering with personal privacy.

Moving from a reactive, post-factual criminal law, towards a preventive criminal law, a security law[10], seems to be a paradigm that national criminal laws can no more ignore.

Alongside criminal regulations, we need extra-penal regulations, to assist collecting information from the new communication techniques environment.

For this purpose, Romania enacted Law no. 82/2012[11] regarding the retention of general data or data processed by the electronic communications public networks providers and electronic communications for public use providers, amending and supplementing Law no. 506/2004 on the processing of personal data and the protection of privacy in the electronic communications sector[12].

That law transposed into national legislation the Directive 2006/24/ EC of the European Parliament and of the Council of 15 March 2006[13] on the retention of data generated or processed in connection with the provision of publicly available electronic communications or public communications networks and amending Directive 2002/58/EC[14].

It did not stay long in force, as the Directive 2006/24/ EC has been declared invalid by the Court of Justice of the European Union, on April 8, 2014, as the directive infringed Art. 7, Art. 8, and Art. 52 para. (1) of the Charter of Fundamental Rights of the European Union[15].

As a result, by its Decision no. 440/2014[16], the Romanian Constitutional Court established that the provisions of the Law no. 82/2012 regarding the retention of general data or data processed by the electronic communications public networks providers and electronic communications for public use providers are unconstitutional,

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[8] L. Picotti*, L'élargissement des formes de préparation et de participation, Raport général,* Révue international de droit pénal no. 3-4/2007, p. 355-404.

[9] S. Signorato, *Misure di contrasto in rete al terrorismo: blak list, inibitione dell' accessso ai siti, rimozione del contenuto illecito e interdizione dell'accesso al domino internet* in R. E. Kostoris e F. Vigano, *Il nuovo "pacchetto"antiterrorismo*, G. Giappichelli Editore, Torino, 2015, p. 55-73.

[10] U. Sieber, *The paradigm shift in the global risk society: from criminal law to global security law– an analysis of the changing limits of crime control, supra*, p. 11-12.

[11] Published in the Official Journal of Romania, Part I, no. 406 of 18.06. 2012.

[12] Published in the Official Journal of Romania, Part I, no. 1101 of 25.11.2004.

[13] Published in the Official Journal of the European Union no. L 105/54 of 13.04.2006.

[14] Published in the Official Journal of the European Communities no. L 201 din 31.07.2002.

[15] Judgment in Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland and Seitlinger and others* available at http://curia.europa.eu (visited on 19.06.2016).

[16] Published in the Official Journal of Romania, Part I, no. 653 of 04.09.2014.

for the exact reasons given by the Court of Justice of the European Union, and the law has afterwards been repealed.

The Constitutional Court did not deny the fact that it is imperatively necessary to ensure appropriate and effective legal means, consistent with the ongoing process of modernization and development of the means of communication, so that criminal phenomenon can be controlled and countered, but the adoption of surveillance measures, in the absence of adequate and sufficient safeguards, could result in "the destruction of democracy under the guise of defending it".

The Court showed the same reticence about the enactment of the Law on cyber security in Romania, meant to replace the Emergency Ordinance no. 98/2010 concerning the identification, designation and protection of critical infrastructures[17].

The Court held[18] that, at the European level, even though under Art. 114 of the Treaty on the Functioning of the European Union, there has been initiated the ordinary legislative procedure for the adoption of a Directive on measures to ensure a common level of security of networks and information in the Union – NIS Directive (Network and Information Security), at the time when the case was before the Constitutional Court, there was no enactment at the European Union level on cybersecurity[19].

Examining the above mentioned law, within the procedure of preliminary control of constitutionality, the Constitutional Court found, among other grounds of unconstitutionality, that "requests for access to retained data for uses prescribed by the law, submitted by state bodies designated as authorities in the field of cyber security, for their specific activities, are not subject to authorization or approval by the court, so that there is no guarantee of effective protection of the stored data against the risk of abuse, and against any unlawful access to such data or use of it. This circumstance is likely to amount to an interference with the fundamental rights to privacy, family and private life, and the secrecy of correspondence, and, therefore, is contrary to the constitutional provisions that set forth and protect these rights".

Given that "the measures taken based on a law subject to constitutional review are not of a clear and predictable character, state interference with the exercise of constitutional rights to privacy, family, private life and the secrecy of correspondence, although required by the law, is not clearly, rigorously and comprehensively described, to provide confidence to citizens, the strictly necessary character in a democratic society is not fully justified, and the proportionality of the measure is not ensured by way of adequate corresponding safeguards. The restriction of the exercise of such individual rights by reason of collective rights and public interests, targeting cyber security, breaks the right balance that should exist between interests and rights of the individual, on the one hand, and of the society, on the other hand, the criticized law failing to offer sufficient safeguards to allow the effective protection of data against the risk of abuse, and any unlawful access to personal data and use of it".

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[17] Published in the Official Journal of Romania, Part I, no. 757 din 12.11.2010.

[18] C. C. dec. no. 17/21.01.2015 on the objection of unconstitutionality of the provisions of Cyber Security Law, published in the Official Journal of Romania, Part I, no. 79 din 30.01.2015.

[19] The initiative belongs to the European Commission, which on, February 7, 2013, referred the proposal for a Directive to the European Parliament and the Council. The draft directive has passed the first reading procedure in the European Parliament, where it was adopted, with amendments, on March 13, 2014. On June 10, 2014, the European Commission expressed partial agreement on the Parliament's amendments. The Council formally adopted the NIS Directive and, after the EP vote, probably in July, the directive could come into force, in August 2016.

The legislative process in the field will have to be resumed, given the objections of the Constitutional Court, to assure enactment of a legislation that meets both the requirements of security and of safeguards for the fundamental rights of individuals.

3. The Romanian legislation sanctioning acts of terrorism

Terrorist offences are not regulated by the Criminal Code, but by special legislation.

A first regulation in the field of combating terrorism was the Government Emergency Ordinance no. 141/2001[20] on the punishment of acts of terrorism and acts of violation of public order, in force from October 31, 2001 until December 11, 2004.

In accordance with the provisions of the Government Emergency Ordinance no. 141/2001, "homicide offences, assault and battery, aggravated assault, illegal deprivation of liberty, offences involving destruction, offences violating the regulations governing arms and ammunition, and the regulations governing nuclear, and other radioactive materials, as well as the regulations governing explosives, and the offences covered by Articles 106 to 109 of the Government Ordinance no. 29/1997 concerning the Air Code, committed for the purpose of creating a serious breach of the peace through intimidation, terror and/or triggering panic" were punishable as acts of terrorism.

The law also punished as acts of terrorism "the introduction or release into the atmosphere, soil, sub-soil or water of products, substances, materials, micro-organisms or toxins harmful to human or animal health or to the environment, as well as threats involving bombs or other explosive material", if they created a serious breach of the peace, through intimidation, terror or triggering of panic, as well as plotting to commit terrorist acts".

Attempts to commit such offences were also punishable, and inchoate offences, such as the production or acquisition of the means or instruments aimed at committing such offences, or the planning of measures for the purpose of their commission, were to be considered an attempt.

In 2004, intending to multiply the mechanisms aimed at fighting terrorism, the legislature enacted Law no. 535/2004[21] on preventing and combating terrorism, thus, also criminalizing other acts than those regulated by the Government Emergency Ordinance no. 141/2001, and repealing the Government Ordinance.

According to Art. 1 of the Law, terrorism refers to an array of actions and / or threats that menace public order and affect national security, having the following characteristics:

a) are deliberately committed by terrorist entities that share extremist views and attitudes and are hostile to other entities that they target by violent and / or destructive means;

b) are aimed at achieving specific goals of political nature;

c) are directed against human and / or material factors representing the authorities and public institutions, civilians or any other element belonging to these entities;

d) generate situations that have powerful impact on the population, which are meant to draw attention to the goals that they pursue.

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[20] Published in the Official Journal of Romania, Part I, no. 691 din 31.10.2001.

[21] Published in the Official Journal of Romania, Part I, no. 1161 din 08.12.2004.

In the framework of the new law, offences can be grouped into five categories[22], as follows:

a) terrorist offences as such (Arts. 32, para. 2, 34 para. 2, 37 para. 1, 38);

b) offences punishable as acts of terrorism (Arts. 33, 38);

c) recruitment and public provocation to commit terrorist offences (Arts. 33^1, 33^2);

d) establishment or leadership of terrorist organizations (Art. 35);

e) terrorism financing (Art. 36).

Terrorist offences refer to the commission of any of the following acts that, due to their nature or the circumstances in which they have been committed, may grievously harm a country or an international organization, when committed for the purpose of intimidating civil population or determining the State authorities or an international organisation to do, not to do or to abstain from doing a certain act or of grievously destabilizing or destroying fundamental political, constitutional, economic or social structures of a country or an international organization[23]:

a) offences of homicide, second degree murder and first degree murder, or bodily injury;

b) threat or illegal deprivation of liberty;

c) offences of destruction;

d) communication of false information, that compromises the safety of the navigation of a ship;

e) offences of non-observance of the regime of arms and ammunition, non-observance of the regime of nuclear materials and other radioactive matters, and of non-observance of the regime of explosives, provided in art. 279, art. 279^1 and art. 280 of the Criminal Code;

e) commission, by using a device, a weapon or a substance, of an act of violence against a person in a civil airport, if the act endangered the safety and security of the airport, or commission of any act of physical or psychological violence on a person on board a civil aircraft, during flight, or while preparing for flight, or on its crew;

f) offences of destruction or seriously damaging, by using a device, a weapon or a substance, installations of a civil airport or an aircraft in service or not in service, but on an airport, or causing damage that make the aircraft unavailable for flight or that are likely to endanger its safety during flight, as well as interruption of airport services, if the act is likely to jeopardize or compromise safety and security at the airport;

g) offences of destruction or seriously damaging navigation installations or services or causing serious disturbance in their functioning, if one of these acts is likely to compromise the safety of the flight;

h) offences of placing or causing to be placed on a aircraft, by any means, a device or a substance that is able to destroy the aircraft or to cause damage that makes the aircraft unavailable for flight or is likely to compromise the safety of the aircraft during flight;

i) offences of taking charge of an aircraft, by any means, or of exercising control over it without right;

j) offences of taking charge of a ship or a fixed platform or of exercising control over these, through violence or threat of violence;

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[22] For another classification, see: R. I. Mocanu, *Feomenul terorist. Analiza legislatiei anti-teroriste române. Studiu comparativ,* Universul Juridic Publishing House, Bucharest, 2013, p. 203.

[23] Art. 32 para 1 of Law no. 535/2004.

k) acts of violence against a person who is on board a ship or a fixed platform, if these acts are likely to compromise the safety of that ship or fixed platform;

l) offences of destruction of a fixed platform or a ship or causing damage to the fixed platform or to the cargo of a ship, if this is likely to compromise the safety of the platform or of the navigation of that ship;

m) offences of placing on a ship or on a fixed platform, by any means, a device or a substance that is able to destroy them or to cause damage to the platform, the ship or the cargo that compromises or is likely to compromise the safety of that platform or of the navigation of that ship;

n) offences of destruction or of seriously damaging a fixed platform or installations or navigation services or causing serious disturbance in their functioning, if one of these acts is likely to compromise the safety of the fixed platform or of the navigation of a ship;

o) offences of non-observance of the regime of arms and ammunition, non-observance of the regime of nuclear materials and other radioactive matters, and of non-observance of the regime of explosives;

p) attack that endangers national security, attack against a community and acts of diversion;

q) fraud committed through computer systems and electronic payment means and offences against the security and integrity of computer systems and data;

r) takeover without the right of collective passenger transport means or cargo.

The following shall also be considered as terrorist acts, and shall be punished with imprisonment of 7 to 15 years and the deprivation of certain rights, when committed for the purposes described at para. 1:.

”a) production, acquisition, possession, transportation, supply or transfer to other persons, either directly or indirectly, of chemical or biological weapons, explosive devices of any kind, and research in this field or development of such weapons or devices;

b) introducing or spreading into the atmosphere, on the soil, into the subsoil or into the water products, substances, materials of any kind, micro organisms or toxins that are likely to jeopardise the health of persons or animals or the environment or with intent to cause fires, floods or explosions that have the effect of endangering human life;

c) interfering with or disrupting the supply of water, power or any other fundamental natural resource, which have the effect of endangering human lives”.

According to Art. 37 para. 1, ”threats, by any means, against a natural or legal person, or a community, with the use of firearms, nuclear, chemical, biological arms, nuclear facilities or devices generating ionizing radiation, a nuclear explosion or a nuclear accident, or the spread or use of products, substances, micro organisms, toxins or materials, of any kind, such as to endanger the health of humans or animals or the environment or cause very serious consequences, committed for the purpose referred to in Art. 32 para. (1) constitute an offence punishable with imprisonment of 1 to 5 years”.

Threat referred to in para. (1) against a State or an international organization is punishable by imprisonment of 2 to 7 years and the deprivation of certain rights.

The following acts **shall be treated as acts of terrorism** and shall be punished with imprisonment of 5 to 12 years and the deprivation of certain rights:

”a) acquisition, possession, manufacture, fabrication, transportation or supply of goods or dual-use technologies or of military goods or explosive or flammable substances, for the purpose of production of means of destruction, explosive devices of

any kind, as well as chemicals, biological, radiological or nuclear substances, that are likely to endanger the health of humans, animals or the environment;

b) instruction or training of an individual to use or manufacture firearms, ammunition, explosives, explosive devices of any kind, chemical, biological, radiological or nuclear weapons, including any equipment designed to be used in direct connection with the use of chemical, biological, radiological or nuclear substances".

A person who commits any of the following acts under Art. 33 para. 2 shall be punished with imprisonment of 2 to 7 years and the deprivation of certain rights:

"a) facilitating border crossing, hosting or facilitating access to the area of the targeted objectives of a person who has committed or participated or will participate or commit a terrorist offence;

b) collection or possession, for the purpose of transmission, or making available data and information on targeted objectives by a terrorist entity;

c) forging official documents in order to facilitate committing one of the offences under this law;

d) blackmail in order to determine a person to commit an act of terrorism;

e) participation in instruction or training for the use of means of destruction, hazardous or toxic substances, firearms, explosive devices of any kind, ammunition, explosives, chemical, biological, radiological or nuclear weapons, in order to commit an act of terrorism;

f) aggravated theft for the purpose of committing terrorist offences".

According to Art. 38, "alarming, by any means and without good reason, a natural or legal person or a community, specialized bodies to intervene in case of danger, bodies with responsibilities in national security or public order, with respect to the use of firearms, nuclear, chemical, biological, radiological weapons or spread or use of products, substances, micro organisms, toxins or materials, of any kind, that are likely to endanger the life, physical integrity or health of humans or animals or the environment or cause very serious consequences shall be punished with imprisonment of 3 months to 2 years or a fine".

Offences of recruitment and public provocation to commit a terrorist offence

According to Art. 33^1, "the act of recruiting a person to commit a terrorist offence or other acts that are punishable as acts of terrorism shall be punished with imprisonment of 5 to 12 years".

According to Art. 33^2, "the act of urging the public, orally, in writing or by any other means, to commit offences under this law shall be punished with imprisonment of 6 months to 3 years or a fine, without exceeding the penalty provided by the law for committing the offence which was the object of such urging.

If the act mentioned above is committed by a public official, the penalty shall be imprisonment of 1 to 5 years and the deprivation of certain rights, without exceeding the penalty provided by the law for the offence which was the object of such urging.

If public provocation resulted in the offence which was the object of such provocation, it shall be subject to the penalty provided by law for the actual offence.

According to art. 33^2 para. 4 "promotion of a message via propaganda committed by any means, in public, with the intent to incite the commission of an offence of terrorism or acts that are punishable as acts of terrorism, regardless of whether the message supports or not directly terrorism, or if the actual offences were committed or not, shall be punished with imprisonment of 6 months to 3 years".

Establishment or leadership of terrorist organizations

According to Art. 35, "the act of association or initiation of an association with the purpose of committing terrorist acts or of joining or supporting, in any form, such association shall be punished with imprisonment of 5 to 12 years and the deprivation of certain rights, without exceeding the maximum punishment provided by the law for the offence that was the purpose of the association".

The act of leading a terrorist entity shall be punished with imprisonment of 7 to 15 years and the deprivation of certain rights.

Terrorism Financing

According to Art. 36, "collecting or making available, directly or indirectly, licit or illicit funds, knowing that they are to be used, in whole or in part, for the purpose of committing terrorist acts or support a terrorist entity shall be punished with imprisonment of 5 to 12 years and the deprivation of certain rights.

Whoever commits an offence for the purpose of obtaining funds, knowing that they are to be used, in whole or in part, for the purpose of committing terrorist acts or support a terrorist entity shall be punished with the punishment provided by the law for the offence whose maximum shall be increased by 3 years".

4. Specialised bodies and procedural issues

The Romanian Intelligence Service – the national authority in the field – consists of the Antiterrorist operative coordination centre through which it ensures the technical coordination of the National System for the Prevention and Combating of Terrorism, involving the public authorities and institutions provided for by the law.

In the event of a terrorist attack, the Romanian Intelligence Service, through its specialized unit, carries out counterterrorist interventions, alone or in cooperation with other authorized forces, across the country, at the objectives attacked or occupied by terrorists, for the purpose of capturing or annihilating them, freeing hostages and restoring legal order.

Counterterrorist intervention is carried out with the approval of the Supreme Council of National Defence.

Threats against the national security of Romania regarding the offences set forth by the law constitute the legal basis for the state bodies having responsibilities in the field of national security to require authorization to conduct specific activities of collecting information, as provided for by the Code of Criminal Procedure with respect to the special methods of surveillance or investigation.

Special surveillance or research techniques refer to: intercepting communications or any kind of distance communication; access to a computer system; video, audio or photo surveillance; locating or tracking through technical means; obtaining data on a person's financial transactions; detention, collection or searching of a person's mails; use of undercover investigators and collaborators; authorized participation in certain activities; controlled delivery; obtaining traffic and location data processed by providers of public electronic communication networks or providers of publicly available electronic communications.

Interception of communications or of any kind of distance communication, access to a computer system, video, audio or photo surveillance, locating or tracking through technical means, obtaining data on a person's financial transactions, detention,

collection or searching of a person's mails must be ordered by the rights and freedoms judge, when there is reasonable suspicion regarding the preparation or commission of a terrorist offence, and the measure is proportionate to the restriction of fundamental rights and freedoms, given the particular circumstances of the case, the importance of information or evidence to be obtained or the seriousness of the offence, and that evidence could not have been obtained otherwise or obtaining it would involve particular difficulties that would prejudice the investigation or there is a threat to the safety of persons or valuable property.

The prosecutor may authorize, for maximum 48 hours, the measures of technical surveillance mentioned above, if there is urgency and obtaining the technical surveillance warrant would lead to a substantial delay in the investigation, loss, alteration or destruction of evidence or would jeopardize the victim, a witness or their family members. The prosecutor must notify, within less than 24 hours after the expiry of the measure, the rights and freedoms judge from the court having the jurisdiction to hear the case at first instance or the appropriate court in rank in whose jurisdiction the office of the prosecutor who issued the order to confirm the measure is located.

Authorization to use undercover agents and controlled delivery is ordered by the prosecutor that is supervising or conducting the criminal investigation.

Within the Public Ministry there operates as a distinct entity the Directorate for Investigating Organized Crime and Terrorism, with local structures, which is also having jurisdiction to conduct criminal investigations in case of terrorist offences.

First instance trial of terrorist offences falls within the jurisdiction of the courts of appeal, and appeals are to be heard by the High Court of Cassation and Justice.

5. Conclusions

Islamic terrorism is a real threat for Romania and the other European countries involved in the Anti-Islamist coalition. In this respect, there is need for "the creation of a parallel criminal system, distanced from the principle of legality and, procedurally, unfaithful to the presumption of innocence, the adversarial principle and the principle of *ne bis in idem*"[24]. Romanian legislation on preventing and combating terrorism is comprehensive and provides adequate means to the judicial bodies to prevent and combat acts of terrorism. Even if we have our doubts about the adoption of regulations meant to allow a broader area for gathering information on persons suspected of acts of terrorism, Romania has already integrated into national law the European directives on combating and financing terrorism and is seeking further harmonization of national legislation with the European Union regulations.

[24] R. E. Kostoris in R. E. Kostoris e F. Vigano*, op. cit.*, p. XVI.

Terrorism and human rights

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Abstract:

Terrorism is not a recent problem nor it is a novelty for governments to intervene in people's everyday life due to the possible threats that terrorism signifies. As opposed to this, it is only as of late that safety has come into focus on a worldwide level, which can be explained by the ever-growing ubiquitous presence of modern terrorism.

Keywords: *terrorism, human rights, possible threats, governments.*

Terrorism definition/s?

Terror[1] (*formidilosus, terror* = fright, horror, fear, *lat.*) is the application of open violence to trigger fear, *terrorism*, based on this term, (according to the most generally accepted definition) is the series of politically motivated violent and threatening actions.

According to the authors Harmat-Bukva[2], terrorism is the application of violence or such strategy of threatening, the primary objective of which is fear, disturbance and hence, the achievement of a given political aim, or maintaining the power. The generation of fear is a supplement and a possible supporter of every form of violence – from pub brawls to traditional warfare –, but in case of terrorism this relation is oppositional, the immediate victims and sufferers of violence are at most only in a symbolic relationship with the actual operation, their selection is often secondary, mostly random.

Many have attempted to define the term *terrorism*. Fletcher[3] claims that it is impossible to define the exact definition of terrorism, in his view, only the existence of the predefined conditions and criteria allow us to be able to talk about terrorism.

Ben Saul, also shares this standpoint though, according to him, there is no difference between terrorism and inner political violence.

László Korinek also agrees that when defining terrorism, there is a need for certain predefined notions. He states that one strait of terrorism is the illegal violence, following political (religious, ideological) aims, finding publicity and a propaganda. Korinek also claims that it is indispensable to see that terrorists do not consider themselves as criminals.

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[1] Wikipedia, https://hu.wikipedia.org/wiki/Terror (March 3. 2016.)

[2] Harmat, Árpád Péter; Bukva, Kármen: A terrorizmus története. http://tortenelemcikkek.hu/node/185 (March 3, 2016.)

[3] Fletcher, George P.: The Indefinable Concept of Terrorism, Abstract http://jicj.oxfordjournals.org/content/4/5/894.abstract (March 3, 2016.)

Besides these approaches above, many experts – both form Hungary and abroad – have tried to clarify the definition of terrorism – few have been lucky to do so. It can clearly be stated that the definition of terrorism is very difficult and complex. If we accept that we need to analyze several aspects and different conditions to define terrorism, we must also accept that all of these factors need to be met.

Even if there has been no common understanding with the definition, it can be stated that there is an agreement in its judgment among the international community members.

Global security policy *vs.* Individual rights

In several states the coming to light of a new and global security policy has brought about significant normative changes, but we can claim in every change that these threaten the already-existent human rights. Governments are taking such measures in the name of antiterrorism that offends fundamental legal human rights. The international organizations, like the UN, kind of motivate these trends; they do not make efforts to step up against these measures.

The most distressing part of this issue is that not only the dictatorial states but also the Western states oppose the defense of human rights – and it is more alarming that it used to be.

With the leading of the United States, these countries mean harm to the prevailing state of the fundamental human rights and nullify the achievements of the human rights movements from the past decade. Bárándy raises this dilemma in two of his works. He explains that the difficulty to define the right proportion between efficiency and legal certainty is not a recent problem. He points out that in criminal actions – or other state acts, as a matter of fact – in recent times rights-limited steps, measures have been made in the name of efficiency, both inland and abroad. In addition to this, the boundaries of legislative acts that were not to overpass have also been created.

With the escalation of terrorism these boundaries have been blurred. This problem is not to be handled only as a question of law.[4]As Bárándy explains: *„There has to be a very serious reason that the derogation of the pillars of a constitutional state crystallized during not only decades, but centuries, could be taken into consideration, or at least this change would not be ignored plainly. It can be accepted as an axiom that the relativization and weakening of these rights mean way more than a question of law. The approach of the state and, stemming from this, the operational model of the governing body lacking of these rights result in a whole new world, a whole new society, and the transformed relationship between the citizens and state."*[5] Bárándy is obviously right that the challenges of today's security policy is the reason why we can't automatically deny every

[4] Bárándy Gergely: Kriminálpolitikai Paradigmaváltás? A védői jogok csorbításának és az ügyészi jogok növelésének okairól. In: Kontroll és Jogkövetés (Kriminológiai Közlemények). Magyar Kriminológiai Társaság. Budapest, 2012. 130. o. Bárándy Gergely: Centralizált Magyarország – megtépázott jogvédelem. A hatalommegosztás rendszerének változásairól (2010-2014). Scolar Press, 2014.

[5] Bárándy Gergely – Bárándy Aliz: Büntetőpolitikai paradigmaváltás? A védői jogok csorbításának és az ügyészi jogok növelésének okairól. In: Tanulmányok Tóth Mihály professzor 60. születésnapjának tiszteletére. Pécsi Tudományegyetem Állam- és Jogtudományi Kar. Pécs, 2011. 34. o. Bárándy Gergely: Centralizált Magyarország – megtépázott jogvédelem. A hatalommegosztás rendszerének változásairól (2010-2014). Scolar Press, 2014.

rights-limiting acts, but it is worth taking the proposal into consideration, that is approaching Professor Korinek's standpoint. According to this, it should extraordinarily be observed that, which rights-limitation is the one that need to be introduced for the sake of security policy and when a government abuses it for the extension of its own space. It is also worth examining whether we will not unintentionally shape our society during these rights-limitations into a society, which its citizens would not want. To put it more simply: where is the boundary in the lives of the citizens, in which the government should interfere because of the antiterrorism. And we haven't even asked the theoretical question, „is it allowed and if so to what measures to yield the demands of the terrorists, and to change something because of the terrorism, or, by doing so we will only let terrorism escalade, as we will give a positive feedback on its success."[6] How the human rights movements react to this challenge will probably define the boundaries of the emergence of human rights in the forthcoming years.

Illegal restraint, torture and other ways of abuse

In the past decades – even in recent years – the United States criticized the dictatorial states because they tried those accused of terrorism in military courts and sentenced. Nowadays the United States does the same – though often they only restrain those, who can be linked to terrorism, without any procedures. Currently ca. 100-150 persons are held illegally in Guantanamo. After the 9/11 terror attacks the Bush administration created a detention center for people that had been accused of terrorism. The detainees were – in the order of their national distribution: Saudi Arabian, Yemenite, Pakistani, Afghanistan, and Syrian citizens, most of whom had been accused of being related to Al-Kaida and of operating the late Afghani-Taliban system – without indictments.

It is made possible due to the fact that being a Cuban territory, American laws are not valid in Guantanamo, the American Constitution is only indirectly in effect, through military rules.

Theoretically, because of this last part, one can be sentenced to death under the Martial Law, thought it has not happened yet. However, reports are regular about tortures and different kinds of abuse, which are told by those few freed inmates (who are solely the citizens of some European countries or maybe of Canada). Others might be captured similarly in some other hidden parts of the world. This kind of illegal restraint violates the person's right to fair trial and their right to freedom.[7]

Regarding the Daschner-trial the Strasbourg Court on June 30th, 2008 stated that the circumstances couldn't legitimate the violent acts of the members of the procedure. The applied methods (such as the threat of constraint) cannot be accepted even if it aims to saving a child's life.[8]

In some member states of the European Union this example, applied in the United States in acceptable.

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[6] Bárándy Gergely: Hová vezethet a tolerált gyűlöletbeszéd? Gondolatok a parlamenti gyűlöletbeszéd szankcionálhatóságáról, s a nagy nyilvánosság előtt elkövetett gyalázkodás egyes társadalmi hatásairól. In: Kriminológiai Közlemények, 75. Magyar Kriminológiai Társaság. Budapest, 2016.

[7] Elek Balázs: Habeas Corpus a magyar büntetőeljárásban. Európai Jog, 2015/6.

[8] Piti Sándor: A pszichikai kényszer. Rendészeti Szemle, 2010/3. Cit. Elek Balázs: A jogerő a büntető eljárásban. DE AJK, Debrecen, 2012.

In Spain the physical abuse is common for the criminals suspected of terrorism. In England, the House of Lords openly disapproves of this policy, however, numerous immigrants, suspected of terrorism are in illegal captivity. Sweden and France expel those persons, suspected of terrorism to other countries, where they are tortured.

And it can be anticipated that if new terror attacks happen, these abuses will become more usual.

From the experiences of the past, we can conclude that if the governments are faced with serious terrorist threats, they will react to these rather aggressively.

The global effect of the United States?

The ever-growing terror threats have significant aftermaths.

As the United States has significant power and influence on the improvement of the global structure – because the US, if it wants to demonstrate its power, can sabotage the decisions of the UN or the International Criminal Court, if they oppose the aims of the US – in this case the attitude shift of the US would have a benign effect on the whole world.

The question is this: can a new global security policy on the agenda, led by the US, mean a threat to the existing system of human rights?

Conclusion: human rights and safety

Recent examples have shown how vulnerable the states are to terrorist attacks. The organizations responsible for the safety of nations and people could only react retroactively.

Sometimes the governments combat terrorism in a way that triggers further questions concerning the existent politics and security. The Bush-administration used the issue of the terrorist threat to attack Iraq.

Barack Obama[9], the president of the United States in 2011, after the death of Osama bin Laden declared the same thing as in 2001 George W. Bush[10] after the terror attacks of September: „The United States is at war and this is a war against terrorists."

This approach of war on terrorism – namely the war against terrorists – denies the humanitarian rules, which ignores the whole system of law, states Korinek, as the basis of the modern political systems is the respect of human rights.[11]

Therefore, joining the standpoint of László Korinek, the human rights organizations have to realize that numerous safety measures, introduced by governments, are sometimes misleading and very dangerous. The main aim of the human rights movements is to convince the governments to balance human rights and security policy.

The best and the most constructive solution would be if the decision-makers considered those plans that maximize the probability of reaching both aims, as the protection of human rights increases the safety of people, which shall never be undermined.

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[9] Obama, Barack: Osama Bin-Laden-dead. https://www.whitehouse.gov/blog/2011/05/02/osama-bin-laden-dead (March 3, 2016.)

[10] President's Address to a joint session of Congress and the American People, http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html (March 3, 2016.)

[11] Korinek im. 6.

The Islamic state and its aims, a possible strategy for the fight against asymmetric warfare

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Abstract:

This article analyses the planning methods, the vision, the strategic and political goals of the Islamic State (IS). The author also recommends a possible strategy for the fight against the hybrid warfare of IS.

Keywords: *Islamic State, strategy, strategic planning, political aims, grand strategy.*

Motto:
„O Muslims rush to your country! This is your state … This is my advice. If you endure you may capture Rome, and if Allah is willing the whole world will be yours."[1]
Abu Bakr al-Baghdadi

Introduction

8.45 a.m. on 11th September 2001 is the first minute of a new era in human history and this moment became an important milestone in the fight against terrorism. The most important consequence of this attack is that terrorism, especially terrorist acts committed by religious extremist groups, and more importantly the fight against these entities became more important than ever. Nobody would have ever believed then, that in 2015 a new wing of the terrorist organisation committing the 9/11 atrocity, the infamous, apocalyptic Islamic State of Iraq and the Levant – or in a more simplified form the Islamic State, or IS, would be threatening the delicate balance of the whole Middle East.

5th July 2014 is another important milestone in history because on this day in Mosul[2] Abu Bakr al-Baghdadi openly declared himself, while wearing the black cloak of the Abbasid caliphs, as the leader of Islamic State. This declaration of leadership took place in the second largest city of Iraq where he called himself the leader of every Muslim or caliph whose aim is to rule this region. On the same day when the existence of the caliphate was proclaimed, the propaganda section of the IS published a video showing the demolition of some border posts between Iraq and Syria. This recording was a proof of their strength since they were able do abolish those artificial borders which were foisted upon the region by the great powers.[3] This was the first occasion

[1] Napoleoni, Loretta: Az iszlamista főnix p. 127; Budapest, 2015.: HVG könyvek. ISBN 978-963.304-264-9. p. 124.

[2] Rainer Hermann: Az Iszlám Állam – A világi állam kudarca az arab világban; Akadémiai Kiadó, Budapest 2015. p. 25.

[3] *Ibid.*

since the First World War that an entity was able to do wholesale changes to the boundaries of countries in the region, which are defined by the secret Sykes-Picot Agreement of 1916 and the Treaty of Lausanne of 1923.

Az Iszlám Állam kialakulása. The birth of the Islamic State

IS was able to set up sizable armed forces and capture and control large swathes of territory very quickly. During the autumn of 2015 IS controlled 22 – 25000 square kilometres where, which is very important, it enjoys the support of the vast majority of the local population. There are 9 million Sunni Muslims in Iraq who became marginalised after the 2003 invasion of Iraq, which is quite a stark contrast to their privileged position in pre-invasion Iraq.[4] The situation is similar in Syria where 74% of the population is Sunni who have been oppressed for decades by the Assad regime.[5]

Changes to the combat strength (hard core members) of IS

2005: 1000 people[6]

2006: 1100 people[7]

2011: 1000-2000 people[8],

2014: 11000 people (6000 in Iraq, 3000- 5000 in Syria) or 20000-31500 people[9]

IS is an offshoot of Al-Qaeda, the infamous international terrorist organisation. Originally it belonged to the Jama' alTawhid wal-Jihad[10] network under the leadership of Abu Musab al-Zarqawi. However, as time passed IS became the preeminent terrorist power of the region and the most influential member of an umbrella organisation containing like minded groups. Similarly to Al-Qaeda IS have achieved the *primus inter pares* position amongst Islamist terrorist groups which means that now every other large terrorist entity pledges its loyalty to IS.[11]

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[4] CIA The World Factbook: Iraq; accessible https://www.cia.gov/library/publications/the-world-factbook/geos/iz.html (downloaded : 2015. 09. 20.)

[5] CIA The World Factbook: Syria accessible https://www.cia.gov/library/publications/the-world-factbook/geos/sy.html (downloaded: 2015. 09. 20.)

[6] United States Department of State, Office of the Coordinator for Counterterrorism: Country Reports on Terrorism; April 2006 p. 220 accessible http://www.state.gov/documents/organization/65462.pdf (downloaded: 2015. 09. 20.)

[7] Tilghman, Andrew: The Myth of AQI; in Washington Monthly, October 2007 ttp://www.washingtonmonthly.com/features/2007/0710.tilghman.html (downloaded: 2015. 09. 20.)

[8] U.S. Department of State: Country Reports on Terrorism 2011; July 31 2012 accessible http://www.state.gov/j/ct/rls/crt/2011/195553.htm#ig (downloaded: 2015. 09. 20.)

[9] The Islamic State of Iraq and Greater Syria: Two Arab countires fall apart; in The Economist, June 13, 2014. accessible http://www.economist.com/news/middle-east-and-africa/21604230-extreme-islamist-group-seeks-create-caliphate-and-spread-jihad-across (downloaded: 2015. 09. 20.) YEGINSU, Ceylan: ISIS Draws a Steady Stream of Recruits From Turkey; in: The New York Times. 15 Sept. 2014. accessible http://www.nytimes.com/2014/09/16/world/europe/turkey-is-a-steady-source-of-isis-recruits.html?_r=0 (downloaded: 2015. 09. 20.)

[10] Hasim, Ahmed, S.: From Al Kaida affiliate to the rise of the Islamic Caliphate: The evolution of the Islamic State of Iraq and Syria (ISIS); RSiS Nanyang Technologial University, 2015. p. 2.

[11] Boko Haram in Nigeria and al Shabaab in Somalia in March 2015, Islamic Youth Shura Council in Libya as early as 2014, the Afghan Taliban in 2015. cf., Hanna Ucko Neill: African insurgent groups look to ISIS as they face increasing pressure. https://www.iiss.org/en/Topics/islamicstate/african-groups-isis-f2d1 (Letöltés ideje: 2015. 12. 11.) !

Aims and Plans

The Islamic State's operations are based upon long term plans which not only apply for its terrorist operations but also for its well operating cartel like business enterprises as well. When analysing the planning methods of IS, we find it includes grand strategic planning on a political level, military aims on the military strategic level and tactical level methods, operations and doctrines as well.

Political aims[12]

IS have the following grand strategic (political) aims which it want to achieve by applying hard power methods

- Achieving the collapse of the governments in Iraq and Syria and taking over these countries;
- Forming an Islamic State and protecting it from outside attack;
- Expanding the area under the control of IS and creating a great Muslim community (ummah)

I interpret the application of hard power by IS in the way that by their overt attacks they achieve the partial destruction of unbelievers and it prepares the ground for spreading the influence of IS further in the region and its settlements.

The IS grand strategy[13]

- abolishing the international frontiers in the region and creating a caliphate which has already been proposed by al-Qaeda;
- creating and stabilising the Islamic State
- convincing masses of Muslims to settle in the IS
- further expansion

The IS military strategy[14]

- controlling Sunni areas, key cities and resources in the Middle East
- creating a defensive zone in areas close to the boundaries of the Kurdish areas in Iraq and Syria to protect IS from Kurdish military attacks;
- continuing attacks against Syrian and Iraqi security forces to weaken their ability to resist and finally defeat them
- capturing more territory in Iraq in order to create a buffer zone against attacks launched from Shiite areas
- neutralising al-Nusra in Syria
- conquering more territory.

The medium term aims of IS include capturing and controlling the territory of Iraq and Syria. The next step for IS is to gain control over Sunni communities and territories in neighbouring countries like Saudi Arabia and Yemen. Their operations are led by the caliph and inside the IS life is regulated by Quranic regulations and the implementation of Shariah law. "Shariah for Muslims is a way to become a perfect man therefore it regulates every sphere of human existence. According to Shariah certain behaviours are ethically explicitly forbibben (haraam), others are compulsory (wajib), some actions are undesirable but not banned (makruh), others are recommended but not compulsory (mandub) and some are simply permissible (mubah). The number of actions which are explicitly forbidden or compulsory is quite small, most activities of everyday life belong

[12] Lewis, Jessica D.: The Islamic State: a Counter-Strategy for a Counter-State p. 9.
[13] Lewis, Jessica D.: *op. cit.,* p. 10.
[14] Lewis, Jessica D.: *op. cit.,* pp. 11-12.

to the mubah category. Anything which is not haraam (explicitly forbidden) is permissible."[15]

Those who are unable to flee from IS are forced to pay a tax or protection money. The houses where Christians live are marked by the letter n referring to word nasara which means Christians in Arabic. The homes of Shiites are marked by the letter R which is connected to the pejorative word raid used by extremist Sunnis to describe Shiites

The strategy of the Islamic State

IS operatives commit classical terrorist actions against certain groups of their enemies, their aim is to kill as many people as possible to ensure that maximise the fear of IS within these people. The aim of targeted killings and assassinations is to deter the opponents from attacking IS again. When IS enters a conquered town a subunit commits spontaneous executions at the main square which has two aims first it deters potential resisters from attacks and encourages a section of the population to flee the settlement. To enhance the deterrence effect IS propaganda units spread videos of these massacres so the conquered populations know what to expect when IS reach their homes.[16] The other face of IS involves humanitarian actions which are designed to improve the welfare and health of the conquered population. An interesting example is that IS launched a campaign supporting polio vaccination. The military strategy of IS quite similar to the old American Shock and Awe approach.

IS soldiers lack empathy and grief and they revel in unlimited aggression which includes the beheading of women and children. Another reason for the success of IS is their ability to set up an efficient military structure. Their leader Abu Bakr al-Baghdadi started the recruitment of former Iraqi officers, when they were imprisoned together. These former military officers were trained in traditional warfare and in achieving surprise and subversion. (However, these men were only admitted to IS if they apologised for their actions and swore an oath of loyalty.) On the other hand the former al-Qaeda fighters of IS were experienced in guerilla warfare.[17]

When we examine their operational plans we can recognise the elements of previous Soviet/Russian strategic and tactical theories, the features of their subversive and deep operations and experience derived from operations in the Afghan, Iraqi and other theatres. IS uses every possible element in their hybrid warfare, this includes conventional regular forces like infantry, armour or artillery, light and irregular units and information warfare. In the latter field field they are especially adept at using the whole spectrum of social media to their advantage.[18]

A key element of IS strategy is that they always divide the areas where they operate into controlled, support and attacked zones. The Center of Gravity – CoG for IS includes the foreign fighters, the jihadis and the Sunni population. When they plan their operations they usually design Rommel-like quick, mobile thrusts towards highly valuable local spots like oil- and gas fields, dams, greater cities and other critical

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[15] Rostoványi Zsolt: Mit kell tudni az iszlámról? 66.

[16] Rainer, *op. cit.,* 56.

[17] U.o.. pp. 58-60

[18] Winter, Charlie: The Virtual 'Caliphate': Understanding Islamic State's Propaganda Strategy pp. 18-21.http://www.quilliamfoundation.org/wp/wp-content/uploads/publications/free/the-virtual-caliphate-understanding-islamic-states-propaganda-strategy.pdf (Letöltési idő: 2015. 11. 25.)

resources[19]. When the primary goal is achieved they apply the clear, build, hold method to solidify their position there. The strengths of IS include the use of light weaponry, good reconnaissance and communication skills[20], mobility, firepower, IEDs and support of the local populace. A basic tenet of their planning includes an active role through social media to gain the support of the local population.

For IS the final military aim is not a victory by its armed forces over its enemies, their final goal is the withdrawal of Western forces from its area of operations. This organisation wants to break, exhaust and bleed out our own forces by applying elements asymmetric and guerrilla warfare and terrorism against them. These armed operations are supported by a broad information operations campaign which targets the hearts and minds of our civilian population back home.

A possible strategy for the fight against hybrid warfare of IS

My aim is to focus attention on certain problems within military studies. Since the most important issues in military studies are about answering questions about armament, organisation and operational methods consequently I will focus my article on these issues too. My research method is based upon indicators, these are features which have an important and significant connection to the problem or researched issue and they clearly show the differences and abnormalities within military studies, so that I could find possible answers for and proposals and consequences of these problems within military sciences.

In this struggle against the all-encompassing hybrid or asymmetric warfare of IS[21] we also have to create a broad and complex strategy. Asymmetric warfare is: "It is well defined combat style especially on the tactical level to achieve a well defined political goal which is often waged by the coalitions of multiple organisations which have a shared ideological, religious or ethnic background. Asymmetric warfare includes military and non-military operations, methods and procedures which have direct and indirect consequences and the intention of those waging such warfare is that the effects of these actions should strengthen each other and threaten multiple dimensions of security at the same time to achieve the end goal of forcing our will upon the our enemy."[22] In this article I can not examine the economic, political, diplomatic, financial and IT issues of asymmetric warfare and even in the field of military studies I will only concentrate on the analysis of a few key area.

The first area of the military studies which I am going to examine is the appearance of new methods including asymmetric warfare and its indicators. Here I will deal with the question of asymmetry itself, suicide bombers, IEDs, child soldiers, female suicide bombers, internal attacks and the operational methods of IS.

Our answer to these questions should be that after scrutinising our experience about fighting IS we have recognise that we are somewhat behind on the tactical level while we have a large gap to close on the strategic level. This large gap includes

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[19] Barrett i.m. p. 52.

[20] In 2014 they had 50000 followers on Twitter, number of tweets per day between 17 September 2013 and 17 October 2013 was between 100000- 250000 cf., Barrett, *op. cit.,* p. 59.

[21] Resperger István - KIS Álmos Péter - Somkuti Bálint: Aszimmetrikus hadviselés a modern korban. Kis háborúk nagy hatással. Zrínyi Kiadó, 2013. Budapest. p. 25.

[22] Resperger István - KIS Álmos Péter - Somkuti Bálint: Aszimmetrikus hadviselés a modern korban. Kis háborúk nagy hatással. Zrínyi Kiadó, 2013. Budapest. p. 25.

challenges connected to planning, training for and executing our operations during a complex conflict which contains cultural, historical and religious elements besides the purely military ones. While our Special Forces, CIMIC, Psyops and information operations propose plenty of new solutions we are still not doing enough to protect our own forces.

My second topic is about the international scene, including the various international organisations and about violence. The most import feature of contemporary conflicts is the lack of effective state participation because often the state lost its ability to enforce its laws and punish those who violated them besides it also lost the monopoly of power in these armed conflicts. As a consequence the nature and methods of warfare have been transformed and the amount of violence during these conflicts have become much larger than in earlier wars. Therefore, there are no longer any safe havens for soldiers, employees of international organisations, members of the media and staff of NGOs and civilians, the situation is even more dire for women. Most experts agree that the root cause of the problem lies in fact that the state lost the monopoly of power, because this made it possible for separatists, guerillas and warlords to use and misuse, often with unlimited brutality, the power they managed to grab.

According to military science the indicators for the weaponry used by IS include the simple equipment, large amount of explosives for their IEDs and suicide bombers, quick light vehicles and anti-tank weapons.[23] There are not any suitable solutions for this problem because adaptation to the new challenges is very slow, which leads to very high casualties.[24]

Probably the most quickly changing area of contemporary military science is how to apply certain methods and procedures in a flexible way. This is one of the reason for the varied interpretation of the concept asymmetry in military studies since "the methods define an organisation". The most important feature of asymmetry lies in the fact that are multiple direct and indirect effects which influence on the outcome of an ongoing situation. This is also true for any military, economic, cyber, psychological, financial or any other type of operations. The quick Romell-like thrusts, the constant threats, the apocalyptic behaviour, enforcing their economic interests by any possible way and the way to preserve or regain popular support are the most important indicators for our analysis. The answer in this field is that we should start evaluating the lesson of our operations in theatre, but it takes time to incorporate these lessons into our training protocols which reduces our losses. This process leads to a delay for countries which have a western military culture.

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[23] Cf., the Iraq war in 2003. We collected informtion about the size and nature of Iraqi resistance from the war diary of Task Force 2-7 of the US 3rd Infantry Division(Mech.) This TF acted as the forward element of the division. The most frequently mentioned type of attack against the TF was committed by RPG-7 anti-tank grenade launchers. (11 times) The largest percentage of KIAs of the division (15%) was caused by this type of weapon. Factfile. Effective range, against a stationary target: 500 metres, against a moving target: 300 metres. Maximum range 1100 m, antipersonnel range 920 m. The flight time of the grenade at 100 metres: 4,5 second. Armor penetration against homogenous armour: 600 mm. The weapon can be equpped by 3 different warheads. PG-7, PG-7M, PG7-N, PG-7NV grenades against homogenous armour. PG-7VR dual cumulative grenade against slat and reactive armour. OG-7, OG-7M antipersonnel grenade. cf., MORDICA, G., J.: Phase Four Operations in Iraq and the RPG-7 In: www.globalsecurity.org/iraq/operation (downloaded: 2015. 12. 04.) quoted by: Kőszegvári Tibor - Resperger István: A nemzetközi terrorizmus elleni küzdelem katonai tapasztalatai p. 17. egyetemi jegyzet, ZMNE, Budapest, 2013.

[24] Lásd még: Islamic State Weapons In Iraq And Syria pp. 7-12. http://conflictarm.com/wp-content/uploads/2014/09/Dispatch_IS_Iraq_Syria_Weapons.pdf (downloaded: 2015. 12. 07.)

When we examine our procedures we also have to be aware of scientific results which can influence and transform organisations. Small units, lightly armed quick vehicles, constantly changing situations and tactics and finally the quick adoption by of more and more efficient lights weapons by large groups of combatants have a collective transformative effect on the operational culture of the armed forces. We can choose any indicator we want we will find a correct answer for the problem because the Western military science always changes methods when it is faced by guerrilla, resistance fighter, insurgent or terrorist activity on the battlefield, although there will be some casualties during the learning process.

It is essential to examine the question about the use of authority, violence, unlimited violence or the phenomenon Clausewitz calls almost extreme violence in contemporary conflicts. In most cases decisions about the highest acceptable level of violence is determined not just by military, political or higher strategic circumstances but also by the religious, social and cultural background of a conflict zone. The Islamic State is a good example for the proposition that extreme and shocking violence, which no Western force would dare to apply in any situation, can lead to quick victories. However, this statement is only applicable in that given social and religious sphere.

Victorious strategy in military science

"We have to defeat the enemy's army, capture its territory and break the will of the local population."[25] is the answer provided by Clausewitz for when he was asked for a victorius strategy?

However, in recent conflicts in Lybia, Syria, Iraq and Afghnistan the enemy have had a different military end goal in mind, their wanted to force us to retreat from their country. To achieve this they want to tire and bleed out our soldiers by the tools of asymmetric warfare.

What can our possible strategy be?

The 5 – 10 year interval after a military end state, which is usually allocated for achieving a political end state is sadly inadequate for the enormous task of reconstructing a failed state. Realising this, even in a normal state, is challenging enough and in an underdeveloped country the chance of success within this time limit is extremely slim. The greatest challenge is guaranteeing security to enable successful humanitarian and military operations. Therefore our most important aims should be ensuring security and forcing our will upon the enemy. We have to defeat and capture the insurgents which will break their resistance. The best tool for this mission is modern, network centric warfare. Using modern concepts and up-to-date equipment will lead to a quick victory on the open battlefield but it will also cause high casualty rates during the occupation phase amongst our personnel and the local population alike.

Although past experiences prove that we cannot directly plan and run our operations according to NATO planning systems like GOP (Guidelines for Operational Planning) and COPD (Comprehensive Operational Plannning Directive). Nevertheless, modified versions of these procedures are suitable for use during high strategic planning process. The gist of changes lies in the fact that these resistance and other

[25] Clausewitz Carl von: A háborúról Zrínyi Kiadó, 2013. Budapest. p. 171.

armed forces do not have a clearly defined Centre of Gravity instead they possess a number of very efficient partial skills like reconnaissance, fire control, leadership, communication and last but definitely not least they enjoy the support of the local population. Therefore our strategy must focus on containment and control.

In the area of reconnaissance we have to introduce such procedures which makes it more difficult for our opponents to identify our own units, bases and patrol routes.

To limit the mobility of hostile forces we have to enact fuel control systems and set up remote number plate identification technology.

The best way to hinder the efficiency of hostile commanders is linked to the improvement of our own intelligence gathering operations so we have to expand the scope of our HUMINT, SIGINT and UAV operations.

We have to limit the use of firepower yet we can not leave our forces unprotected so we must follow the applicable regulations and we must also ensure that military personnel wear their own equipment correctly and they are ready to engage the enemy as quickly as possible. The use of counter-IED procedures is also essential to protect us from explosion related casualties. For offensive operations we must prefer the use high precision solutions like UAVs.[26]

During the planning process we must prevent the enemy from acquiring reliable information about our movements and activities via any dimension of security.

At the strategic planning level we have to set realistic political and military end goals which must be fulfilled in a judicious way. In order to gain support of the local population we must not behave as conquerors. We have respect local traditions, religions and history because this may earn us the support of the inhabitants of our theatre of operations. Finally we must cooperate with the international organisations and the NGOs which are active in the conflict zone.

Summary

An important feature of asymmetric conflicts is that events play out on a hexagonal chessboard. The actors include the Islamic State and their sympathisers, the members of the anti-IS coalition and their supporters, international organisations like the UN, OSCE, EU, African Union and various NGOs. Sadly the centre of the board is filled by internally displaced people and the local population. Only those forces can win such a conflict who are not only capable of achieving a military victory but who can also win the peace after the end of the armed conflict by providing better living conditions for the long suffering local population and refugees.

After examining the planning procedures of the Islamic State we can conclude that they have a thought through, efficiently structured and operated planning system which is used on every planning level (political strategy, military strategy, tactical methods).

In this game which involves a large number of actors including some active geopolitical players like the USA, Russia, Saudi-Arabia, Turkey and Iran. Furthermore these conflicts take place in geopolitical pillars like Syria, Afghanistan and Iraq where the numerous ethnic and religious tensions, which existed in the region long before the eruption of the current asymmetric conflict, may play a much more critical role in the final outcome than we usually imagine.

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[26] Haskologlu, İsa – EKER, A. Alparslan – ADANA, Şaban: A Perspective of Applications of Unmanned Systems in Asymmetric Warfare http://www.ijiet.org/papers/356-K3004.pdf (downloaded: 2015. 11. 14.).

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From poaching to financing terrorism. Thoughts on poaching endangering society

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Abstract

Poaching is a collective term for a series of actions opposing law and morals, and these amalgamate into a specific, standalone notion. Poaching means more than the simple stealing and destruction of game. Poaching is a dangerous activity, and by its nature it always implements the possibility of the realization of other, more serious crimes, or other dangerous crimes can connect to it, for example, misuse of firearms, homicide and assault, violence against public officials.

Poaching violates rights of ownership, violates the right of those entitled to wildlife management and hunting, endangers the stock of game, the interests regarding wildlife management and its hunting order, and at the same time, violates public safety.

In certain places of the world, such trans-boundary problems appear together as illegal or excessive fishing, trafficking of drug and people, piracy and terrorist threats. Terrorist threat, drug trafficking, human trafficking based on migration and other crimes supervised by organized criminal groups are present in Europe as well. Income is present.

Keywords: *incomes, terrorism, poaching, rights on ownership, human trafficking.*

Introductory thoughts

Until the new Criminal Code put into force on 1st July, 2012, poaching was not considered as a standalone crime in Hungary. The reasons for this are partly social, and partly historical. However, the legislator realized that the dangers of poaching go far beyond the damage caused by the stealing of game killed in any way. Poaching in Hungary does not threaten primarily the survival of certain endangered species.

Poaching is a collective term for a series of actions opposing law and morals, and these amalgamate into a specific, standalone notion. Poaching means more than the simple stealing and destruction of game. Poaching is a dangerous activity, and by its nature it always implements the possibility of the realization of other, more serious crimes, or other dangerous crimes can connect to it, for example, misuse of firearms, homicide and assault, violence against public officials.

Poaching violates rights of ownership, violates the right of those entitled to wildlife management and hunting, endangers the stock of game, the interests regarding wildlife management and its hunting order, and at the same time, violates public safety.[1]

[1] Zoltán, Ödön: Az orvvadászatról és büntetéséről. Magyar Jog, 1995, október, 607-613.p.

Poaching as a global phenomenon

From this point on, poaching is such a global phenomenon that cannot be managed and interpreted in an isolated way. The notion of transnational crime refers to such crimes, the prevention, exploration and direct or indirect effect of which affects many countries. This scope includes, besides international drug and art treasure trafficking, terrorism and the market focusing on endangered wildlife.

In special literature, it is already considered as a fact that poaching generates such a vast income that is desired by organized crime groups as well. The price of rhino horn per kilo is higher than that of gold or platinum. Poaching provides a huge income with a relatively small risk.

Circles of organized crime have already attacked European museums in order to acquire rhino horns. According to the Metropolitan police, 20 thefts have taken place across Europe in the past six months – in Portugal, France, Germany, the Czech Republic, Belgium and Sweden as well as the UK. Scotland Yard and Europol are now advising galleries and collectors to consider locking up their rhino horn collections or keeping them away from public view. Several museums have removed their displays or replaced horns with replicas.[2] The global danger of the problem is shown by the fact that the thefts are attributed to an organized gang, allegedly active in Europe, Asia and North and South America.[3]

According to an estimation from 1993, the value of the black market focusing on the endangered wildlife is 6 billion USD. According to some estimations, wildlife trafficking is the second largest form of black market commerce, behind drug smuggling.[4]

Traffic International, which monitors wildlife trafficking for the UN, has claimed that it may have become the world's third-largest illegal trade after drugs and arms, with an annual turnover of $5 billion to $10 billion.[5] According to estimations, wildlife trafficking has become the fourth most lucrative illegal activity after drugs, counterfeiting, and human trafficking.[6] Statistics differ of course regarding the amount of income from poaching, but there is an agreement that at least part of this income is used to finance terrorist organizations.

The dangers of poaching and the trading of endangered species goes far beyond the environmental damage regarding certain endangered species. Those who are involved in the illegal wildlife trade also traffic in other illegal commodities, including drugs and weapons. A very lucrative form of transnational crime is the large scale theft of natural resources including wildlife. Participants in this form of crime include

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[2] Esther Addley: Epidemic of UK rhino horn thefts linked to one criminal gang. the guardian, Monday 8 August, 2011http://www.theguardian.com/environment/2011/aug/08/rhino-horn-thefts-chinese-medicine.

[3] Dr. Ranee Khooshie Lal Panjabi: For Trinkets, Tonics, and Terrorism: International wildlife poaching in the twenty-first century. Georgia Journal of International and Comparative Law, Volume 43, 2014, number 1, 1-92 pp.

[4] Greg L. Warchol, Linda L. Zupan, Willie Clack: Transnational criminality: an analysis of the illegal wildlife market in Southern Africa. International Criminal Justice Review, Volume 13, 2003, 1-27 p.

[5] Uli Schmetzer, Tribune Staff Writer: Old Chinese Cures Endangering Wildlife.Chicago Tribune, September 26, 1993http://articles.chicagotribune.com/1993-09-26/news/9310010039_1_endangered-species-rhino-horn-white-rhinos.

[6] How to Stop the Illegal Wildlife Trade From Funding Terrorist Groups. Scientific American, Decembe 01, 2013http://www.scientificamerican.com/article/how-to-stop-the-illegal-wildlife-trade-from-funding-terrorist-groups/.

poachers, traffickers and guerrilla insurgency groups, military units, and organized criminal syndicates.[7] The potential financial gain from poaching, „coupled with low risk of detection and often inadequate penalties," attracts known terrorist groups. These groups use such violent and aggressive hunting methods that park rangers cannot protect the elephants or, in some cases, themselves. As a result, poached ivory has earned the name „blood ivory".[8]

This form of crime is so widespread that it presently threatens the political and economic stability of several developing African nations. [9] A lot of African countries suffer at the same time from terrorism, poverty and crime, including poaching, and the trafficking of elephant tusks and rhino horns associated with it. Special literature considers the poaching of certain symbolic species as an attack against a whole nation. The rhino, for example, embodies the rich natural heritage of South Africa. An attack against this animal „becomes an attack on the nation itself, economically, ecologically, and symbolically".[10]

Poaching as a way to finance terrorism

Terrorism is fundamentally a political phenomenon, behind which there are both structural and psychological factors as well. Modernization and untreated social tension may create such conditions, that could bring terrorism into life. Korinek defined terrorism as "a methodical application of violence or threat thereof, appearing in various forms, influenced by a different system of ideas, and obeying a peculiar logic, the aim of which is to reach political goals by forcing a compromising behavior on the victim, on the spectators, on the state or on society. The advertised goal is usually the forcing of radical changes of a political, ideological, religious, ethnic etc. nature, a series of activities applied to arrive at their goal. However, the means, as far as their legal point is concerned, are legal and violent criminal acts."[11]

Material resources are needed to execute a terrorist act. If the perpetrators do not have sufficient assets, then they need to obtain the missing money from an external source. Terrorist organizations are very diverse today, but they are all identical in one sense: they require material resources to organize and execute the attacks. Financing terrorism includes all activities during which one provides, in a direct or indirect way, resources that help realizing terrorist attacks.[12]

Wildlife poaching is a very lucrative, but the least risky criminal venture. Besides the huge profit, this is the other reason why it is a perfectly comfortable income for financing terrorism. Some terrorist organizations are funding their activities from

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[7] Venter, C. (2003): Organized crime: A perspective from South Africa. In J. Albanese, D. Das, & A. Verma (Eds.): Organised crime: World perspectives (pp. 379-391) Upper Saddle River, NJ: Prentice Hall.

[8] Manley, Morgan V.: The (Inter)National Strategy: An Ivory Trade Ban in the United States and China. Fordham International Law Journal, Vol. 38, Issue 5 (August 2015), pp. 1511-1586.

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[10] Elizabeth Lunstrum: Green Militarization: Anti-Poaching Efforts and the Spatial Contours of Kruger National Park. Annals of the Association of American Geographers. Published online: 04 Jun 2014, http://www.tandfonline.com/loi/raag20.

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[12] Gál István László: Bejelentés vagy feljelentés. A pénzmosás és a terrorizmus finanszírozása elleni küzdelemmel kapcsolatos feladatok és kötelezettségek. Penta Unió, Pécs, 2013, 14. p.

poaching, and from the associated illegal trafficking. Wildlife trafficking is not an isolated trade. It is often part of a larger network of organized crime that involves drugs, guns, and people smuggling.[13]

Wildlife crime is a global issue that does not only threaten the environment, but the huge profit it offers turns it into a threat equal to drug-trafficking and gunrunning.

„The obvious and easily-acquired financial success of poaching and trafficking syndicates may have impelled some cash-strapped terror organizations to follow suit. After all, targeting wildlife is an easy way to make quick money. The animals are fairly easily accessible, defenseless against modern weapons and their parts yield vast sums for the purchase of weapons and other materials. So terrorists or those poachers they employ enter national parks and wildlife habitats on horseback or in vehicles, butcher numerous animals and disappear „like the wind". This notorious linkage between poaching and terrorism raises wildlife killing to the level of a matter that is important for the national security of many states primarily those in the Western and democratic Asian world that are specifically targeted by terrorists. Their aim is apparently to destabilize entire societies and harming civilians is one method frequently used to increase the terror."[14]

The killing of wildlife has become a route to finance and fund the killing of human beings.[15] „Terrorist organizations require a constant and dependable source of funding, both to retain loyalists and to pay for their operations." One of the most efficient ways to fight against terrorist organizations is to cut them from these sources of funding. It needs to be realized that the safety of mankind is closely connected to the safety of wildlife.

Dangers of poaching in Europe and in Hungary

Illegal wildlife traffickers are present in Europe, and thus, in Hungary as well, but poaching there entails entirely different (but in certain cases, somewhat similar) dangers as opposed to, for example, in Africa. As a result, the legislator codified unauthorized hunting as a criminal offense during the creation of the new Criminal Code, as opposed to its earlier status as a minor offense. Poaching violates many different interests. Examining these all together helps to understand it as a complex source of dangers.

Dangerous situations, attack against functionaries and public officials

Many of the poachers carry on with their activities for years. It is not about accidental, one-time theft, but a series of well-planned, well-conspired poaching. This process then often has serious consequences regarding the wildlife, foresters, hunters and of course, the poachers themselves. As poaching regularly leads to dangerous situations. By not registering in the safety areas – maintained by those who are entitled to hunt –, the poachers are already creating a risky situation just by wandering around in these areas.

One cannot say that in Hungary, poaching has a direct connection to terrorism, but due to the vast profit, organized criminal groups have already occupied this scene.

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[13] Dr. Ranee Khooshie Lal Panjabi, (2014) 1-92 pp.
[14] Dr. Ranee Khooshie Lal Panjabi, (2014) 1-92 pp.
[15] Dr. Ranee Khooshie Lal Panjabi, (2014) 1-92 pp.

Poaching produces dangerous criminals, who often attack state-employed professional hunters. They obtain the most sophisticated firearms, and most improved war gear, like night vision aiming devices fitted on the telescope of a gun. Illegal gunrunning creates dangerous criminals who can threat the safety of the state as well. All this warns us not to underestimate the danger resulting from poaching, a danger threatening not only the environment and nature, but also public safety.

The poacher is a dangerous enemy of professional hunters, water bailiffs and wildlife rangers. There are no witnesses in the woods, no help can come, a cry for help or a shot gets lost in the thick forest, it dies in the night, gets swallowed by fog, along with the armed poacher. In certain cases, poachers, instead of taking responsibility for crimes like poaching and illegal possession of firearms, rather commit a more severe crime and threaten the life of another person.

Professional hunters, water bailiffs and wildlife guards are obligated to act against poachers, which is not without any dangers at all.

It is quite difficult to catch a poacher red-handed, as they are on the move all the time, changing their hide, and usually avoid to appear at the same place more than once. The weapon they might carry with them is more dangerous than any other tool. Catching and disarming a poacher can be very dangerous. On the hunting-ground, a professional hunter can expect no help whatsoever. There are no witnesses around, so poachers rarely hesitate to use their weapons. Professional hunters and water bailiffs are in a tough situation – if they let the poacher go, they violate their oath and obligations, whereas if they employ force as expected, they risk their own life and safety. When using a weapon, they even have to consider the risk of the court sentence, if they cannot prove the necessity of lawful self-defense.

In this respect, we need to mention the wildlife ranger service, which operates in Hungary with members having uniforms and service weapons for the sake of guarding, of protecting and preventing the damaging of natural values and areas, especially of those under preservation. A member of the wildlife ranger service is an official employed by the state. During their service, wildlife rangers are required to take action if they notice any behavior, offense or crime violating or threatening the interests of nature protection.

According to the estimation of the President of the International Ranger Federation, during a single decade, 1000 rangers have been killed in 35 countries, but the real global number may be between 3-5000.[16] So wildlife protection is a "huge national security issue." Poachers have committed life-threatening crimes against professional hunters and rangers many times in Hungary as well. All this was a sign for the legislator, to regulate the phenomenon of poaching in a stricter way.

Gunfight on the hunting-ground

It has already occurred in Hungary as well that poachers attacked a professional hunter with illegally obtained firearms, which lead to a gunfight in the woods. The High Court of Justice published a guiding decision saying that as using lawful self-

[16] Ruthless Crime Gangs Driving Global Wildlife Trade, Hindustan Times (India) (Sept. 3, 2013), http://www.hindustantimes.com/world/ruthless-crime-gangs-driving-global-wildlife-trade/story-8tLDPxMu XPAYUe8mJfB1qJ.html.

defense, the professional hunter, who averts the unlawful attack against his or her life by killing the poacher, cannot be punished for his or her act. The accused person in the case was the professional hunter of the hunting-ground, who lethally shot a poacher who was caught in the guarded hunting-ground, and attacked the hunter with his company.

The shot fired in the direction of the professional hunter understandably formed the realization in the accused that his attackers wanted to kill him. From this viewpoint, the circumstances in which the events took place must also be considered. The dark of the night, the beam of the searchlight pointed at him, the call saying that he will be shot, being outnumbered by the attackers, the threats repeated in short periods of time and in short sections of the road provided objective conditions for the formation of the contents of consciousness of the accused. The threatening situation had been maintained during the firing of all four shots, and his behavior aiming to avert the attack was necessary and proportionate with what the attack could have resulted in. Considering all of the above, the court acquitted the accused holding a professional hunter's position of the charges raised against him regarding voluntary endangerment committed in the line of duty resulting in death.[17]

Poacher in the prisoner's box

In another case, the court was deciding about a poacher attacking a professional hunter. The accused had been hunting without permission using an illegally obtained firearm. He obtained many weapons, so he had a pistol as well. The accused had previously been an enlisted, and later, a contracted soldier, and received sharpshooter-training. The accused had no official permit for either obtaining or keeping the pistol or the ammunition. The accused appeared in the area of the hunters' club in the middle of March, 2012, in the early morning hours, with his muzzle-loader gun to poach. The accused killed a hind of deer and a roe with the gun, in spite of not having a hunting permit, and also it was not open season. At this time did a professional hunter of the area and his companion arrive to the scene where the accused was gutting the deer killed by him? The accused became aware that the deer bodies had been discovered, so he decided to kill the injured with his pistol. One of the injured died from the pistol wounds, the professional hunter survived the attack. The court found the accused guilty in the crimes of repeated manslaughter, of abusing firearms and ammunition, and of attempted theft.[18] The court sentenced the accused to incarceration for life as a cumulative sentence. The aim of the accused was to kill the injured in order to prevent them from reporting his poaching to authorities, and this qualified his action as aggravated.[19]

Poachers today are using the most advanced techniques as well. They have silenced weapons and telescopes with night vision mode, in order to avoid attention that spotlights get. Sometimes they even use bow and arrow.

Maybe it is natural that during fishing and hunting, people always tried to use the most advanced tools possible. After their appearance, firearms quickly spread from theaters of war to hunting-grounds. But today, the technology got so advanced, that

[17] Bírósági Határozatok 2000.42.

[18] *1978. évi IV. törvény (former Criminal Code) 166. § (1), (2) c), f),, 263/a. § (1) a), 316. § (1), (4), a).*

[19] Pécs Courthouse 12.B.338/2012/31., High Court of Appeal Pécs Bf.I.51/2013/.

society is forced to control itself when using it, as it is endangering the preservation of nature in its original form, and of wildlife. Forbidden hunting and fishing methods and tools also belong under this scope.

Among hunters, the judging of so-called night vision accessories is not uniform. Many consider these as unbecoming for hunting, or unethical, while others would enable their use arguing for safe hunting. Their use is not lawful, even if their possession is, as hunting law qualifies hunting with an electronic optical device as the violation of the order of hunting, which is considered as an offense punishable with administrative sanctions, and may result in the cancellation of the hunting permit for two years.[20]

All in all, poaching establishes an organized and desperate criminal circle, whose members possess the most advanced weaponry and military devices, and point them sometimes at the protectors of wildlife.

The damages of poaching on nature preservation

The question arises whether hunting has any relation to nature preservation, as this needs to be cleared up before stating anything regarding poaching itself.

There are two main viewpoints in public opinion. According to one, hunting and nature preservation are two things that cannot be reconciled. Hunting involves the destruction of a part of wildlife, so it cannot be anything else than an activity opposing the preservation of nature. The shooting of innocent animals, the killing of the peaceful little fawn is the most cited argument. This viewpoint is mostly based on emotional grounds, but it cannot be ignored. Most people approach hunting from the side that represents their love for the animals, and reject it because of the destruction of the beloved beings. Their knowledge about the biological, ecological and natural processes are quite shallow. However, it is without doubt that in certain parts of the world, ruthless and unscrupulous hunting contributed to the extinction or huge decrease of certain animal species. In certain areas of Hungary for example, the native otter population is clearly driven back by poaching. Poaching can be an actual threat for the survival of certain species as well.

According to the other viewpoint, hunting and wildlife management is also an act of nature preservation, where hunters ensure the survival of those species living in the wild that can be hunted. The way hunters are judged is primarily ushered towards the impression of doing nature preservation by the over-emphasis of wildlife protection. This viewpoint also has its own truth. The role of the hunters in the sense of nature preservation, when it comes to preventing the overpopulation of wild animals – for lack of natural predators – by simulating natural selection via sorting, is definitely positive. The establishment of open seasons is undoubtedly a serious long-term hunting interest, that entails nature preservation.

Eco-terrorists

Certain organizations are conducting violent preservationist campaigns against companies that otherwise operate legally, or at the border of lawfulness, with the aim

[20] Polt Péter (editor.): Új Btk. kommentár 6. kötet, különös rész. Nemzeti Közszolgálati és Tankönyvkiadó, Budapest, 2013. Gál István László: Haditechnikai termékkel vagy szolgáltatással visszaélés (Btk. 329. §), 65-69. p.

of protecting endangered species. An example of that are the activities of those organizing attacks against the Japanese whale-hunting fleet. The organizers of actions of such contradictory nature get a lot of supporters, but also condemnation from governments, and are often labeled as "eco-terrorists."[21] This expression tries to turn the public opinion against the activities of these organizations by referring to the word "terrorist".

In my opinion, one can use the expression "eco-terrorist" on those associations calling themselves "green organizations" that conduct attacks against vehicles and tools (for example, high-stands) of state hunting authorities and professional hunters. Such activities are illegal, and come from a fundamentally wrong attitude, as the state-regulated hunting activity is at the same time a very important activity of nature preservation.

For example, a hunter is preserving nature when protecting natural habitats, when protecting species that one could once hunt, but that are now very scarce, when eliminating landscape wounds, when performing natural agriculture, sylviculture and wildlife management, and when reconstructing habitats.[22]

Consideration of nature preservation is also present in the provisions concerning hunting equipment, close seasons, and the protection of wildlife in general. During wildlife management and hunting, the enforcement of the interests regarding the preservation of nature and maintainable usage must be ensured, which means the maintenance of the biological diversity of the in-season species living in the wild. As a result, the hunting of the in-season wild species can be allowed only to such an extent that is not endangering the diversity and survival of the natural stock of the species.[23] Hunting can make a serious contribution to the preservation of nature by creating the appropriate balance between species, by preventing the overpopulation of certain species, which can help preventing also the spreading of diseases and damage to plant-life.

These points of contact to nature preservation fall outside of the activities of poachers. Neither natural wildlife management, nor the protection of the off-season species, nor the keeping of the preservation-motivated hunting seasons are characteristic of the poacher.

Making wildlife-management impossible

The treacherous, forbidden and uncontrollable activities of a poacher endanger wildlife and the interests concerning the order of hunting, and at the same time, violates the lawful right of those entitled to hunt to wildlife management and hunting.

Based on the Hungarian law on hunting, any activity concerning the protection of wildlife stock and its habitat, and the regulation of wildlife stock qualifies as wildlife management.[24]

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[21] Roeschke, Joseph Elliott: Eco-Terrorism and Piracy on the High Seas: Japanese Whaling and the Rights of Private Groups to Enforce International Conservation Law in Neutral Waters [comments] *Villanova Environmental Law Journal*, Vol. 20, Issue 1 (2009), pp. 99-138.

[22] Kovács M.: Vad és természetvédelem. In.: Bán István (szerk.): Vadászetika. Lipták Kiadó, Budapest, 1996, 215-221. o

[23] Bezdán A.: A vadászat természetvédelmi vonatkozásai. Jogelméleti Szemle, 3 (1) 2007, 1-25. o.

[24] A vad védelméről, a vadgazdálkodásról, valamint a vadászatról szóló 1996. évi LV törvény 40. §.

Its aim is to formulate, maintain and rationally utilize an appropriate wildlife stock. All this has to be realized in accordance with agriculture, sylviculture, with the preservation of the environment and nature.

Modern wildlife management and hunting require by all means a scientific grounding. Without the very thorough knowledge of the habitat, behavior, biology and essential conditions of the wild animals, wildlife management cannot be conducted today in an effective and refined way.

The goals of wildlife management include that the wildlife stock needs to be preserved for the future generations, and it needs to be improved within rational bounds as well. One needs to be especially careful with wild species, the stock of which is dropping for certain factors.

Poaching causes unmeasurable damages in this regard as well, as snares and traps kill without selection, and catch animals that stumble into them. Perpetrators are not motivated either to professionally kill for the sake of wildlife management when using a firearm, but to kill the game as fast as possible without being caught in the act. Poachers usually are not even familiar with the factors, principles and regulations that need to be considered when shooting a wild animal.

One can easily see the way how poaching makes it impossible for hunting companies, forestries and other organizations entitled to hunt to practice and plan their management, poaching being a factor which might be even harder to predict than the weather itself.

Not conforming to rules of animal protection

Hunters respect the game, and adhere to the written and unwritten rules of hunting as a profession, the methods and instruments of hunting, the hunting regulations and traditions.

However, it does not interest a poacher that it is forbidden to torture an animal. When killing the game, one needs to make the agony of the animal as short as possible. Game needs to be killed with a shot causing swift and immediate death out of consideration. However, the wire trap frequently used by poachers for example does not cause immediate death, so during the long death-struggle, infection or sepsis may occur. If the wild animal frees itself and survives the trap or snare, sometimes the infected limb mortifies, and the animal becomes crippled.

It is a fundamental hunting rule that hunters are required to track down the game that had been wounded by them, or which is otherwise seriously ill, in order to be able to kill it. After a shot taken hastily, from too far and in an uncomfortable pose, the chance is bigger that the game will flee wounded. As the search for blood traces would take too long, poachers do not spend the time with tracking wounded animals. All this leads to the unnecessary suffering of the animal.

Risks of poaching on food safety

All in all, poaching has a risk on food safety due to putting game meat on the market without the authorities checking it. Poachers today are shipping for kitchens as well, and often sell a kilogram of meat for one quarter of the actual market price, illegally. The issue brings up public health problems as well. It may happen that pathogens of dangerous illnesses are in the meat, the signs of which can only be recognized by specialists on the killed animals.

Poaching for game and fish in the Criminal Code

The statement of facts for the crime of poaching first appeared in the criminal code in force at the moment in Hungarian law, which legislation has been put into force on 1st July 2013.

Any person who:

a) is engaged in activities for the killing or capturing of wild game on a hunting ground without hunting right, or as a hunter on the hunting ground of others without authorization,

b) kills or captures during the close season for game – provided for in specific other legislation covering all species of game – any wild game of that species,

c) is engaged in activities for the killing or capturing of wild game, or any vertebrate animal under special protection or any protected animal using unauthorized hunting equipment and methods provided for in specific other legislation, or on restricted hunting grounds, is guilty of a felony punishable by imprisonment not exceeding three years.[25]

The new statement of facts means a significant change in the Criminal Code because it already orders the untitled hunting as punishable, independent from its effectiveness. When poaching is effective, and a game is killed, then the guiltiness of the perpetrator can be decided in further crimes, such as theft, abuse of firearms, abuse of forbidden military equipment, and damaging of nature. When attacking a professional hunter, the poacher commits violence, assault or murder against a public official.

Money laundering

The income coming from illegal hunting may become so large as a result of the activities of organized crime groups, that perpetrators may be forced to whiten their profit from this source. Money laundering is an illegal service which converts a "dirty" sum of money coming from an earlier crime into a sum that seemingly arrives from a legal source. The goal of the exercise is to make the illegal origin of the money unidentifiable.[26]

This means that the money launderer returns the illegal income into the legal economy, and by doing this, strives to avoid the attention of investigators or the tax authorities. The fact that the illegal income from poaching is injected into a seemingly legal enterprise, means a competition for members of legal economy that is impossible to overcome. Such "entrepreneurs" get a competitive advantage in the business, who obtained part of their capital through criminal activities.[27]

It is easy to see that out of two restaurants or butchers, the one obtaining ingredients from poachers for a small fraction of the market price will be able to offer game courses or game meat on a better price.

Poachers are responsible for money laundering by injecting their illegal income into the legal economy, but even when the direct result of poaching, fish, game meat is

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[25] Criminal Code 245.§

[26] Gál István László: Bejelentés vagy feljelentés? A pénzmosás és a terrorizmus finanszírozása elleni küzdelemmel kapcsolatos feladatok és kötelezettségek. Penta Unió, Pécs, 2013, 5. p.

[27] Gál István László (2013) 5. p.

given to restaurants, or trophies given to ornament-makers so that their origin would become untraceable in the future.

Financing terrorism in the Criminal Code

Terrorism is a form of crime, and one of its most severe and dangerous forms. Thus, terrorist organizations are not afraid from committing other crimes. This usually has a smaller risk than the terrorist acts, as the sentence is less severe in such cases. Terrorists usually prefer such types of crime which bring a large income in a short period of time. Maybe the most preferred of these is drug trafficking, but serious sources of profit are kidnapping, human trafficking and money laundering as well.

The new Hungarian Criminal Code put in force on 1st July 2013 regulates the financing of terrorism in a separate statement of facts. Based on Section 318 of the Criminal Code, "any person who provides or collects funds with the intention that they should be used in order to carry out an act of terrorism, or who provides material assistance to a person who is making preparations to commit a terrorist act or to a third party on his behest is guilty of a felony punishable by imprisonment between two to eight years." The value that is damaged by this crime is public safety, just like in the case of terrorism or poaching.

Fortunately we have not met with a criminal case in Hungary yet, where the income from poaching was spent on financing terrorism by the organized criminal groups. But seeing the tendencies in the world, the crime-fighting authorities must be prepared for this possibility as well.

Conclusion

In certain places of the world, such trans-boundary problems appear together as illegal or excessive fishing, trafficking of drug and people, piracy and terrorist threats.[28] Terrorist threat, drug trafficking, human trafficking based on migration and other crimes supervised by organized criminal groups are present in Europe as well. Poaching is also there due to the great abundance of game. Poaching creates dangerous situations, damages public safety, erodes the feeling of being safe in the public. Dangerous criminal groups are formulated, which possess the most modern weapons and other military equipment. Fortunately, poaching has no direct connection to terrorism in Hungary. We do not have direct evidence on the Hungarian poaching having a role in financing terrorism either. However, organized criminal groups sooner or later appear where the possibility of a great income.

[28] David Rosenberg, Christopher Chung: Maritime Security in the South China Sea: Coordinating Coastal and User State Priorities. *Ocean Development and International Law*, Vol. 39, Issue 1 (2008), pp. 51-68.

Principles of criminal law: immersion in theory

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Abstract:

The article is devoted to the criminal law principles. Criminal law principles can be defined as sustainable, objective and essential connections between criminal law phenomena, on the one hand, and social and legal phenomena, on the other hand, which determine the genesis, structure and functional peculiarities of criminal law. In the work of the proposed classification of the criminal law principles, based on various grounds.

Keywords: *Principles of criminal law, modern Russian criminal law theory, groups of principles functioning in the criminal law, criminal law formation principles, criminal law development principles, criminal law functioning principles, structural principles of criminal law.*

Introduction

Principles of criminal law in the most general and figurative form may be defined as the sustainable basis of this legal sphere, its "skeleton", on which legal matter grows and on which the whole "body" of criminal law is formed. They are, on the one hand, a result of the prior evolution of criminal law, something stipulated historically and socially, and on the other hand, the source and basis of the modern state, functioning and sustainable development of the area. Principles dictate the formation of the criminal law aspects of social life and are responsible for the form, structure, composition, functions and features of criminal law, the progress of the criminal law procedure.

Just as any physical, chemical, biological processes are governed by certain laws discovered by scientists, criminal law aspects of social life are based on specific principles which give a special quality to criminal law as a social phenomenon.

Meanwhile, it is worth noting that in the framework of criminal law theory the topic of criminal law principles still remains a "white spot". For all the years of its formation, criminal law science has accumulated a significant amount of theoretical knowledge about various phenomena of criminal law reality. In particular, the doctrine of crime, corpus delicti, punishment, punitive law have been established. As for the problem of the principles of criminal law, it has not become a separate subject of study in Russian science. It led to the fact that a significant number of issues are still unresolved: the definition of the concept of criminal law principles and the establishment of their

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specific character, the system of principles which function in the criminal law sphere, their classification, wording and content, etc. Search for the English language sources did not reveal any special works devoted to the problem of the criminal law principles, either.

Lack of proper results of exploring them explains the critical condition in which modern Russian criminal law theory and practice remain. In particular, at the legislation level the increase in the number of erroneous decisions, their essential character, illogicality, inconsistency and invalidity indicate that criminal provisions are either inappropriate or ignore their own principles. While at the level of law enforcement ignoring the essential and necessary connections between various elements of the system of law, relationships between legal activity of people and competent authorities, or neglecting them may make even the most perfect laws useless.

These circumstances seem sufficient to point out the fundamental importance of scientific research and explanations of the content of criminal law principles and their role in modern socionormative regulation. The study of principles of criminal law is the subject area and stage of its exploration which brings criminal law theory to the level of other natural, technical and social sciences and requires the research of the universal principles inherent in all forms of the movement of matter, in particular a social form, and is a further step into methodological interaction of sciences.

Concept of criminal law principles

Identification of the principles governing the criminal law reality requires in the first place the formulation of the concept of criminal law principles. To do this we believe it appropriate to use deductive reasoning from the general to the particular as an effective methodological approach. A philosophical concept of the law will serve a starting point of the analysis in this case. It is a well-known fact that the law is an interaction between substantial properties or stages of development of the objective world phenomena, which has a universal and essential character and is manifested in relative stability and recurrence of this connection[1]. Since criminal law principles by their nature are a kind of social principles, we should define the latter. The definitions of a social law state that it is a universal, essential, stable connection between social phenomena, which determines the flow of events of a historical process in a particular direction; that the law is the basis of human activity, it emerges and is implemented only through human activity[2]. The next step in the study of criminal law principles is the definition of principles of law. Proceeding from philosophical and sociological understanding of the category of "principle" and taking into account the specific character of the legal reality as a particular area of social life, the following definition can be suggested: principles of law are objective, substantial, universal, essential, recurring and sustainable connections of social and legal phenomena which characterise the emergence, formation, structuring and functioning of the law and which are part of the system of social principles and function alongside other laws of society, evolving and

[1] See: Tugarinov V.P. Laws of objective world, their study and usage. L., 1955. p. 55-56.

[2] See: Popov S. Social laws and social cognition. M., 1973; Uledov A.K. Sociological laws. M., 1975; Vinogradov V.G. Social laws and principles. Tallin, 1980; Concept-terminological dictionary. Rostov-on-Don. 2005; Osipov G.V. Sociology. M., 2008. p. 34

coming into effect through legal activity of people. This definition is the basis for understanding and identifying the principles of criminal law proper.

In line with the above, *criminal law principles can be defined as sustainable, objective and essential connections between criminal law phenomena, on the one hand, and social and legal phenomena, on the other hand, which determine the genesis, structure and functional peculiarities of criminal law*.

Criminal law principles: general and special

Analysing the criminal law reality in the light of the proposed definition allows to discover the principles this reality is subjected to, and reveal their content and properties.

In our view, criminal law would not exist and function as an independent branch of law without having its own specific principles. However, this does not mean that in the sphere of criminal law only criminal law principles work. In our opinion, *four groups of principles functioning in the criminal law sphere of social life should be highlighted*:

specific principles (*e.g.,* the principle of the prevalence in the criminal law method of the elements of power and subordination in conjunction with prohibitive and punitive means; the principle of immanence of a crime to criminal law as a category of legal facts and punishments as legal implications; the principle of the quantitative prevalence of crimes in a set of facts provided by the norms of criminal law; the principle of predetermination of various aspects of criminal liability implementation according to the category of a committed crime; the principle of providing means of implementation of regulatory norms in criminal law; the principle of dividing *corpus delicti* into four elements: object, objective side, subject, subjective side; the principle of criminal liability for a crime; the principle of proportionality of a crime and the punishment; the principle of compliance of the variation of sanction with the variation of disposition of the criminal law norm);

- *general principles of law* (*e.g.,* the principle of the transformation of social freedom and liability into subjective legal rights and obligations; the principle of coherence of the legal system; the principle of the presence of two main subsystems in law: regulatory and protective; the principle of law division into private *(jus privatum)* and public *(jus publicum);* the principle of emergence of legal relations in the following typical way: according to legal norms and on conditions stipulated by these norms certain individuals begin to have rights and duties; the principle of emergence of regulatory legal relations as a result of lawful conduct of subjects and protective legal relations on the basis of unlawful actions; the principle of inevitability of legal consequences based on the presence of a legal fact; the principle of interrelation between subjective legal rights and duties; the principle of combining legal norms into institutions and branches; the principle of unity (compliance) of a subject and method of legal regulation; the principle of dependence of forms of implementation of legal norms on the ways of legal regulation expressed in them (positive obligation – execution, permission – use, prohibition – compliance);

- *social and sociological principles* (*e.g.,* the principle of determinancy of other sides of society's life by its economic system and their reversionary impact on economy; the principles of interaction between social subjects (social struggle, the relationship between society and individual); the principle of interrelation between governing and governed subsystems; the principles of interrelation between social being and social

consciousness; the principles of the functioning of social psychology and ideology; the principles of interaction between society and nature);

- *universal principles* (principles of dialectics: the principle of the unity and conflict of opposites, the principle of transition of quantitative changes to qualitative ones, the principle of the negation of negation).

The above-mentioned general (universal, social and legal) principles manifest in the field of criminal law while gaining specific character due to the peculiarities of its nature, content and functions.

In this context the question of the relationship between general and specific principles is important. In philosophical and sociological literature, it refers to debatable questions. Some authors[3] believe that general principles manifest through specific principles functioning in one or another group of phenomena at a certain stage of their formation; while others[4] argue that although general principles are connected with specific ones, they act independently, along with the specific ones; the third[5] believe that general principles manifest through and along with specific principles.

Aware of a largely conditional nature of this discussion, we nevertheless tend to hold the view that the action of general principles manifests in specific principles.

Hence, all the principles acting in the sphere of criminal law are to a certain extent specific and may be divided into two groups: a) special – principles represented in criminal law exclusively, *i.e.* purely specific principles; b) specified – general (universal, social and legal) principles which are interpreted and objectified in criminal law reality acquiring a certain specificity. Specified principles are a peculiar manifestation of general principles, which is why they contain universal features characteristic of a corresponding general principle as well as specified features stipulated by the peculiarity of the phenomena whose connections they express.

Types of criminal law principles

For deeper exploration of criminal law principles, it may be practical to classify them according to different criteria. In particular:

1. Depending on which aspect (genesis, function or structure) of criminal law they express, the principles can be divided into four groups:

a) *criminal law formation principles*, which characterise peculiarities of emergence and further formation of criminal law as an independent branch of law (*e.g.,* the principle of dependence of protective criminal law orders on regulatory norms which they protect from violating);

b) *criminal law development principles*, which characterise factors and primary directions of its development (*e.g.,* complete codification of criminal law; the prevalence

[3] See: Deborin A.M. Philosophy and politics. M., 1961. P. 188; Glezerman G.E. Laws of social development: their character and usage. M., 1979. P. 224; Alexeev P.V., Pann A.V. Philosophy. M., 2007, p. 501.

[4] See: Tugarinov V.P. On interrelations of objective laws of social development // LGU Vestnik. 1954. Nr. 9, p. 49; Andreev M.A. On correlation of common and specific laws of social development // Philosophical and sociological research. Issue 14. L., 1973. P. 64; Sirin A.D. Classification of social laws. Specifics of society laws. Irkutsk, 1974, p. 79.

[5] See: Sheptulin A.P. Dialectics of the singular, special and common. M., 1973. P. 163; Uledov A.K. Sociological laws. M., 1975. P. 73-75, 138, 201-203; Gindev P. Philosophy and social cognition. M., 1977. p. 146; Theory of organisation: Manual for higher education/ed. by V.G. Aliev. M., 2003. p. 85.

of criminalisation processes over decriminalisation processes; mitigating punishment for criminal offences which are not of considerable danger to society; expanding optional elements in criminal law regulation; strengthening the criminal liability differentiation);

c) *criminal law functioning principles*, which are essential and sustainable relationships manifested in the course of implementation of criminal law (*e.g.,* the principle of criminal liability; the principle of appropriateness of the punishment to the severity of the crime and the individuality of the offender; the principle of reasonability of applying a compromise and alternative penalties in social relations regulation caused by crimes of small and medium gravity, as well as the punishment for severe and highly severe crimes);

d) *structural principles of criminal law*, which are relationships characterising legitimate organisation of the criminal justice system (*e.g.,* the principle of the Criminal Code division into general and special parts with their further subdivision into sections, chapters and articles; the principle of allocation of the Criminal Code articles in the following order: from the general to the particular (general and special parts), from the cause to the effect (crime – punishment), from more to less grave crimes; the principle of dividing the Special Section of the Criminal Code into disposition and sanction; the principle of combining articles which contain various penal regulations protecting homogeneous social relations into one chapter of the Criminal Code; the principle of systematisation of protective penal norms according to the objects of their protection).

2. According to the degree of generality, law principles may be subdivided into:

a) *general principles*, which function in all or several historical types of legal systems (*e.g.,* the principle of genesis from a case to a general norm; the principle of law formation arising from customs codification; the principle of compliance of legal orders with real social life needs; the principle of transformation of social claims and social debt into legal rights and obligations);

b) *specific principles*, whose functioning is limited by one historical type of law or a family of legal systems (*e.g.,* law emergence from court decisions is characteristic of the Anglo-Saxon legal family; law emergence from legal acts is characteristic of the Romano-Germanic legal family; law emergence from precepts for believers is characteristic of Islamic law).

3. According to their sphere of activity, criminal law principles may be subdivided into:

a) *intrasectoral principles*, which express internal relationships between elements of criminal law (*e.g.,* the principle of dependence of various aspects of legal liability realisation on the category of the committed crime);

b) *intersectoral principles*, which express relationships between criminal and other branches of law (*e.g.,* the principle of providing with legal means of implementation of regulatory standards; the principle of functional interaction between criminal law branches (criminal material, procedural and penal law) in order to resolve conflicts caused by an offence);

c) *socio-legal principles*, which express relationships between criminal law and other aspects of social life: public, economic, political, religious (in general, these principles reveal criminal law as the public will in terms of recognising certain acts as criminal and punishable, which is expressed in obligatory legal regulations and whose contents are determined by objective needs to protect the interests of an individual, society and the state from the most dangerous types of human conduct).

4. According to their manifestation, criminal law principles can be subdivided into:

a) *absolute principles*, which establish a strict relationship between phenomena of legal reality and are valid for each individual case of legal phenomena (*e.g.,* the principle of dividing corpus delicti into four elements: object, objective side, subject, subjective side);

b) *statistical principles*, which extend onto a certain class of legal phenomena rather than onto each phenomenon separately (criminality is mainly governed by statistical principles; e.g., the probability of acquisitive crimes rises with progressive poverty, while the increase in welfare of citizens lowers their probability).

5. According to the nature of relationships all criminal law principles can be subdivided into two groups:

a) *principles which differ among themselves on the subject of relationships*. Some of them express relationships between structural elements within legal phenomena (*e.g.,* the principle of division of *corpus delicti* into four elements), others between legal phenomena (*e.g.,* the principle of criminal liability), the third between a phenomenon and its features (*e.g.,* the principle of systematisation of punitive norms according to objects of protection; the principle of categorising all crimes according to the character and degree of danger for the public into four groups: crimes of small gravity, crimes of medium gravity, severe crimes, highly severe crimes); the fourth between features of legal phenomena (*e.g.,* the principle of compliance of the type and strictness of the punishment which is stipulated for committing a crime with the character and degree of its danger for the public; the principle of compliance of sanctions alternative with disposition alternative of a criminal norm);

b) *principles which differ among themselves in the quality of relationships*. Thus, some principles express causal relationships (*e.g.,* the principle of dependence of criminal law emergence on the objective need in such a system of social regulation which could perform the function of protection of the interests of an individual and society from dangerous types of human conduct), others express relationships of programmed conditioning (*e.g.,* the principle of emergence, modification and termination of legal relationships only with the occurrence of the facts which are connected with certain consequences by the Criminal Code norms), the third express relationships between the general and the particular (*e.g.,* the principle of dividing the Criminal Code into general and specific parts with their further subdivision into sections, chapters and articles), the fourth express relationships between the form and the content (*e.g.,* the principle of the unity of the Criminal Code and criminal law; the principle of correspondence of the Criminal Code to historically developing system of criminal law), the fifth express relationships of identity and equality (*e.g.,* the principle of proportionality of the crime and the punishment), the sixth express relationships of development, movement (*e.g.,* the principle of dividing legal facts into law making, law modifying and law terminating), the seventh express genetic relationships (*e.g.,* the principle of dependence of protective measures on the content of regulatory norms which they protect) and functional relationships (*e.g.,* the principle of providing with protective legal norms of the realisation of regulatory norms), the eighth express relationships of subordination (*e.g.,* the principle of subordination of legal norms to constitutional norms) and relationships of coordination (*e.g.,* the principle of functional interaction between criminal law branches (criminal material, procedural and penal law) in order to regulate the conflict caused by the crime), the ninth express structural relationships (*e.g.,* the principle of dividing the Special Section of the Criminal Code into

disposition and sanction; the principle of dividing corpus delicti into four elements: object, objective side, subject, subjective side).

Conclusion

The analysis of the concept and types of criminal law principles conducted in this article does not claim to be comprehensive and exhaustive. However, these initial results of immersion in the problem allow to see the prospects for its further development not only to ensure harmonious formation of criminal law within a particular country, but to identify common and different principles peculiar to criminal law phenomena and institutions in legal systems of different countries.

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Impact of corruption on the process of Eurointegration of Serbia

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Abstract:

Corruption, as an economic and political problem, represents negative social phenomena and is more or less present in all countries of the world. The Republic of Serbia on her path towards membership in the European Union has an obligation to establish effective measures in the fight against corruption through strengthening of the institutional and legal framework. The primary objective of this paper is to review and discuss the most characteristic forms of corruption in the Republic of Serbia by recognizing the circumstances that might be considered for those conditions. Further in the paper a special attention is devoted to the review analyzes the state of corruption in Serbia through the Global Corruption Perception Index, all in order to fully understand the current anti-corruption measures and their level of efficiency. Furthermore a reference was made to the criminal and other legislations in the Republic of Serbia that are governing the issue of corruption. The importance of this part of the research is that it shows the current anti-corruption measures. In this paper, in addition to the above, special attention was paid to the major statistical indicators on the state of corruption in the Republic of Serbia, which are obtained from the relevant organization. In the last part of the paper we have provided conclusions of the research about the issues which relate primarily to the negative impact on the economic system of the country, and after that we have proposed specific anti-corruption measures.

Keywords: *corruption, manifestations, economic crime, anti-corruption measures, eurointegration.*

1. Introductory remarks

During the recent decades, the issue of corruption is characterized by newer forms of manifestation primarily due to many social and economic changes, changes that represent a direct connection with wars, huge political changes, economical and business weakening of the country, but also due to the planned privatization of property belonging to a county and other forms of transitional politics. Weakening of standard of the citizens and a gradual strengthening of the gray economy, in addition to the indisputable direct negative impact on the economic system of the country, the most common consequence is the increase of criminal and deviant behavior.

The term "corruption" (lat. *Coruptie*) during the period of ancient Rome has been describing the moral corruption and venality. Since the begining of organized human society, corruption appears as a hidden phenomenon, whose scale can not be accurately

measured and can not be completely eradicate.[1] Corruption is negative social phenomena that is more or less present in all countries of the world. Depending how the society and the country are developed we can identify different forms of that problem, ranging from overt and publicly known behavior right to the "elegant" incorporated in many governing entities and institutions.

Corruption can be observed through the issue of organized crime in a way that organized criminal activities are manifested through close cooperation *i.e.* teaming up with government agencies and institutions. Some authors suggest that corruption occurs as a side activity of the primary activity of criminal groups and the reason for that is because through corruption is achieved expansion of power.[2] If you take a close look at the conditions that favor the emergence and strengthening of organized crime, we can see that they do not differ greatly from the already mentioned circumstances that usually precede issue regarding corruption. According to many authors, the basic cause of crime are dysfunctional social relationships which are mostly caused by inadequate and uneven material development and social division of labor, which arise due to inequality in economic and political sphere within a country, which can often provoke certain implications on the international level.[3] Correlation between corruption and organized crime is that organized crime must have self-protection mechanisms, because only in this way can guarantee the criminal activity and its survival, therefore, organized crime resort to methods of violence and intimidation, or establishing a criminal connections with state authorities, political parties, and that is usually achieved through corruption.[4] Reasons we have mentioned above are typical for all forms of crime, but from the etiological aspects it is necessary to take account what's causing the organized crime, ie, its specificities.[5] Without going deeper into details about these problems, it is necessary to point out that many authors have classified causes of organized crime into three groups, and those are: economical, social and political causes.[6] In addition to the observations shown so far, it is necessary to underline that corruption, viewed separately or as a part of organized crime, is often characterized by a significant degree of conspiracy and organization, especially in the allocation of duties, ie. tasks (as well as any organized crime), which is also reasonable to expect because corruption is exibited through offenses against official duty (abuse of official position. breaking the law set by a judge, public prosecutor and his deputy, dereliction of duty, unlawful collection of payments, fraud in the service,bribery, disclosure of official secrets etc.).

In the eyes of the regular citizens, usually no distinction is made between bribery and corruption or they can't make a clear distinction between these two concepts. Basically, corruption involves much wider range of abuse, *i.e.* may involve a higher

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[1] Bjelajac, Ž: *Korupcija kao izazov savremenog demokratskog društva*, Kultura polisa, 2015, pp. 43.

[2] Dobovšek, B: *Fenomenološka obeležja korupcije kroz prozmu delatnosti organizovanog kriminala*, ur. Bjelajac, Ž. i Zirojević, M, Organizovani kriminalitet – Izazov XXI veka, Pravni fakultet za privredu i pravosuđe u Novom Sadu, 2012, pp. 327.

[3] Bjelajac, Ž: *Organizovani kriminalitet – Imperija zla,* Pravni fakultet za privredu i pravosuđe u Novom Sadu, 2013, pp.79.

[4] Bošković A, Pavlović Z: *Special evidentiary actions in the function of combating organized crime in Serbia*, Journal of Easterneuropean criminal law, no. 1/2015, pp. 42.

[5] Bošković, M: *Transnacionalni organizovani kriminalitet*, Policijska akademija, Beograd, 2003, pp.73.

[6] Bjelajac, Ž. *op. cit.,* p. 80. i Šikman, M: *Kriminološki aspekti organizovanog kriminaliteta – karakteristike i uzroci*, ur. Bjelajac, Ž. i Zirojević, M, Organizovani kriminalitet – Izazov XXI veka, Pravni fakultet za privredu i pravosuđe u Novom Sadu, 2012, pp. 85-89.

number of different types of crime, whereas bribes are limited to receiving or giving money or gifts to officials. Some authors specify that corruption in addition to being an abuse of public official functions, by which is meant the various forms of extortion, bribery, etc., may not be restricted only to public office. Corruption can exist in the private sector where it can refer to taking bribes to favor the certain clients (customer or supplier) or revealing business secrets and so on. Although it is not necessary to emphasize, it is clear that the problem of corruption can have much greater impact when it comes to the abuse of public official functions.[7] Same authors also suggest that the bribery (which is defined in an already specified way), i.e. with the use of illegal incentives in order to achieve unfair and often illegal benefits compared to others.[8]

2. Classification and causes of corruption

In literature we can often find differentiated classifications of corruption, mostly based on characteristics of her attributes. For example, there is a difference between political and administrative corruption, because of the level of authority. Political corruption is the corruption that exists among high state officials and politicians who hold political power as well as the right of making crucial political decisions. This form of corruption can be defined as Grand corruption, as opposed to so-called administrative or bureaucratic corruption – petty corruption, which applies to officers employed in the public administration responsible for implementing the decisions, regulations and other measures adopted by state authorities.[9]

Regardless of the type of corruption, there are different manifestations of corruption. In addition to bribery, the most common is embezzlement of public funds, misappropriation of public property - theft, fraud and extortion, nepotism and cronyism, influence peddling, patronage and lobbying. One of the possible divisions of corruption is a division on centralized and decentralized corruption. When we talk about decentralized corruption we are talking about corruption committed by civil servants for their own benefit and for their own interests, whereby state may not be in favor for those activities, while the main characteristic of centralized corruption, the fact that the state leadership becomes a generator of this manifestation.[10] One possible option is division of corruption into petty, medium and grand. Petty corruption is reserved for assistant officer of the public administration, local or national, or, an official of a public service. Medium corruption usually occurs in the economic sphere and consists mainly in receiving and giving bribes and abusing the office in that way. The most dangerous is grand corruption, it is represented by highest political officials and important businessmen, i.e. political elite and the owners of huge capital.[11]

In general, the majority of European legislations are able to distinct between two types of corruption:[12]

1. "Active" corruption, which exists if someone commits a criminal offense by: offering, promising or giving any gift, to obtain favor or advantage for some kind of a right, make it a criminal offense, for example, taking bribes and other forms of incitement to:

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[7] ICAEW: *Business and economic crime in an international context*, ICAEW, London, 2010, pp. 11.
[8] *Ibid.*
[9] Bjelajac, Ž: *Organizovani kriminalitet – Imperija zla, op. cit.*, pp. 348.
[10] Šoškić, N: *Oblici i načini suzbijanja korupcije*, Akademska štampa, Zemun, 2004, pp. 20.
[11] *Ibid,* pp. 22.
[12] Bjelajac, Ž: *Korupcija kao izazov savremenog demokratskog društva*, *op. cit.*, pp. 46.

2. "Passive" corruption is when someone in an official or personal position receives offer, gift, favor or promise of a gift or benefit, and thereby commits the offense of receiving bribes, abuse of authority, unlawful mediation and others.

Forms of corruption according to Arnold J. Heidenheimer are: "black", "gray" and "white". Black corruption is the most serious form of corruption; she is strongly condemned by community, and also punishable by law. Gray corruption is condemned by community, but tolerated by political elites (for example, illegal financing of political parties in France or Italy until 1988). White corruption has mildest social consequences, and the public tolerates her. This includes, for example, discarding (through "connections") traffic fines,"cutting through" the rows in the different administrative procedures, small tax evasion etc.[13]

Due to the complexity of the corruption phenomena, it is difficult to list all forms. In addition to already mentioned, there are also terms: judicial corruption, corruption in health care, corruption in education, corruption in the police, corruption in customs, corruption in the tax administration, economic corruption, "general corruption", etc. However, having in mind adverse implications on society, the most perfidious and dangerous form of corruption is so called large-scale corruption, which initiates and leads to the change or the enactment of new regulations (laws). Political or "grand" corruption, as some call it, is often used as a synonym for high-level corruption. Therefore, this type of corruption occurs at high levels of the political system, i.e. at the highest level in the public sphere, where policies and rules are formulated when politicians and senior civil servants implement laws in the "name of the people" use their political power to maintain their power, status and wealth.[14]

In contrast to the political ("grand") corruption, there is a small, bureaucratic or petty corruption. This type of corruption occurs every day, and takes place at the end of policy implementation by state officials. This type of corruption includes bribery in connection with the implementation of existing laws, rules and regulations. Petty corruption deals with the modest sum of money at a low level. People such corruption may experience more or less on a daily basis, in a meeting with officials employed in public administration, schools, hospitals, police, local governments, tax authorities etc.[15]

3. Summary analysis of the state of corruption in Serbia

Existing forms of corruption to some extent vary from the level of (public) official functions, except that they share many common features. If you for example take the specificity of the local level, it can be seen that corruption is based exclusively on mutual social relationship of the citizens, which comes directly from the local community (rural or urban) as a form of association of the citizens. In the local community, which can commonly be characterized as a relatively small community, many social contacts can be realized, which can be grouped into kinship, friendship, acquaintance and others forms of relations. These kinds of relationships can often be sufficient cause for the various forms of abuse, which directly affects the violation of the laws or deviation from the normal application of legal norms, whereby it creates inequality between citizens.

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[13] Heidenheimer, A: *Readings in comparative analysis on political corruptino* (lektira /rasprava uporedne političke korupcije), izd. Hott. Rinehart & Winston Inc., New York, 1970.

[14] Bjelajac, Ž: *Korupcija kao izazov savremenog demokratskog društva, op. cit.,* pp. 46-47,

[15] *Ibid.*, pp. 47.

When we join the discussion and analysis of the causes of corruption, frequently asked questions are: Why some officials misuse public office for private purposes? Why is more bribery in countries than in other countries? Economists, political scientists, psychologists and sociologists, have their own views and speculation. Some emphasize the historical and cultural traditions, others cite differences in levels of economic development of individual countries, others link the level of corruption with the characteristics of the country, political institutions or incentives created by the predominant public policy. However, the problem is obviously much deeper and more complex.

The anomie is not a simple violation of norms to achieve things and statuses that are otherwise unattainable. "Thief, a bully or swindler know well when they violate those norms. They are afraid of sanctions, they are ashamed of social condemnation, trying to hide the traces of their own work and develop mechanisms of self-deception. In the mind of the offender (sinner), there are norms that justify delinquency. Anomie is a social situation in which the function of norms is unpredictable". However, it is not a state of the individual, but of a mass phenomenon.[16] Corruption is a systemic weakness, it is connected with other elements of the social, economic and political system, which is especially evident in the case of countries in transition (new democracies). Although the morale is associated with corruption, it is not the sole cause. There is no homo corupticus.[17]

3.1. Serbia's place in global corruption perecption index for year 2014

In Serbia, a country still in transition, corruption is still present. It can be said that she took proportions of systemic manifestations and forms of everyday life. Surviving through historical periods and various systems, corruption metastasized and became a phenomenon that has stuck in the mindset of man. It is present in every facet of business and society. Bribery has become a necessary condition for even the smallest business enterprise. Unsafe and easily crushed institutions and the lack of control of the executive and judicial authorities are the main institutional obstacles for the fight against corruption that has engulfed almost all segments of society.[18]

The Corruption Perceptions Index (CPI), which was published in 2014 by international organization called Transparency International, presented the results of research on the perception of the extent of corruption in which participants were relevant respondents in 175 countries (and dependent territories) On a side note, this type of research has been conducted since year 1995, is presented annually and defines corruption as "the abuse of public power for the sake of private gain." CPI is represented on a scale of 0-100, where in 2014 Serbia had 41 points, one less than in 2013 year. Serbia is on the 78th place down from 72nd place where she was last year, and Serbia is now ranked under Bulgaria, which last year was ranked below Serbia. Although last year registered a minimal shift in the right direction when it comes to the perception of corruption, this year, Serbia also has minimal drop in the scale of countries where the CPI is measured.[19] It should be kept in mind that changes in perceptions of corruption

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[16] Tarle, T: *Korupcija u javnoj upravi*, Pravnik, 38, 2 (79), Udruga pravnik, Zagreb, 2004, pp. 134.

[17] Derenčinović, D: *Mit (o) korupciji*, NOCCI, Zagreb, 2001, pp. 106.

[18] Bjelajac, Ž: *Korupcija kao izazov savremenog demokratskog društva, , op.cit.,* pp.51.

[19] Indeks percepcije korupcije, http://libek.org.rs/sr/vesti/2014/12/06/zasto-politika-u-srbiji-deluje-tako-kvarljivo-osvrt-na-indekspercepcije-korupcije, 12.06.2015.

do not reflect the factual progress in fighting corruption in the Republic of Serbia (whether corrupt activities are reduced or not), but it is a significant indicator that despite the fact that the fight against corruption was declared as one of the pillars of the current government activities, activities undertaken in this area didn't had a positive effect on perception of corruption of government officials and public servants. When we look at the results of the CPI from 2013, it should be taken into consideration and the start of large criminal cases (such as the arrest of Miroslav Miskovic) which can be considered to have contributed to the reduction of corruption perception. The longevity of the effects of "major cases" could be brought into question the absence (so far) final verdicts in these cases.[20] As the main problems in Serbia, representatives of Transparency Serbia (TS) has been stating allegations for years now: violation of anti-corruption law, violations of legal certainty by adopting contradictory and ambiguous provisions, excessive power of political parties in the work of the public sector, unregulated lobbying, non-transparent decision-making process, unnecessary procedures and insufficient capacity of authorities supervising the application of laws.[21]

4. Review of the criminal law and other legal regulations in Republic of Serbia that governing the field of corruption

Before we point out to the criminal regulation of these problems it is necessary primarily in hierarchical order, to point to the Constitution of the Republic of Serbia [22] which contains standards on how to prevent conflicts of interest, incompatibilities, but also the norms on which those institutions are established that among other things deal with this issue (the State Audit Institution, Ombudsman etc.). Given that this is the highest legal act of the state which regulates the most important issues, it is understandable that the issue of corruption is regulated to this extent.

The Criminal Code of the Republic of Serbia [23] in chapter 33 prescribes 12 offenses against official duty and those are: Abuse of Office (article 359), Violation of Law by a Judge, Public Prosecutor or his Deputy (article 360), Dereliction of Duty (article 361), Unlawful Collection and Payment (article 362), Improper use of Budgetary funds (article 362a), Fraud in Service (article 363), Embezzlement (article 364), Unauthorised Use (article 365), Unlawful Mediation (article 366), Soliciting and Accepting Bribes (article 367), Bribery (article 368) and Revealing of Official Secret (article 369). During the discussion about the issues of bribery and corruption, focus of the research was on some of the mentioned crimes, because of that we are going to take a closer at those offences.

The offense Abuse of office is regulated by Article 359. which stipulates that a public official that's abusing his official position or authority, or by exceeding the limits of his official authority or fails to execute his official duty, obtains for himself or another person or entity any benefit, or causes damage or a severe violation of the rights of another, shall be punished by imprisonment of six months to five years. The same article also stipulates that by executing this criminal deed, if a material gain in excess of 450,000 dinars (~3,750 euro), the offender shall be punished by imprisonment of one to

[20] *Ibid.*

[21] Bjelajac, Ž: *Korupcija kao izazov savremenog demokratskog društva, op. cit.*, pp. 52.

[22] Ustav Republike Srbije, Službeni glasnik RS, br. 98/2006.

[23] Krivični zakonik 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.

eight years, while in cases where the value of acquired material benefit exceeds the amount of 1,500,000 dinars (~12,500 euro) then the offender shall be punished by imprisonment of two to twelve years.

Criminal offence Soliciting and Accepting Bribes is regulated by Article 367. which stipulates that an official who solicits or accepts a gift or other benefit, or promise of a gift or other benefit for himself or another to perform an official act within his competence that should not be performed or not to perform an official act that should be performed, shall be punished by imprisonment of two to twelve years, whereas shall be punished by imprisonment of two up to eight years in cases where an official performs an official act which he should perform or not to perform an official act that should not be performed. In the case where an official commits the offense already specified in respect of uncovering of a criminal offense, instigating or conducting criminal proceedings, pronouncement or enforcement of criminal sanction, shall be punished by imprisonment of three to fifteen years. The same article also prescribes that when an official who after performing or failure to perform an official act already specified, solicits or accepts a gift or other benefit in relation thereto, shall be punished by imprisonment of three months to three years. This Article also prescribes an offense when a foreign official who commits the offense specified in paragraphs 1 through 4 of this Article shall be punished by the penalty prescribed for that offences. Same applies to a responsible officer in an enterprise, institution or other entity. The final chapter of this article prescribes the measure of confiscating the received gifts and equity that was gained in this way.

The criminal offense of bribery is regulated by Atricle 368, which stipulates that makes or offers a gift or other benefit to an official, that within his official

competence perform an official act that should not be performed or not to perform an official act that should be performed, or who acts as intermediary in such bribing of an official, shall be punished by imprisonment of six months to five years, while it would be punished by imprisonment up to three years whoever makes or offers a gift or other benefit to an official that, within his official competence, perform an official act that he is obliged to perform or not to perform an official act that he may not perform or who acts as intermediary in such bribing of an official. The above provisions shall also apply in cases where the bribe is given, offered or promised to a foreign official or responsible person in a company, institution or other entity. Finally, the Article prescribes that the offender, who reported the offense before he found out he exposed, can be acquitted from the crime Law on organization and jurisdiction of state authorities in fighting organized crime, corruption and other especially serious crimes[24] is the law governing education, organization, jurisdiction and powers of state organs and special government body to ensure the detection, prosecution and trials for criminal offenses envisaged by this law. This law applies to the detection, prosecution and trial for several offenses, and those relating to the suppression of corruption are: criminal offenses against official duty (abuse of official position, influence peddling, bribery), abusing the position of the person responsible (if the value of acquired equity exceeds the amount of 1,500,000 dinars ~12,500 euro), criminal offense abuse in connection with public procurement (if the value exceeds the amount of 150 million dinars ~1,250,000 euro) and the criminal

[24] Zakon o organizaciji i nadležnosti državnih organa u suzbijanju organizovanog kriminala, korupcije i drugih posebno teških krivičnih dela, Službeni glasnik RS, br. 42/2002, 27/2003, 39/2003, 67/2003, 29/2004, 58/2004 - dr. zakon, 45/2005, 61/2005, 72/2009, 72/2011 - dr. zakon, 101/2011 - dr. zakon i 32/2013.

offense of abuse of official position (if the value of acquired equity exceeds the amount 1,500,000 dinars ~12,500 euro).

Law on confiscation of the proceeds gained from crime [25] stipulate the conditions, procedures and authorities responsible for the detection, seizure and management of property of physical and legal entities proceeds from crime, and the main aim of the law is the confiscation of property acquired through corruption (proceeds of crime). Indirect contribution of this law is in his preventive nature in the sense of discouraging persons who might be or are in the chain of corruption because of the confiscation of assets obtained in this way.

In addition to the already mentioned laws, one of the most important laws governing the area of corruption is the Law on The Anti-Corruption Agency [26]. This law represents legal basis for the establishment of the Agency for fight against corruption as an autonomous and independent state body, and performs duties under its jurisdiction and falls under the jurisdiction of National Assembly of the Republic of Serbia. The law in addition to adapting the functioning of the Agency regulates the issues of conflict of interest (prohibition of doing the second public function; working in a political party or political entity; performing other work or activities; perform other work or activity at the time of stepping into public office; the obligation to report the existence of conflict interest; prohibition of establishment of a company or public service during his tenure in public office etc.), gifts (being obligated to refuse gifts; obligation of notification and keeping of records on gift and prohibition of receiving gifts for a related person), registering property (urgent review of assets; property register etc.), prevention of corrupt dealings (cooperation in the fight against corruption; training; research, international cooperation etc.), archiving and data protection and criminal provisions.

Important law for preventing the corruption is Law about financing political parties[27] which for a main goal is regulating sources and means of financing, recording and controling financing activities of political parties, coalitions and citizen groups. Undisputedly this law represents anti-corruptional measure, especially in areas where political corruption is present.

It is necessary to point out a Law about free access to information of public interest[28] which regulates the rights regarding access to informations of public interests which are held by public authorities. Important significance of this law first of all is in additional ways of fighting against corruption because it gives us access to certain informations, but also because with the help of this law Commissioner for Information of Public Importance was established and represents an independents public authority who is also independent in the exercise of its jurisdition.

At the end of this short review about legislations in Republic of Serbia, it is necessary to point out that all the mentioned laws are in accordance to a ratified international treaties and conventions that are of importance in preventing bribery and corruption, and those are: The United Nations Convention against Corruption [29]; United Nations Convention against Transnational Organized Crime and the Protocols Thereto

[25] Zakon o oduzimanju imovine proistekle iz krivičnog dela, Službeni glasnik RS, br. 32/2013.

[26] Zakon o Agenciji za borbu protiv korupcije, Službeni glasnik RS, br. 97/08, 53/10, 66/11-US, 67/13-US i 8/15-US.

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[29] The United Nations Convention against Corruption.

[30]; Criminal Law Convention on Corruption – Council of Europe [31]; Additional Protocol to the Criminal Law Convention on Corruption [32]; Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime [33] and Civil Law Convention on Corruption – Council of Europe [34].

5. Corruption as an obsticle on a road to an evident Eurointegration progress of Serbia

Negotiations between the candidate countries for membership in the European Union are primarily about the criteria that should be accepted, but also on the implementation of the legislation of the European Union. Each Member State is obliged to implement the acquis communautaire, i.e. taking collective rights and obligations arising from treaties and EU law. The said negotiations represent the final stage of the integration process of candidate country to the European Union, which preceded the conclusion of the Association Agreement and the gaining status of candidate.[35]

Fields that are negotiated are divided into 35 chapters[36] and each field is negotiated separately. One of the fundamental principles of the negotiations is the fact "that nothing is agreed until everything is agreed".[37]

Without going deeper into the issue of negotiations, we will specify that when the criteria which were defined in particular parts of the chapters are met, that chapter is closed, and then we move to the next chapter. The candidate country can work on meeting the criteria for a number of chapters at the same time. In the process of expanding of European Union, which includes the countries of the Western Balkans, based on the experience from the negotiations with the Croatia, the most complex

[30] United Nations Convention against Transnational Organized Crime and the Protocols Thereto.

[31] Criminal Law Convention on Corruption - Council of Europe.

[32] Additional Protocol to the Criminal Law Convention on Corruption.

[33] Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime.

[34] Civil Law Convention on Corruption - Council of Europe.

[35] Dragojlović, J, Bingulac, N: *The evolution of the European Union- historical heritage as a foundation for future development*, Zbornik radova sa međunarodne naučne konferencije "The old and New World Order - between European integration and historical burdens: prospects and challenges for Europe in the 21st century", Institut za međunarodnu politiku i privredu pp. 92.

[36] Subject of negotiations represent the following areas: Chapter 1: Free movement of goods; Chapter 2: Free movement of workers; Chapter 3: Right of establishment and freedom to provide services; Chapter 4: Free movement of capital; Chapter 5: Public Procurement; Chapter 6: Company law; Chapter 7: Intellectual Property law; Chapter 8: Competition; Chapter 9: Financial Services; Chapter 10: Information society and media; Chapter 11: Agriculture and rural development; Chapter 12: Food safety, veterinary and phitosanitary policy; Chapter 13: Fisheries ; Chapter 14: Transport policy; Chapter 15: Energy; Chapter 16: Taxation; Chapter 17: Economic and monetary policy; Chapter 18: Statistics; Chapter 19: Social policy and employment; Chapter 20: Enterprise and industrial policy; Chapter 21: Trans-European Networks; Chapter 22: Regional policy and coordination of structural instruments; Chapter 23: Judiciary and fundamental rights.

Chapter 24: Justice, freedom and security; Chapter 25: Science and research; Chapter 26: Education and culture; Chapter 27: Environment; Chapter 28: Consumer and health protection; Chapter 29: Customs Union; Chapter 30: Foreign Relations; Chapter 31: Foreign, security and defense policy; Chapter 32: Financial Control; Chapter 33: Financial and budgetary provisions; Chapter 34: Institutions and Chapter 35: Other issues.

[37] European Commission*, Understanding Enlargement, The European Union's enlargement policy*, European Commission – Directorate General for Enlargement, Brussels, 2013., стр. 11.

chapters are 23 and 24. In these chapters are treated areas dedicated to law and justice, human rights, freedom and security. Due to the above, the European Union has made the decision that the best start to begin negotiations is by opening these chapters so that candidates can have more time to adapt to EU standards in these areas. This model was applied in negotiations with Serbia.[38]

One of the major issues of those two chapters is the issue of corruption. It should be emphasized that Chapter 23 expects that Republic of Serbia creates a professional and efficient judiciary, as well as the overall fight against corruption with the establishment of efficient institutional framework and legislation, and it is anticipated that this can be achieved by preventing conflicts of interest, transparent funding of political parties, a clear procedure of public procurement, but also limiting abuse of political influence. As an example for effective fight against corruption in this area, usually taken for example is Croatia and trial for corruption of former Prime Minister Ivo Sanader.[39]

A special importance on the fight against corruption is the fact that EU member states, European Commission and the European Parliament, place much importance to the fight against corruption. Mentioned arises precisely from their determination that the European Union does not want to deal with problems that could happen when new member state joins EU. Given that the European Union is a common market in which there is a free movement of capital, goods and services, corruption can be a barrier to these freedoms and it can lead to discrimination in "market competition".[40]

6. Results and discussion

Beside a general assessment of the state of corruption in Serbia, by the relevant international organizations, it is appropriate for this opportunity to present some other researches on environment rating from the perspective of the anti-corruption community

Every fifth citizen believes that giving gifts to official so he would do something that is otherwise his job – isn't a "sin". Finishing obligations "through connection", *i.e.* through the use of acquaintances 19% of people don't consider as corruption. A minimum tolerance has a direct payment of money to officials, because it is only supported by 9% of the population. These are the results of the research published by the Agency for fight against corruption. As many as 77% said that corruption is now the biggest problem in Serbia, and they find that most corruption is in health care, among politicians, political parties, the judiciary... That in the past year one or more times they gave a bribe was admitted by 18% of respondents, and every fifth official has directly asked for a "gift" from them. Through an intermediary bribe was asked of 38% of respondents, while 42% said that they themselves have made "an offer" and that the "official has accepted." As the biggest culprit for the occurrence of corruption, citizens (21%) mention tycoons and their impact on the work of state institutions, while 18% believe that everything happens because of the influence of political arbitrariness of the institution. The "root" of the corruption, citizens see in the huge authority a public

[38] Informacioni centar EU, *Pregovaračka poglavlja ka Evropskoj uniji*, Beograd, 2014, pp. 13.

[39] EurActiv, *Poglavlja 23 i 24: suštinska promena društva,* http://www.euractiv.rs/pregovori-sa-eu/7059-poglavlja-23-i-24-sutinska-promena-drutva-, 20.08.2015.

[40] Vlada Republike Srbije, Kancelarija za evropske integracije, http://www.seio.gov.rs/upload/documents/publikacije/vodic.pdf, 20.08.2015.

servants has, their low salaries, complicated procedures. More than half of respondents (55%) reported repression, punishment of the perpetrators as the most effective method of combating corruption, while 36% of them stated that they need to work on prevention. Only 19% of citizens believe that there is enough information on the occurrence of corruption.[41] Serbian citizens still consider political parties, health workers and police as the most corrupt, is the results of six-month research by the United Nations Development Programme and CeSID. The survey also shows that nearly 60% of citizens had direct or indirect experience with corruption or they themselves offered bribes. The average bribe in Serbia is 250 euros, and nearly a third of Serbian citizens believe that such money often ends in healthcare. The survey shows that citizens claim that bribes are most often given to doctors, and there is an increased number of those who gave money to police officers and state administration officials. Although, according to the survey, more than 60% of respondents had some experience with corruption, this problem affects then less than poverty or unemployment.[42]

Because of the need to study this issue, through survey method, this survey was conducted on a subject "Perceptions of the population of Belgrade and Novi Sad on the widespread of corruption" , with the aim to give an answer to the question of how much is the corruption present in our society. The survey was conducted in the period from 15. 10. 2014 to 10. 02. 2015, on a random representative sample of 700 adult residents of Belgrade and Novi Sad. The selection of respondents was carried out by random sampling in relation to the day of the survey, and the interview was conducted through a research technique face to face, direct contact with the respondent, and as a research mechanism was used a questionnaire, which consisted of seven questions. During the interview, it was insisted on the implementation and compliance with two important rules in addition to the sample significantly affect the representativeness of the study: strict adherence to the sampling frame, given the complexity of the topic and the selection of the sample with an emphasis on gender, education and age representativeness of respondents.

Based on the methodology established during the implementation of this survey, following categories of respondents are:

- The gender structure of respondents: 39% of women and 61% men;
- Age structure: between 20 to 30 years – 48%, 30 to 40 years 20%, 40 to 50 years 22% , and 50 to 65 years 10% respondents;
- Educational structure and occupation of respondents: high school – employed 18%, student 22%, high school – unemployed 26%, pensioner 1% , higher and high schools 3% ispitanika, college degree 30% surveyed;
- Nationality of respondents: Serbian 76%, Hungarian 10%, Bosnian 4%, Roma/Gypsy 1%, Montenegrin 5%, Slovak 1%, rest 3%.

On the question "What is the biggest problem in Serbia?", 35% of respondents answered that it is corruption, 27% said that it is poverty, 33% said that it is unemployment, 5% of respondents could not give an answer. On the question "Did you have direct or indirect experience with corruption? ", 28% of respondents said they had direct experience with corruption, 47% had indirect experiences with corruption, 25% of respondents didn't want to give an answer. On the question "Have you once or twice

[41] Istraživanje Agencije za borbu protiv korupcije RS, http://www.mogucasrbija.rs/Vest/1/Vesti/703/05/1 /2012, 18.01.2015.

[42] Rezultati šestog ciklusa UNDP ispitivanja javnog mnjenja o korupciji, http://www.mc.rs/upload/documents/saopstenja_izvestaji/2013/012813_UNDP-saopstenje.pdf, 18.01.2015.

offered or gave a bribe in order to complete a particular job through a connection? ", the responses were as follows: 29% of respondents answered that that did, as much as 45% of respondents said they would offer bribe, but did not have the funds to do that, 26% of respondents did not give a precise answer. On the question "Has anyone, directly or through intermediaries, asked for a bribe? ", 20% of respondents said they were asked directly for a bribe, 44% of respondents said that they were asked for bribe indirectly, 36% of respondents did not give a precise answer. On the question "In what part of the government there is highest corruption? ", 40% of respondents replied that in politics, 21% of respondents in healthcare, 10% answered in the judiciary, 9% said inspection services, 7% said the police, 6% said local government, 5% said education, 2% of respondents didn't had an opinion. On the question "Would you report corruption to the competent authorities? ", 55% responded that they would not, 16% of respondents said they would, 20% of respondents said they would but only under certain conditions, 9% didn't want to comment on that question. On the question "What do you think is the most effective method of combating corruption? ", 88% of respondents answered repression or punishment, 12% of respondents had no opinion.

Analyzing the results of the research, an autonomous and independent state authority, the Agency for fight against corruption from 2012, the results of the joint research by the United Nations Development Programme and CeSID, from 2013, the results of research on the perception of the prevalence of corruption, which was presented using Corruption Perception Index (CPI), which was published in 2014 by the international organization Transparency International, and finally the results of internal research for this study from the 2014/2015 year, we came to a very interesting and useful observations about the state of corruption in Serbia. Specifically, in this study, for the reasons of expediency the results were mixed: an autonomous and independent body, the largest agency within the United Nations and non-governmental organizations, relevant international organizations and the results of an internal research. The subject of this research covers a period from 2012 until 10.02.2015., which is pretty respectable time range for analysis of a complex phenomenon such as corruption. What do following results suggest?

It is necessary to point out some general remarks:

1. Corruption is widely spread in Serbia, to the extent that the respondents had very often positioned her in front of poverty and unemployment as a problem;

2. A large number of respondents had direct or indirect experience with corruption;

3. As areas with the highest corruption, respondents mentioned politics and health care;

4. There is a passive approach of citizens towards corruption that continues to have a high degree of tolerance towards certain corrupt practices;

5. Citizens still do not want to accept responsibility and take the initiative to report corruption, which reflects an unhealthy relationship in society;

6. Corruption is most present where services are urgent, such as employment and health care;

7. From government, citizens still expect a lot in fighting against corruption, citing repression and punishment of the perpetrators as the most effective method of combating corruption.

Fact is that on the question why is corruption so present in Serbia, only partial responses were given and some reasons were identified. They related to low wages and unemployment, impunity, too complicated and hazy administration. Measures that

could bring significant improvement may relate to improving the quality of service, transparency, simpler and more acceptable rules, information, and prevention of violation of the established rules. Apparently, ahead of Serbia in the upcoming period are numerous challenges. One of the most important is the fight against corruption, the result of which will determine the European perspective of the success of the ongoing social reform. The latest measures by the Government of the Republic of Serbia, to promote stance of zero tolerance to corruption, resolving major corruption scandals and the arrest of the richest and most powerful people in Serbia, and the investigation against former political and government officials, suggest a shift on this issue, which is of great importance in order to heal our society. "It is very important question of general prevention of crime and corruption, and then showing everyone that there is still a legal state, and that it still operates. Germans, the Brits or the French are not more or less corrupt by their nature from us Serbs. They have a better system and more fear of committing the crime. "These words of the current Prime Minister Aleksandar Vučić, as published on his profile on the social network "Facebook" , may open a new page in fight against corruption and organized crime, on which we must find the names of those who made so called. "Predatory" privatization possible, but also the names of individuals from government which allowed the protection of the leaders of organized crime groups and condoned mingle of dirty money into the legal economic flows, otherwise it will be yet another failed attempt, which is used in everyday political and sensationalist purposes.

7. Final considerations

The issue of corruption is a very complex problem in every country, especially those that belong to the group with weakened or underdeveloped economic system. Contemporary views on corruption indicate that it can be viewed through the prism of organized crime because corruption occurs as a side activity of basic activities of criminal groups in order to achieve the establishment and expansion of power.

There are many circumstances that can be considered for the conditions and causes of corruption, where it is usually thought on dysfunctional mutual social relationship which is mostly caused by inadequate and uneven material development and social division of labor, which arise due to inequality in economic and political sphere within a country.

After consideration of corruption from theoretical and practical aspects, special attention in this survey was given to the major statistical indicators of corruption in the Republic of Serbia using the Corruption Perceptions Index (CPI), which was published in 2014 by the international organization Transparency International, followed by the survey done by Anti-Corruption Agency in 2012 and the joint research by the United Nations Development Programme and CeSID.

In considering this issue in the report a reference was made to the criminal and other legislation in the Republic of Serbia governing the issue of corruption. The importance of this part of the research is that it shows the current anti-corruption measures.

In the last part of this research, we made a short display of Eurointegration relations of the Republic of Serbia and corruption due to the special importance of the fight against corruption in the candidate countries.

In Serbia, a country that strives to establish European values in the process of joining the European Union, corruption is still present. It can be said that corruption has become a systemic effect and form of everyday life. Analyzing the results of different studies, we can come to very interesting and useful observations about corruption in Serbia. This phenomenon is widely spread in Serbia to the extent that survey participants have placed it often in front of poverty and unemployment.

The conclusions we reached after reviewing the problems of corruption in the Republic of Serbia are primarily related to an unequivocal negative impact on the economic system of the country by placing personal interests ahead of the interests of the community, but also for creating uncertainty for legitimate business, especially for foreign investors, which can cause significant business problems on a multi-year plan.

Is it possible to eradicate corruption? The answer is no, especially not at the levels where public official can make discretionary decisions, e.a. employment (the influence of political parties, acquaintances and family ties especially in smaller communities), while only with a more efficient implementation of laws, action plans[43], transparency in the work and with a conscientious and independent work of agencies that have been established to combat corruption, corruption could be significantly reduced at the highest levels of government, but that takes time and constant control, which is not easy to achieve especially in times of economic crisis.

When considering proposals to prevent corruption on the basis of domestic and international practice, we have come to the conclusion that there is no solution, one which can guarantee the prevention of corruption, *i.e.* economic crime in general, but every appropriate measure to some extent can affect the prevention which could reduce the risk of this form of crime. With greater number of preventive measures, in terms of the adoption of new and amendments to existing laws, forecasting and implementation of national plans and strategies, the creation of independent agencies, maintaining a high level of transparency in the work and others, creates conditions that hinder the formation of economic crime.

In addition to the above, to prevent corruption and economic crime in general, it is necessary to have cooperation with other countries and international organizations and track their experience and if necessary to make the harmonization of national legislation, especially if there is an estimate that certain measures could have positive effects. Then, it is necessary to work on achieving and encouraging a high level of professionalism with the person in an official position through education but also through economic stimulation.

Finally, due to the complexity of this issue, its discussion and finding effective anti-corruption measures is necessary from the theoretical aspect, which represents one of the specific objectives and the contribution of this paper.

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Controversies related to plea bargaining in the new Romanian Code of Criminal Procedure

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Abstract:

In the New Romanian Code of Criminal Procedure (hereinafter the NCPP), the pleading guilty procedure on the one hand borrows the features of the formerly consecrated proceedings, on the other hand, gains new dimensions which actually turn it into a special, self-governing procedure, which justifies its appellation of "plea bargaining".

More precisely, in the NCPP the pleading guilty procedure shapes out under two forms: as a unilateral statement of the defendant given before the court, as well as a bilateral agreement between the defendant and the prosecutor.

As to the first situation, that of a unilateral statement, it is initially set out in art. 349, 2nd paragraph NCPP. This text is the antechamber of art. 374, 4th paragraph NCPP which also refers to the unilateral statement of the defendant who expresses, before the court, his option for a settlement of the case in summary proceedings. It is to be noticed that in such a hypothesis, the new code preserves the benefit of the penalties' latitude that is reduced to a fourth in case of imprisonment and to a third in case of criminal fines (art. 396, 10th paragraph).

The second situation is actually the sheer novelty in the New Code of Criminal Procedure.

The bilateral plea bargaining (articles 478-488 NCCP) becomes a transaction which is concluded, during the early stage of investigation, solely between the defendant and the prosecutor, with the almost total exclusion of the judge, who may, if the case, censure the bargain..

The plea bargaining procedure, like many other new institutions introduced by the NCCP, has been subject to decisions of unconstitutionality ruled by the Romanian Constitutional Court, and, as a result, the Romanian Government adopted on the 18th of May - Act no. 18/2016 which substantially modifies and completes the structure of the NCCP, among other important laws.

Keywords*: Romanian Code of Criminal Procedure; summary (abbreviated) proceedings; plea bargaining, article 374 parag. (4), article 478; Government's Act no. 18/2016.*

According to the Explanatory Memorandum[1] which prefaces Act no. 135/2010 on the New Code of Criminal Procedure[2], the special procedure of plea bargaining[3]

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[1] The Explanatory Memorandum, section P.1 is available at http://www.cdep.ro/proiecte/2009/400.

[2] The Act was published in the Official Journal no. 486 of July the 15th, 2010.

[3] One must make an important distinction between *plea bargaining*, an expression which designates the procedure of the agreement concluded between the defendant and the prosecutor, and *plea bargain*, which is the legal document (i.e. contract or agreement) signed by the defendant and the prosecutor, as well as the other participants to the procedure.

introduced in the NCCP is an innovative legislative procedure which has borrowed features from the French and German penal systems and adapted them to the specifics of the Romanian judicial system.

The same Memorandum proudly states that the introduction of such procedure into the NCCP implies a radical change of the Romanian criminal trial and brings about several advantages, among which: a less complicated activity of criminal investigation, a reduced length of the trial stage and, above all, an economic advantage, which, to a certain extent, benefits to all parties to the trial, but especially to the state, which has the opportunity to save essential financial and human resources.

In precise terms, in the NCCP the pleading guilty procedure may occur during two distinct stages of the trial, and depending on that it shall have specific features: on the one hand, during the trial stage, when the defendant pleads guilty before the court (art. 374 parag. 4 NCCP), on the other hand, during the earlier investigation stage, when the defendant agrees to enter a plea bargain with the prosecutor and this bargain shall be subject to the control of a court (art. 478-488 NCCP)[4].

The order in which the two procedures shall be analyzed in what follows is the one in which they are settled in the NCCP. The plea bargaining procedure has been provided separately, at the end of the NCCP, in a section dedicated to a series of special procedures (Title VI).

I. Pleading guilty before the court (art. 374 parag. 4 NCCP)

According to art. 349 parag. 2 NCCP, the court can solve the case based only on the evidence supplied during the investigation stage, if the defendant requires this and pleads guilty for all the charges brought against him/her, on condition that the court may consider that the collected evidence allows the search for truth and leads to a fair solution in the case. The offenses which the law punishes with life imprisonment shall not be taken into account in such a procedure.

The first remark to be made at this point is that pleading guilty before the court during the trial stage obviously has certain features that distinguish it from the plea bargaining, a newly introduced procedure under the NCPP, which occurs during the early investigation stage.

The immediate distinguishing feature consists of the fact that, at trial there is a *unilateral statement* of the defendant before the court, by which he pleads guilty to the accounts listed in the indictment and requires that the judgment be based only on the evidence supplied during the investigation stage.

Therefore, during this stage of the trial, there is no bilateral agreement between the defendant and the prosecutor.

The initiative to benefit from summary (abbreviated) proceedings belongs only to the defendant, the court having no possibility to act of its own motion *(ex officio)* with regard to that, if it envisages that the conditions of summary proceedings are fulfilled.

However, as a mark of its active role, the court shall inform the defendant that he may require summary proceedings, *i.e.* his case shall be judged based only on evidence adduced during the investigation stage, when certain legal requirements are met. These requirements are provided under art. 374 parag. 4 NCCP.

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[4] Magdalena Roibu, *On a Different Kind of Compromise in the New Code of Criminal Procedure (Despre un alt fel de compromis în NCPP)*, Analele Universității București, supliment 2014, p. 345.

The contents of art. 374 parag. 4 NCCP have actually been amended by the recent Government's Act no. 18/2016[5], so that in its current form, the article reads: " When the public action has not been initiated for an offense punished by life imprisonment, the presiding judge shall inform the defendant as to his/her possibility to request that the judgment be based only on the evidence supplied during the investigation stage, on the documents presented by the parties and the victim[6], if the defendant pleads guilty for all the counts of offenses against him".

The unilateral statement of the defendant is not enough by itself, but must be validated by the court which has to be convinced that the case can be judged in summary proceedings if the court considers that the evidence supplied so far (during the investigation) may allow the search for truth and a fair settlement of the case. The court's control is the common ground of both procedures in which the defendant pleads guilty, both during the investigation and the trial stage.

Thus, during the trial stage the defendant's pleading guilty generates effects only if the court has validated this procedure which is subject to the condition that truth has to be searched for.

At trial, everything gravitates towards the search for truth principle, which is actually specific to inquisitorial systems, and still survives in the NCCP, despite the fact that the new code aims at being more open to adversarial systems, from where it took its inspiration.

Moreover, neither of the two justice systems - the French or the German - has provided for such principle. Anyway, only the search for truth may be possible in lawsuits, since the discovery of truth, be it a judicial truth, is a quasi-impossible mission, even for Romanian criminal courts, therefore it is highly doubtful that it functions in practice.

Guiding itself by this principle, if the court considers that the truth cannot be discovered only based on the evidence supplied during the investigation stage it shall dismiss the request of the defendant who solicited summary proceedings.

Another distinctive feature of the pleading guilty procedure before the court is that summary proceedings may be used for most offenses, except for those which the law punishes by life imprisonment. In case of plea bargaining, this agreement between the defendant and the prosecutor can be used only for those offenses that are punished by a fine and up to 15 years of imprisonment. This new maximum latitude of penalties (15 years) has been recently introduced in the NCCP, as a result of the adoption of Government's Act no. 18/2016 (see above).

Before this recent amendment, the maximum latitude of the offenses for which a plea bargain could be concluded used to be 7 years of imprisonment, which restricted a lot the access to the procedure.

As concerns the latitude of penalties, this feature singularizes the pleading guilty procedure before the court from the plea bargaining procedure. Yet, the two procedures keep something in common, namely the immediate effects that they generate for the defendant – a similar and substantial decrease in the limits of the penalty applied.

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[5] The Act was published in the Official Journal no. 389 of May the 23rd 2016.

[6] In the approach of the NCCP the victim (also called "injured person") is no longer a party to a criminal trial. If the victim chooses to participate to the trial in order to be compensated for the loss generated by the offense, whether financial or moral, he/she must make an official statement to that end, and thus he/she becomes a *civil party*.

Thus, in case the defendant chooses to plead guilty for all counts against him/her and accordingly makes a statement before the court, he shall benefit (automatically) from a decrease in the latitude of penalties, namely by a third in case of imprisonment and by a fourth, in case of a fine (art. 396 parag. 10 NCCP). If the defendant enters a plea bargain with the prosecutor during the early stage of the investigation, he presently benefits from the same decrease, following the introduction of a new paragraph into the contents of art. 480 NCCP – namely paragraph 4, inexistent before the amendment, which clearly states that "The defendant shall benefit from a decrease by a third in the limits of penalties provided by the law in case of imprisonment, and by a fourth in the limits of penalties provided by the law in case of fines. In case of minor offenders, the court shall take these elements into account upon ruling an educational sanction; in case of custodial educational sanctions, the limits of the periods for which such measures are ordered shall be decreased by a third".

It is to be noticed that a further novelty introduced by Government's Act no. 18/2016 is that even minor offenders can presently conclude a plea bargain with the prosecutor as regards the educational sanctions ordered against them, while before the amendment, the NCCP clearly stated that minor offenders could not do that. Accordingly, they shall benefit from a decrease in the latitude of the educational custodial sanctions.

From the perspective of the more relaxed (maximum) latitude of penalties in case of offenses for which the summary proceedings are accepted by the law (all offenses, except for those punishable by life imprisonment), it becomes clear that the pleading guilty procedure before the court turns out to be more advantageous than plea bargaining.

Moreover, during the trial stage, the defendant can bring before the court any document that mitigates his position at trial (e.g. he has a steady employment, he paid some or all of the damages to the victim), in addition to the evidence supplied during the investigation, an action which cannot be performed if he/she enters a plea bargain with the prosecutor.

There have been debates in the doctrine[7] related to whether the summary proceedings might be in contradiction with art. 6 parag. 3 d)[8] of the European Convention on Human Rights (hereinafter the European Convention or simply the Convention), due to the fact that it represents an abbreviated type of justice, where the defendant waives many of his/her procedural safeguards.

Most authors have shown that the procedure does not violate said European provisions. We deal in fact with a relative type of right, and the defendant may at any time waive this right before an impartial judge and have his/her case be judged in a summary proceeding.

This idea is also supported by the European Court of Human Rights (hereinafter the ECHR), which stated that the defendant has the possibility to opt out of the right guaranteed by article 6 parag. 3 d) of the Convention and, therefore, cannot claim that his right has been violated, if the national court bases its conviction on the statement

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[7] Andreea Uzlău, *Plea Bargaining – a New Criminal Procedure Institution*, article available in English at www.juridicaljournal.univagora.ro.

[8] Art. 6 parag. 3 d) – Right to a fair trial - "Everyone charged with a criminal offense has the minimum following rights: to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him".

given during the criminal investigation stage by a witness of the prosecution (including witnesses with protected identity), whose hearing the accused has waived[9].

II. Plea bargaining amendments (art. 478-488 NCCP)

This procedure has been significantly amended, as a result of the entry into force of Government's Act no. 18/2016.

The first serious amendment concerns the category of persons who can conclude a plea bargain with the prosecutor. Thus, the contents of art. 478 parag. 6 NCCP have changed, so that currently even minor offenders can enter a plea bargain. Initially this category of offenders was excluded from the procedure. The only condition that the new code imposes on them is that the bargain be concluded with the consent of the legal representative of the minors.

This reconfiguration of the former art. 478 NCCP is welcome since it clears off the discrimination that used to exist in respect with minor offenders who were left out of the plea bargaining.

It is important that they be able to bargain with the prosecutor, even if they are no longer sentenced to penalties, but only to educational sanctions as the NCCP provides, because even educational measures (especially the custodial ones) should be mitigated. In case of custodial educational sanctions, the period for which they are ordered shall be decreased by a third (see below comment on art. 480).

Another element of novelty regards the object of the plea bargaining, set out in art. 479 NCCP, pursuant to which the plea bargain shall be concluded on condition that the defendant admits the commission of the offense and accepts the charge(s) against him, the nature and latitude of the penalty, as well as the type of sentencing, and respectively, the nature of the educational sanction, or, if the case may be, the waiver of penalty or the postponement of applying the penalty.

Perhaps the most advantageous amendment of the plea bargaining procedure consists of the fact that the maximum latitude of the penalties for the offenses which enable the conclusion of a plea bargain have been extended from the initial maximum of 7 years of imprisonment to 15 years of imprisonment. Therefore, the present requirements are that a defendant shall be able to bargain with the prosecutor only if his/her criminal act is punishable under the law by a fine, up to 15 years of imprisonment.

This change is very much in accordance with the source dispositions of the plea bargaining, namely the US Code of Criminal Procedure provisions[10], according to which even federal offenses i.e. the most serious offenses punishable by 20 years of imprisonment can be subject to a plea bargain.

This extension of the maximum latitude of penalties allows a greater participation to the plea bargaining procedure and encourages defendants to seek to have their cases negotiated out of court.

Despite these important amendments, there is still one element that has survived from the former configuration, which hinders the flow of the procedure, namely its double check, both by the senior prosecutor, as well as, subsequent to its conclusion in a

[9] ECHR, the case of *Brandstetter v. Austria* (28.08.1991), paragraph 46 and the following, available in English at http://hudoc.echr.coe.int/eng?i=001-57683.

[10] See U.S. Code – Title 18 – Crimes and Criminal Procedure, available at. www.law.cornell.edu/uscode/text.

final form, by the court. This might considerably change the initial form under which the bargain was concluded.

Regardless of such possible obstacles, another important amendment is to be saluted, namely that in its current form, the plea bargaining brings a certain benefit for the defendant, i.e. a decrease in the latitude of penalties. Before the amendment, this decrease used to be an act of prosecutorial discretion and was completely uncertain. Additionally, when the plea bargain was finally filed before the court, the court could exercise its own discretional power against the bargain. Therefore, no decrease of the penalties' limits was certain to operate.

Now art. 480 has been completed with a new paragraph, parag. 4 which expressly states that: "The defendant shall benefit from a decrease by a third in the latitude of the penalty in case of imprisonment and by a fourth in the latitude of the penalty in case of a fine. For minor offenders, these elements shall be taken into account upon ruling an educational sanction; in case of educational custodial sanctions, the limits of the periods for which such sanctions are ruled, shall be decreased by a third".

If the plea bargain is successfully concluded, the agreement is subject to the control of the court. Thus, art. 483 NCCP relating to the referral to the court has remained unchanged.

The amendment emerges at art. 484 NCCP related to the procedure before the court which checks the plea bargain that has been substantially reconfigured.

Thus, parag. 1 stipulates that if the plea bargain lacks one of the formal requirements provided under art. 482, or if the conditions set out at art. 483 were disregarded, the court shall order that these dysfunctionalities be corrected in a term of at most 5 days and refers the file back to the head of the prosecution office where the plea bargain was concluded.

Furthermore, parag. 2 successfully completes the contents of the former legal text with an essential mention, establishing that at the date set for the proceedings, there shall be summoned to appear in court the defendant, the other parties as well as *the victim*.

This last mention is extremely important, since in its previous version, the contents of art. 484 totally ignored the victim, who was left out of the proceedings of plea bargain control before the court. Following a Decision of unconstitutionality passed by the Romanian Constitutional Court[11], and a as a result of the recent entry into force of Government's Act no. 18/2016, the victim (the injured party, according to Romanian procedural terminology) is now part of the plea bargaining procedure, with full rights, a situation which brings the victim closer to the legal standing of the parties.

The introduction of the victim in the procedure before the court respects the principle of the right to a fair trial provided by art. 6 of the European Convention, more precisely the safeguards related to the rule of contradictory debates and the equality of arms.

The court shall rule on the plea bargain by a sentence, in open court (before the amendments, the procedure used to be non-contradictory), after listening to the prosecutor, hearing the defendant as well as, if present, the other parties and the victim.

The solutions that the court may rule, following this check-up procedure, have also been amended (art. 485 NCCP). Thus, after a thorough examination of the plea bargain, the court shall:

[11] Decision no. 235/2015, published in the Official Journal no. 364 of May 26th 2015.

a) allow the plea bargain and rule the solution which led to the conclusion of the agreement, if the conditions provided by articles 480-482 are fulfilled, namely those related to all the charges imposed on the defendant which were subject to the agreement;

b) dismiss the plea bargain and refers the file back to the prosecutor in order to continue the investigation if the conditions provided by articles 480-482 are not fulfilled or if the court considers that the solution which led to an agreement between the prosecutor and the defendant is illegal or too lenient judging by the seriousness of the offense or the potential danger represented by the offender.

Once the victim has been introduced in the procedure, the whole content of the plea bargaining has been amended so that even the victim can file an appeal against the sentence of the court.

Accordingly, art. 488 NCCP was reshaped and presently states that the prosecutor, the defendant, the other parties, as well as the victim, can file an appeal against the sentence, in a term of 10 days from the day the decision was served upon them. All the provisions related to the procedure of the appeal (art. 409 and the following in the NCCP) apply in the exact terms to the plea bargaining framework.

Similarly with the procedure before the first instance court, the appeal procedure against a plea bargain shall involve the defendant, the other parties and the victim.

It is important to mention the fact that the appeal can be aimed only at the nature and amount of the penalty or the type of sentencing.

The appellate court may rule one of the following decisions (art. 488 parag. 4 NCCP):

a) dismisses the appeal, and upholds the sentence, if the appeal is introduced after the 10 –day term set out by the law, if it is inadmissible or ill-founded;

b) allows the appeal, quashes the sentence by which the plea bargain was confirmed and rules a new decision, according to articles 485-486;

Point b) of parag. 4 has been amended, in order to be symmetrical with the previous dispositions of articles 485-486 to which it refers, since they have been amended as well.

c) allows the appeal, quashes the sentence by which the plea bargain was infirmed and confirms the plea bargain.

III. Concluding remarks

Subsequent to the recent amendments, the plea bargain procedure undoubtedly displays a series of clear advantages, mainly for the defendant. But the benefits it brings are also important for the course of Romanian criminal justice, in general, because the plea bargaining saves the courts from a huge amount of (unnecessary) work.

As Chief Justice Burger of the U.S. Supreme Court once stated referring to the beneficial effects of plea bargaining, "If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities"[12].

[12] The statement was made on the occasion of the U.S. Supreme Court case of *Santobello v. New York*, 404 U.S. (257) 1971 available at http://www.caselaw.lp.findlaw.com.

Nonetheless, due to the manner in which the plea bargaining was settled in the NCCP, it continues to display some issues that have not been solved by recent amendments.

Thus, in case of a defendant who is prosecuted for several counts of offenses, the court shall be referred to by an indictment for some of those offenses and by a plea bargain for the other offenses, even if the offenses are concurrent, while in the end the defendant shall execute the concurrent sentence (*i.e.* in which the period of imprisonment equals the length of the longest sentence, to which an increment may be added). In case of plural offenders, prosecuted for several offenses, things become even more complicated, since several plea bargains shall be concluded and the trial shall be split[13].

Yet another question to be answered in relation to plea bargaining is that of what may happen in practice when, as a result of the control exerted by the court, a plea bargain is dismissed, the file is referred back to the prosecutor who continues the investigation, but in the end he decides not to enter an agreement with the defendant and instead prosecutes him on an indictment? In such a case, can the former plea bargain generate negative effects on the legal situation of the defendant who previously admitted his guilt?

The doctrine[14] has come up with a possible solution to such an issue, namely a completion of the plea bargaining procedure with a legal text which expressly provides that the contents of the former plea bargain cannot be used against the defendant, once the bargains is dismissed by a court.

Such a solution has been set out in the French Code of Criminal Procedure[15], for instance, which, in art. 495-14 clearly states that "When the person has not accepted the sentence or sentences proposed or where the president of the district court or the judge appointed by him has not approved the district prosecutor's proposal, the official report may not be sent to the investigating or trial court or to the public prosecutor, and neither the parties nor the public prosecutor may make use of any statements made or documents given in the course of the procedure".

Such provisions in the French Code of Criminal Procedure are destined to effectively protect the right to the presumption of innocence and the privilege against self-incrimination in case the plea bargain is invalidated, while they represent at the same time a mark of the court's impartiality.

For the future, this might be a good example for a further amendment of the plea bargaining procedure that the Romanian lawmaker should seriously consider.

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[13] Florin Cotoi, Versavia Brutaru, *The Effects of Pleading Guilty in Criminal Law* (Efectele recunoașterii vinovăției în dreptul penal), C.H. Beck Publishing House, Bucharest, 2013, p. 67.

[14] Voicu Puşcaşu, *Negotiating Guilt in Modern Criminal Trials* (Negocierea vinovăției în procesul penal modern), Criminal Law Writings (Caiete de drept penal) no. 1/2010, p. 35.

[15] Available in English at https://www.legifrance.gouv.fr/content/download/1958/13719/version/3/.../Code_34.pdf.

Human reproduction – selected aspects of criminal justice in Croatia

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Abstract:

Republic of Croatia has recorded great success in human reproduction and infertility treatment from the fifties of the last century. Significant steps in medicine were not though adequately followed by protection of law and more precisely protection of criminal law. The article aims to present promotion and improvement of normative protection of certain aspects concerning human reproduction in Croatian Criminal Code from 2011 based on four incriminations: trafficking in human body parts and human embryos, cloning and human genome changes, prohibition to mix human sex cells with animal sex cells, unauthorised removal and transplantation of parts of human body. All these offences are harmonized with relevant acts of European Union and their standards.

Keywords: *human reproduction, trafficking in human body parts and human embryos, cloning and human genome changes, unauthorised removal and transplantation of parts of human body.*

1. Introduction

History of human reproduction and infertility treatment is in Republic of Croatia closely related to the work of Institute of human reproduction at the Clinic of Obstetics and Gynecology in Zagreb. In 1953, the Antisterilitetic Ambulance started with its work in Petrova hospital as the first organized acitivity for research and infertility treatment in Croatia, as well as in the broader region. Within the development of the proffession, the title of the organisation has changed: from the Department of gynecological endocrinology and infertility (1962), Centre for gynecological endocrinology and fertility (1977), until the actual: Institute for human reproduction and gynecological endocrinology (1988).[1] The special achievement of the Croatian human reproduction is delivering first child conceived by *in vitro* fertilization in 1983, that made Croatia the seventh state in the world enrolled in the history of human reproduction.[2] Today, all

[1] Poliklinika IVF – History of human reproduction in Petrova and Croatia, available at: http://www.ivf.hr/index.php/hr/neplodnost-i-ivf/83-povijest-humane-reprodukcije, 7.1.2016.

[2] As a result of the work of gynecologist Velimir Šimunić and biologist Ernest Suchanek. 10 years afterwards, all the others clinical centers in Croatia include in their services and work human reproduction and IVF. *Idem*.

forms of research, diagnosis and treatment of infertility are applied in Croatia. About 70% of all causes of infertility are treated with IVF or related methods.[3] Advanced methods of diagnosis of the DNA damage of the sperm are used as well as the selection of competent gametes for fertilization. Treatment is prepared by identifying ovarian reserves, the risk of ovulation stimulation and other potential factors reducing fertility and success. The activities of family planning, contraception, gynecological endocrinology, pediatric and adolescent gynecology and menopausal medicine are improved.

Exercising of parenthood is wonderful and noble, but unfortunately, within the development of medicine, the genius of crime associated with human reproduction as specific field of medicine is developed. Criminal law seeks to adequately protect the appropriate legal good in accordance with its very nature: subsidiarity and fragmentation.[4]

2. Modern approach in Criminal Code 2011

Within the great changes of the Criminal Code in 2011,[5] level and significance of the normative protection of certain aspects concerning human reproduction increased. First of all, in the ninth head: Crimes against humanity and human dignity; three offences in the field of biomedicine and bioethics with the aim to protect dignity and identity of human species are prescribed: trafficking in human body parts and human embryos (Art. 107), cloning and human genome changes (Art. 108) and prohibition to mix human sex cells with animal sex cells (Art. 109).[6] In explaining reasons for including these offences in the head nine of the CC11, it is stated that the rapid development of medicine science and technology provides higher possibilities of high quality treatment, but also imposes a range of ethical issues important for the whole humanity and increases the risk of various abuses, that is why, the most serious violation of human dignity should be incriminated.[7]

2.1. Trafficking in Human Body Parts and Human Embryos

The Article was designed in order to be harmonized with the Convention for the protection of human rights and dignity of the human being with regard to the

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[3] *Idem.*

[4] See Kurtović Mišić, A., Krstulović Dragičević, A., Kazneno pravo (Temeljni pojmovi i instituti), Udžbenici Sveučilišta u Splitu, Split, 2014, p. 95.

[5] In the last two decades Croatian criminal law was dominated by the two criminal codes. Criminal Code from 1997 (Offiacial journal or „NN" 110/97, 27/98, 50/00, 129/00, 51/01, 111/03, 190/03, 105/04, 84/05, 71/06, 110/07, 152/08, 57/11, 143/12) and Criminal Code from 2011 („NN" 125/11, 144/12, 56/15, 61/15). In the further text the abbreviations CC97 and CC11 will be used for these codes.

[6] Munivrana Vajda, M. in Derenčinović, D. (ed.), Posebni dio kaznenog prava, Pravni fakultet Sveučilišta u Zagrebu, 2013, p. 4.

[7] *Idem.* Not all legislation in the region differ these types of crime, so in the Criminal Code of Montenegro ("Official Gazette of the Republic of Montenegro" 70 /03, 13/04) criminal offense of trafficking in human body parts (Art. 295a) is situated in the same head, directly behind the criminal offenses of illegal transplantation of parts of the body (čl.294.) and unlawful taking of body parts for transplantation purposes (Art. 295). The same is with the Slovenian Criminal Code: Art. 181, para. 6 (Official Gazette of RS, 50/2012), while in the Serbian Law on Organ Transplantation, crime of trafficking in human body parts is placed in the head of penal provisions (Chapter X, Art. 79 of the "Official Gazette of the Republic of Serbia", 72/2009).

application of biology and medicine and the Additional Protocol to the Convention on human rights and biomedicine concerning transplantation of organs and tissues of human origin,[8] The declaration of Istanbul on organ trafficking and transplant tourism from 2008, Directive 2004/23/EC of the European Parliament and of the Council of 31 March 2004 on setting standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissues and cells,[9] COMMISSION DIRECTIVE 2006/17/EC of 8 February 2006 implementing Directive 2004/23/EC of the European Parliament and of the Council as regards certain technical requirements for the donation, procurement and testing of human tissues and cells,[10] COMMISSION DIRECTIVE 2006/86/EC of 24 October 2006 implementing Directive 2004/23/EC of the European Parliament and of the Council as regards traceability requirements, notification of serious adverse reactions and events and certain technical requirements for the coding, processing, preservation, storage and distribution of human tissues and cells.[11]

In absence of internationally accepted definition of human organs and tissues trafficking, Croatian legislator followed example of some European legislations, mostly Article 17 of the German Transplant Act[12] and Franch CC (Articles 511-2, 4, 9, 15).[13]

The crime of the trafficking in human body parts and human embryos from the Article 107 Para 1 is committed by whoever procures, possesses, transports, transfers, stores, receives or transplants a human organ, tissue, cell, embryo or foetus, provided he/she knows or should and could have known that they originated from a person who was a victim of trafficking in persons for the purpose of removing body parts referred to in Article 106. The prescribed sentence is imprisonment for a term of between one and ten years. This form of the crime is withal the most severe form of it due the fact that organ trafficking is punishable when they are removed from the person who was a victim of trafficking with the special aim for removing body parts.

Imprisonment for a term of between one and eight years is provided for the one whoever, by means of the use of force or threat, of deception, of fraud, of abduction, of abuse of authority or of a situation of hardship or dependence, procures, possesses, transports, transfers, stores or receives a human organ, tissue, cell, embryo, foetus or dead body for the purpose of removing body parts. So, in this form of the crime besides organ trafficking, trafficking of dead bodies, tissues, cells (including male and female sex cells and the stem cells), trafficking of embryo and foetus is incriminated. It is modelled upon the definition of the organ trafficking from the Declaration of Istanbul. In preparing this article, the legislator has been consulting Croatian Act on Removal and Transplantation of Human Body Parts for treatment that encompasses only transplantation of organs and tissues, wherein tissues include stem cells.[14] In 2012, Act

[8] NN MU 13/03.

[9] OJ L 102, 07/04/2004 p. 0048-0058.

[10] OJ L 38, 9/12/2006, p. 40-52.

[11] OJ L 294, 25/10/2006.

[12] Gesetz über die Spende, Entnahme und Übertragung von Organen und Geweben (Transplantationsgesetz - TPG), available at: https://www.gesetze-im-internet.de/bundesrecht/tpg/gesamt.pdf, 4.4.2016.

[13] Turković, K. *et al*., Komentar Kaznenog zakona, Narodne Novine, Zagreb, 2013, p. 159.

[14] NN 177/04, 45/09.

on transplantation of human organs for therapeutic purposes and Act on application of human tissues and cells were adopted.[15]

Paragraph 3 incriminates providing human body parts for financial benefit. It is harmonized with the Art 21 of the Protocol on transplantation of the Convention on human rights and biomedicine of the Council of Europe. The crime is committed when someone procures a human organ, tissue, cell, embryo, foetus or dead body by means of the giving of payments or other comparable benefits.[16]

The sentence of imprisonment for a term of between six months and five years shall be imposed on whoever, with a view to financial gain, induces or helps another to give his/her organ, tissue, cell, embryo or foetus in exchange for payment or another benefit. In this way, special incrimination of inducing and helping a person who gives away part of his/her body for financial gain or some other material benefit. This was necessary because otherwise punishment for inducing and helping would be left out for the accessory principle, since the person who is selling part of her/his body is not punishable.

Paragraph 5 is the new one, prescribing punishment for a term of up to three years for whoever removes or transplants a human organ, tissue, cell, embryo or foetus, where he/she knew or should and could have known that in exchange for it the donor had received payment or another benefit. Concerning the possible consequence, this crime can be in concurrence with the bodily injuries or unlawful termination of pregnancy.[17] Instead of imprisonment, a fine, community service and conditional sentence can be imposed.

The same punishment shall be imposed on whoever advertises the need for or availability of a human organ, tissue, cell, embryo, foetus or dead body for the purpose of offering or requesting payment or another benefit. This was also a new crime that required elimination of the misdemeanour from the Art 56 of the Act on the medically assisted fertilization.[18]

Existence of the donors consent has no influence on the existence of the crime. Considering the fact that the crime is mostly committed for the personal gain, along with imprisonment, a fine can be imposed.[19]

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[15] NN 144/12. Within the judgement of the Court (third Chamber) of 11 June 2015 in Case C-29/14, European Commission v. Republic of Poland, the Republic of Poland failed to fulfil obligations under Article 31 of Directive 2004/23/EC of the European Parliament and of the Council of 31 March 2004 on setting standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distrubution of human tissues and cells under Articles 3(b), 4(2) and 7 of, and Annex III to, Commission Directive 2006/17/EC of 8 February 2006 implementing Directive 2004/23/EC of the European Parliament and of the Council as regards certain technical requirements for the donation, procurement and testing of human tissues and cells, and under Article 11 of Commission Directive 2006/86/EC of 24 October 2006 implementing Directive 2004/23/EC of the European Parliament and of the Council as regards traceability requirements, notification of serious adverse reactions and events and certain technical requirements for the coding, processing, preservation, storage and distribution of human tissues and cells, by excluding reproductive cells and foetal and embryonic tissue from the scope of the provisions of national law transposing those directives.

[16] Prescribed sentence is imprisonment for a term of between six months and five years.

[17] Turković, K. *et al*., *op. cit*, p. 159.

[18] *Idem*.

[19] See Art 40 Para 5 CC11.

2.2. Cloning and Human Genome Changes

The same offence existed in the CC97. But, as the cloning aims to protect dignity and identity of human beings and presents no crime against life and limb, it was removed into this head. The title and content of the crime have been taken from the Art. 1 of the Additional Protocol to the Convention on human rights and biomedicine whereby Croatia fulfilled international obligation from the Protocol to incriminate reproductive cloning. Cloning and human genome changes from the Article 108 Para 1 is committed by whoever acts with the aim of creating a human being that shares with another live or dead human being the same set of genes from the nucleus of a cell. The prescribed sentence is imprisonment for a term of between one and ten years.[20]

The novelty is new paragraph 2 incriminating interventions in the human genome: whoever carries out an intervention seeking to modify the human genome for purposes other than preventive, diagnostic or therapeutic, or does so for preventive, diagnostic or therapeutic purposes with the aim of introducing modifications in the genome of a patient's descendent shall be sentenced to imprisonment for a term of between six months and five years. Performing tests that indicate genetic disease or serve to identification of the patient, as holder of the genes responsible for the disease or detection of the genetic disposition or susceptibility to disease, if not performed for the medical purposes or for the scientific research for the medical purposes and by the appropriate genetic consultation, should be further incriminated as the misdemeanour.[21] In that sense, here should be pointed to the Article 7 of the Codex of the medical ethics and deontology that closely state obligations of the doctors when applying procedure directed to the modification of the human genome.[22]

2.3. Prohibition to Mix Human Sex Cells with Animal Sex Cells

Prohibition to mix human sex cells with animal sex cells from Article 109 is committed by whoever fertilises a woman's egg cell with a sperm cell of any species other than the sperm cell of a man or an animal egg cell with a human sperm cell, modifies the human embryo by transplanting animal embryos or introduces human sex cells or the human embryo into an animal, or animal sex cells or the animal embryo into a woman. Prescribed sentence is imprisonment for a term of between one and ten years. The offence criminalizes creation of human-animal hybrids or "*himer*" and it was taken over from the Article 49 of the Act on medical fertilization.[23]

2.4. Unauthorised Removal and Transplantation of Parts of Human Body

Unauthorised removal and transplantation of parts of human body from the Article 182 Para 1 is accomplished when a doctor of medicine, doctor of dental medicine or other health worker who without the prescribed consent or for no justified medical reason removes an organ, tissue, cell, embryo or foetus from a live donor, or transplants

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[20] Contrary, *„procreation via cloning is a fundamental right guaranteed by the Constitution, and there is no compelling state interest to restrict this right, legislation is undesirable and would be unworkable*." Tall, S., Legal and Ethical Implications of Human Procreative Cloning, 3 J. L. & Soc. Challenges 25 1999, p. 56. Available at http://heinonline.org, Apr 30 07:22:55 2016.

[21] Turković, K. *et al*., *op. cit*, p. 161.

[22] Codex of the medical ethics and deontology, NN 55/08, 139/15.

[23] Act on medical fertilization NN 88/09, 137/09, 124/11.

them to a recipient, or uses them for the medical fertilisation procedure.[24] The prescribed sentence is imprisonment for a term of between one and ten years. The crime is *delictum proprium*, but if it is committed by someone else, it can be regarded as the crime of serious or especially serious bodily injuries and even, in some special conditions crime of the trafficking in human body parts and human embryos from the Article 107.

With this legislative solution, the difference between medically unjustified removal and transplantation with donors or recipients consent and without consent has been removed. Namely, consent is in the case of medically unjustified removal invalid and, as such should not be specially emphasized, but in some circumstances its existences should be regarded as mitigating circumstance.[25] The issue is no more limited to removal of human body parts for transplantation, but includes every medically unjustified removal of the human body parts.[26] Medically unjustified removal or transplantation implies removal or transplantation not undertaken for the treatment of the recipient, if there's appropriate organ or tissue of the dead person or there's other, approximately equal method of treatment or if there's great risk for the life of the donor or significantly impairment of the donors health.[27] Procedures related to the organ transplantation are prescribed by the Directive 2010/45/EU of the European parliament and of the Council of 7 July 2010 on standards of quality and safety of human organs intended for transplantation.[28]

Valid consent has to fulfil some requirements: it has to be explicit, free (not obtained by fraud, coercion or threat), informed and written.[29] In daily clinical practice, the concept of informed consent is presented with its clinical, ethical and legal dimension.[30] Patient has a right to be in comprehensible way informed about suggested medical intervention and upon that information to accept or refuse it. Attending physician introduces the patient with the appropriate information about the nature, purpose, procedure of intervention, probability of the success and usual risks, so that the patient has free choice to except or refuse the specific treatment.[31] Informed consent is regulated in Art 6 "Right to co-decision" of the Act on the protection of the patient's rights[32] with its origins on the international level in Art 6 of the General declaration on bioethics and human rights that respects the will of an individual to decide by himself whether some intervention will be performed on him and for which purposes.[33] The

[24] This crime is a part of nineteenth head CC11: Crimes against human health.

[25] Turković, K. *et al*., *op. cit*, p. 242.

[26] *Idem.*

[27] *Idem*. See Art. 2, 12, 14 Act on the removal and transplantation human body parts for treatment, NN 177/04, 45/09.

[28] OJ L 207, 6.8.2010, p 14-16.

[29] Turković, K. in Novoselec, P. (ed), Posebni dio kaznenog prava, Zagreb, 2007, p. 261. For informed consent in the process of organ transplantation see Parturkar, D., Legal and ethical issues in human organ transplantation, 25 Med. & L. 389 2006, available at: http://heinonline.org, Sun May 1 04:21:07 2016

[30] Kurtović Mišić, A., Osnove kaznenopravne odgovornosti zdravstvenih radnika, Zbornik radova s međunarodnog simpozija: „Medicinsko pravo u sustavu zdravstvene djelatnosti", Pravni fakultet Sveučilišta u Splitu, 2015, p. 199.

[31] *Idem.*

[32] Act on the protection of the patient's rights, NN 169/04, 37/08.

[33] Art 6: Any preventive, diagnostic and therapeutic medical intervention is only to be carried out with the prior, free and informed consent of the person concerned, based on adequate information. The

right to co-decision includes the right of the patient to be informed and to accept or refuse any diagnostic or therapeutic medical intervention.

If a person dies as a result of the criminal offence referred to in paragraph 1, the perpetrator shall be sentenced to imprisonment for a term of between three and fifteen years.

Special form of the crime is prescribed in paragraph 3: a doctor of medicine, doctor of dental medicine or other health worker who for the purpose of transplantation removes a part of a deceased person's body although he/she knows that this person, or his/her statutory representative or guardian, gave during his/her life a written statement declining to donate organs, or whoever without the prescribed consent removes for the purpose of transplantation a part of the body of a deceased child or a deceased person of age unable to exercise his/her judgment shall be sentenced to imprisonment for a term of up to one year.

3. What about practice?

No data about prosecution and conviction of the crimes related to human reproduction provides *European Sourcebook of Crime and Criminal Justice Statistics* for the period 2007-2011.[34]

In 2015, 2014 and 2013 no adult person was reported, prosecuted nor convicted in Croatia for none of these crimes.[35] Does it mean that Croatia is safe country concerning organ trafficking and irregularities in human reproduction or can we only speculate about the *dark number* in these crimes?[36]

There is though, one judgment that attracted formerly great public and professional attention. In case I KO-1146/07 of the Municipal Criminal Court in Zagreb, three respected doctors gynaecologists and one biochemist were as employees of a private policlinic at the end of strong negative media monitored criminal proceeding deliberated from all charges with judgement dated 26 January 2009. Namely, they were charged in seven counts for the criminal offence of unauthorised transplantation of human body parts from the Art 242 Para 2 and 7 CC97, more specifically for the application the method of *in vitro* fertilization cells of other women "using the fact that this method was not regulated in Croatia".[37] The factual state was in all counts the same: gynecologist would with assistance of embryologist perform embryo transfer with prepared laboratory embryos as result of using ovum of other woman presented in the treatment program of the policlinic for personal problems in conception, without her prior knowledge and consent.

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consent should, where appropriate, be express and may be withdrawn by the person concerned at any time and for any reason without disadvantage or prejudice.

[34] European Sourcebook of Crime and Criminal Justice Statistics 2014, fifth edition, Helsinki 2014. Presented data concern major traffic offences, homicide, assaults, rape, sexual assaults, robbery, theft, fraud, money laundring, corruption, drug trafficking.

[35] Croatian Bureau of Statistics, Statistical Reports 1551/2015 „Adult Perpetrators of Criminal Offences, Reports, Accusations and Convictions, 2014", Zagreb, 2015, Croatian Bureau of Statistics, Statistical Reports 1528/2014 „Adult Perpetrators of Criminal Offences, Reports, Accusations and Convictions, 2013", Zagreb, 2014, Croatian Bureau of Statistics, Statistical Reports 1504/2013 „Adult Perpetrators of Criminal Offences, Reports, Accusations and Convictions, 2012", Zagreb, 2013.

[36] For the *dark number* see, Derenčinović, D., Getoš, A-M., Uvod u kriminologiju s osnovama kaznenog prava, Pravni fakultet Sveučilišta u Zagrebu, Zagreb, 2008, p. 6, 7.

[37] Judgement I KO 1146/07 p. 2-6.

During the proceeding, one of the court experts stated in his expertise that ovum is not an organ, but a cell that has to be treated with special attention. It can't be an object of transplantation.[38] The expert further stated that ovum is product of the organ ovarium so that terms organ and human body part can't be equalized.[39]

In the judgement, Court emphasized that there is no evidence at all in the whole criminal procedure that would confirm that embryo transfer created from the ovum of some other woman was performed in the uterus of the patients.[40] This procedure would require harmonizing the cycles of the donor and recipient by hormonal therapy. The proof of this procedure was not exercised and identity of "donors" was not even indicated.[41]

So, the judgement was primarily based on deficiency of any evidence confirming that the defendants have committed the crimes. But not only that, the Court considered the very possibility of application of the specific incrimination on the concrete factual state. Namely, the main legal and factual question was: is an ovum part of human body that can be implemented? After transplantation DNA of the donors organ reliefs different comparing to the recipient, while ovum has partly number of the chromosomes and DNA content and within successful fertilization it changes DNA content. Act on removal and transplantation human body parts for treatment purposes from 2004 in its first article highlights that transplantation of human body parts can't be applied on organs and tissues for reproduction, organs and tissues of embryo or foetus and on blood and blood derivatives. The concrete incrimination refers the period before this Act, when Act on transplantation of human body parts for treatment purposes from 1980 was in force.

The second legal question is in line with donors consent. Namely, state attorney, nor the court could determine identity of the possible "donor". Without this determination, existence or absence of the consent could not be established at all.

The third legal question relates the qualification of the fourth defendant. By his education, he is doctor of veterinary medicine and biochemist, more precisely specialist of laboratory medicine with PhD in medicine endocrinology. The scope of his work is human medicine indeed. He was charged for the qualified form of the offence in Art 242 Para 7 committed by doctor of medicine or doctor of dental medicine. Due to Act on Medical Practice, a doctor is health care worker with medical degree and acquired title doctor of medicine.[42] So, application of the concrete incrimination is very questionable because work in the field of human reproduction should not be sufficient without medical degree and acquired title doctor of medicine.

4. Conclusion

Great success in human reproduction and infertility treatment as a part of medicine from the fifties of the last century was not adequately followed by protection of criminal law in Croatia. CC97 was a proper base for the changes, but only within CC11, level and significance of the normative protection of certain aspects concerning human

[38] *Idem*., p. 41. There are two acts in European Union that protect organs; first protecting organ transplantation and the second focused on gametes and embryos.

[39] *Ibid.*

[40] Judgement I KO 1146/07 p. 48.

[41] *Ibid.*

[42] Art 2 Act on Medical Practice, NN 121/03, 117/08.

reproduction increased. This result was achieved through three offences in the field of biomedicine and bioethics with an aim to protect dignity and identity of human species: trafficking in human body parts and human embryos, cloning and human genome changes and prohibition to mix human sex cells with animal sex cells. The last, but not least offence in this connection, as presented by the analysed judgement is unauthorised removal and transplantation of parts of human body.

The legislative changes have removed some important legal problems through prompt harmonisation with EU standards, but efficiency of the supervision of the work of private and state clinics and complex procedure of proving together with existence and absence of medicine documents challenge successful fight against the "genius" of crime and greed in this field.

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Tightening of penalty in the penal law of the Republic of Serbia

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Abstract:

The subject of the authors' attention is the issue of tightening a penalty in Penal Law of the Republic of Serbia. To tighten the penalty means to impose it higher than its maximum length for a particular punishable act. The authors observe current criminal legislation by analysing regulations and laws concerning the tightening of penalty. The subjects of analysis are Criminal Code, Law on the Criminal Responsibility of Legal Entities for Criminal Offences, Law on Misdemeanours, and Economic Offences Act.

Keywords*: penalty, criminal offence, economic offence, misdemeanours, tightening.*

Introduction

Criminal offences, misdemeanours, and economic offences are the part of the Penal Law of the Republic of Serbia. Differences between these three types of criminal acts are generally significant. However, in some situations the line between them is thin. These three groups of punishable acts are regulated by different documents, with the exception of cases where there is analogous application of another regulation.

It is rightfully pointed out that the process of measuring the penalty is the most important phase in criminal proceedings in general, when the commitment of a criminal offence is already determined, as well as its perpetrator and the existence of prerequisites for criminal responsibility. Then the court faces the most challenging task – to determine the type and extent of penalty which would be justified given the gravity of the committed offence and the level of criminal responsibility on one side, and on the other, the most suitable criminal measure for achieving the purpose of punishing.[1]

One of the ways of individualisation of penalty is its tightening. In the Criminal Code, as well as in other laws that regulate this field of Criminal law, various possibilities for tightening of punishment are stipulated. Therefore, for some criminal offences, it not possible to tight penalty under requirements set under relevant law, while for others it is possible to act in that manner.

This article is divided in the several systematized sections. The first section refers to the tightening of penalty for natural persons under the Criminal Code, followed by tightening under Law on the Criminal Responsibility of Legal Entities for Criminal Offences. The central section of the article relates to the tightening of penalty for perpetrators of misdemeanours, which is regulated by the Law on Misdemeanours.

[1] Ljubiša Lazarević, *Commentary on the Criminal Code*, 2006, p. 185.

Finally, the subject matter of the last section is the issue of the tightening of penalty in accordance with the Economic Offences Act.

Tightening of penalty under the criminal code of the Republic of Serbia

Tightening is imposition of more severe penalty than the one envisaged for a particular criminal offence, in the situations stipulated in the relevant law.[2] In the current Criminal Code[3] the possibility of tightening the sentence is not envisaged. Thus, according to current Criminal Code, it is not possible to tighten the sentence under any conditions.

Prior criminal legislation had envisaged the possibility of tightening the penalty. Admittedly, in article 46 of the Penal Code[4], which was entitled "**Determination of penalty in the case of multi-recidivism", it was defined that:**

(1) For a criminal act committed with premeditation for which the law provides the penalty of imprisonment, the court may impose a more severe penalty than the one prescribed by statute in the following cases:

1) if the offender has been sentenced to imprisonment for a term exceeding one year at least twice before, and if he still demonstrates a propensity toward continuing to commit criminal acts;

2) if a period of five years has not expired between the day when the offender was released after serving his previous sentence and the day when he committed the most recent criminal act.

(2) The more severe penalty must not exceed double the amount of the prescribed penalty of imprisonment, and must not exceed a period of fifteen years.

(3) In considering whether to impose the more severe penalty the court shall take special account of the similarity among the criminal acts committed, the motives from which they were committed, as well as the need that such a penalty be imposed for the sake of attaining the aim of penalty.

In light of the mentioned provision it is obvious that in the case of multi-recidivism, it was possible to tighten the penalty, where there were defined requirements for multi-recidivism. The tightening of penalty has been facultative. By passing the Criminal Code in 2005, such a possibility has been reversed. However, by the Law on Amendments and Additions to the Criminal Code in 2009[5], it was possible to tighten the penalty for continuous criminal offence. On the other hand, in regard to committed criminal offence, this possibility was finally reversed by the Law on Amendments and Additions to the Criminal Code in 2012[6].

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[2] Emir Ćorović, *System of sanctions for criminal offences of the Republic of Serbia*, 2015, p. 159.

[3] Official Gazette of RS, Nos. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013 and 108/2014.

[4] Official Gazette of SFRY Nos. 44/76, 36/77 - corr., 34/84, 37/84, 74/87, 57/89, 3/90, 38/90, 45/90 - corr. and 54/90 and Official Gazette FRY, Nos. 35/92, 16/93, 31/93, 37/93, 41/93, 50/93, 24/94, 61/2001 and Official Gazette of RS, No. 39/2003.

[5] Official Gazette of RS, no. 72/2009.

[6] Official Gazette of RS, no. 121/2012.

Tightening of penalty to legal entities because of committed criminal offences

In the Republic of Serbia, the Law on the Criminal Responsibility of Legal Entities for Criminal Offences was passed in 2008[7], which regulates conditions governing the liability of legal entities for criminal offences, penal sanctions that may be imposed on legal entities as well as procedural rules when ruling on the liability of legal entities, on imposing penal sanctions, passing a decision on rehabilitation, termination of security measures or legal consequences of the conviction, and on enforcement of court decisions.[8]

According to the mentioned Law, it is possible to tighten the penalty for criminal offence committed by a legal person. **A legal person is responsible for a continuous criminal offence** if, in compliance with Article 6 of this Law, it is accountable for several criminal offences committed by two or several responsible persons, provided that the criminal offences constitute a joinder as mentioned in Article 61, paragraph 1 of the Criminal Code. The sanction imposed against the liable legal person for the continuance of a criminal offence may be aggravated to the extent of a double amount stipulated in Article 14 of this Law.[9] Under article 14 of the mentioned Law, a fine can be imposed against a legal person in particular amount within range between the lowest and the highest envisaged extent of a fine. The fine cannot be lower than 100 000 dinars and higher than 500 million dinars. Fines shall be imposed in the following amounts: 1) from a hundred thousand to a million dinars for criminal offences punishable by imprisonment up to one year or by fines; 2) from a million to two million dinars for criminal offences punishable by imprisonment up to three years; 3) from two million to five million dinars for criminal offences punishable by imprisonment up to five years; 4) from five to ten million dinars for criminal offences punishable by imprisonment up to eight years; 5) from ten to twenty million dinars for criminal offences punishable by imprisonment up to ten years; 6) minimum twenty million dinars for criminal offences punishable by imprisonment for more than ten years of duration.[10]

Tightening of sentence under the law on misdemeanours

Law on Misdemeanours[11] regulates the definition of a misdemeanour, the conditions for misdemeanour liability, the conditions for prescribing and enforcing sanctions for misdemeanours, the system of sanctions, the misdemeanour proceedings and the judgment enforcement procedure.[12] Therefore, the main source of law in the field of misdemeanours is the Law on Misdemeanours[13], which does not define any of

[7] Law on the Liability of Legal Entities for Criminal Offences, *Official Gazette of RS, no.* 97/2008.

[8] See Article 1 of the *Law on the Liability of Legal Entities for Criminal Offences.*

[9] *Law on the Liability of Legal Entities for Criminal Offences*, Article 11.

[10] *Law on the Criminal Responsibility of Legal Entities for Criminal Offences*, Art. 14.

[11] *Law on Misdemeanor*, Official Gazette of RS, Nos. 65/2013 and 13/2016 .

[12] *Law on Misdemeanor*, Article 1.

[13] See more Ivan Milić, *The new Law on Misdemeanor and Old Issues with Security Measures Ordering Compulsory Alcohol and Drug Addiction Treatment*, Collected Papers of the Faculty of Law of the University of Novi Sad, No. 1/2014, pp. 363-271.

the misdemeanours. Instead of that, particular misdemeanours are defined in other laws and acts of a lower legal power. For the purpose of this paper, the focus is put on provisions which regulate the issue of punishing for misdemeanour, particularly those regulating tightening of penalty.

As previously stated, the Criminal Code of Serbia does entitle courts to tighten the penalty, which is not the case with the Law on Misdemeanours. Thus, under the Law on Misdemeanours, it is possible to tighten a sentence against the perpetrator of such punishable act. It is envisaged in the situations of concurrence of misdemeanours and continuous misdemeanour as well.

Tightening the penalty for concurrence of misdemeanours

Law on Misdemeanours contains special rules for measuring penalty in a case of concurrence of misdemeanours[14]. In Article 45 it is provided that if a person has committed, with one or more actions, a number of misdemeanours for which they will be tried simultaneously, first the penalty shall be determined for each of the misdemeanours, and then a consolidated penalty shall be pronounced for all those misdemeanours.

A consolidated penalty shall be pronounced according to the following rules:

1. If a penalty of imprisonment has been determined for all consolidated misdemeanours, a consolidated imprisonment penalty shall be pronounced, which cannot exceed 90 days;
2. If a fine has been determined for all consolidated misdemeanours, a consolidated fine shall be pronounced which will be the total amount of the determined fines, but the consolidated fine cannot be greater than twice the amount of the highest fine prescribed by this Law;
3. If a penalty of community service has been determined for all consolidated misdemeanours, a consolidated penalty of community service shall be pronounced, which cannot exceed 360 hours in duration.
4. If a penalty of imprisonment has been determined for the consolidated misdemeanours, and a fine for all other misdemeanours, a penalty of imprisonment and a fine shall be pronounced in accordance with Points 1 and 2 of this Paragraph.

The solution provided in the current Law on Misdemeanours clearly states that penalties can be tightened, with different treatment of particular penalties. If a penalty of imprisonment has been determined for all consolidated misdemeanours, a consolidated imprisonment penalty shall be pronounced, which cannot exceed 90 days. Bearing in mind previously mentioned fact, it is evident that the perpetrator can be imposed to imprisonment in total duration higher than its prescribed general maximum. Namely, under the Law on Misdemeanours, the perpetrator cannot be sentenced to the less than one day or longer than 60 days of imprisonment.[15] To conclude, in case of the concurrence of misdemeanours, penalty of imprisonment can be tightened for 1/2 of its prescribed general maximum.

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[14] See more in Zoran Stojanović, *Criminal Law – General Part*, Belgrade, 2009, p. 207.
[15] *Law on Misdemeanor*, Article 37(1).

If penalty for concurrence of misdemeanour is imprisonment, a fine can be tightened, but a sentence of imprisonment cannot be higher than the double amount of maximum sentence which is prescribed by the Law on Misdemeanour. As a conclusion, in case of determining the fine as a penalty for concurrence of misdemeanour, the penalty can be tightened by doubling, while in case of jail sentence, it can be tightened higher than the general maximum, but no more than half.

If a perpetrator is sentenced to community service, the penalty can be tightened, but it is not allowed to be higher than the maximum 360 hours of work. Therefore, community service penalty can be tightened up to maximum general duration.

Tightening of penalties for continuous misdemeanours

Current Law on Misdemeanours governs continuous misdemeanour, which had not been governed in the last version of the Law on Misdemeanour.[16] Article 46 of the Law on Misdemeanours stipulates that Misdemeanour in continuous duration exists if the perpetrator with unique intent commits several of the same time-related misdemeanours, which represent the same entirety due to at least two of the following circumstances: the same identity of the aggrieved party, the same object of misdemeanour, usage of the same situation or permanent relationship, and unity of place or space of the execution of the misdemeanours. First provision of this Article can be applied only on misdemeanours whose nature allows unification in one unity. Misdemeanour that causes damage to immaterial legal property of natural person or legal entity can be caused in continuous validity only if it has been committed against same aggrieved party. Misdemeanour which has not been included in continuous misdemeanour in legally binding court decisions represents specific misdemeanour, respectively becoming part of a specific continuous misdemeanour. For misdemeanours stipulated in the first provision of this Article a penalty may be imposed that is more severe than the prescribed one, but it must not be severe more than double in comparison to the prescribed one nor higher than the highest sentence envisaged in the second Provision of Article 45 of the Law on misdemeanour, which regulates measurement of penalty for misdemeanour committed as concurrence of misdemeanour. To conclude, sentences for continuous misdemeanour can be tightened as in the case of sentences for concurrence of misdemeanour.

Tightening of penalty for economic offence

The third kind of criminal acts are economic offences. As per legal definition: "An economic offence is a socially harmful violation of regulations on economic or financial operations which has caused or may have caused graver consequences and which is defined as an economic offence under the competent authority's relevant regulation."[17] Field of economic offences is regulated with Economic Offences Act which has been adopted back in 1977. As stipulated in the first article of the Economic Offences Act: „To

[16] *Law on Misdemeanor*, Official Gazette of RS, Nos. 65/2013 and 13/2016.

[17] *Economic Offences Act*, Official Gazette of SFRY, Nos. 4/77, 36/77 (corrected version), 14/85, 10/86 (revised text), 74/87, 57/89 and 3/90, Official Gazette of FRY, Nos. 27/92, 16/93, 31/93, 41/93, 50/93, 24/94, 28/96 and 64/2001 and Official Gazette of RS, No. 101/2005 (other law), Article 2(1).

protect the legality in the sphere of economic and financial operations, the present Act shall define the general terms and principles governing the imposition of sanctions for economic offences, the sanctions system and the proceedings for establishing the liability of and imposing sanctions on economic offenders."[18] Economic Offences Act does not stipulate particular offence, though they are stipulated by other laws and regulations.

As it was indicated for our subject of interest, it is important to determine whether the penalty could be tightened or not. However, before we provide an answer to that issue, it is necessary to explain which penalties could be imposed for committed economic offence. For economic offence, only a fine can be imposed.[19] This specific legal solution arises from the nature of this responsibility, due to the fact that for this kind of penalty, the responsibility lies in the legal entity and responsible person from the executive board.

According to regulations of Economic Offences Act (Article 18):

(1) The minimum fine which may be prescribed for a legal entity is 10,000 dinars, while the maximum fine is 3,000,000 dinars.

(2) Fine levels may be prescribed for a legal entity in proportion to the damage done, the unfulfilled obligation or the value of a commodity or other item which is the subject of an economic offence, in which case the maximum fine may be up to twenty times the amount of the damage done/unfulfilled obligation or the value of a commodity or other item which is the subject of the economic offence.

(3) The minimum fine which may be prescribed for the responsible person is 2,000 dinars, while the maximum fine is 200,000 dinars.

On the other side, the Law on Economic Offences envisages that a fine **can be higher**. Therefore, the Article 22 stipulates:

(1) The court may aggravate a penalty against a legal entity or the responsible person for the economic offence committed to up to twice the maximum penalty set, if the perpetrator is a multiple re-offender.

(2) A legal entity shall be considered a multiple re-offender if it has already been convicted of related economic offences to penalties of over 20,000 dinars at least twice, and if the time elapsed since the last validly imposed penalty does not exceed five years.

(3) The responsible person shall be considered a multiple re-offender if they have already been convicted to imprisonment or fined for over 4,000 dinars at least twice, if the time elapsed since the last prison sentence completed/validly imposed fine does not exceed five years and if the offender is inclined to commit such criminal acts/economic offences.

(4) When deciding whether to aggravate a penalty, the court shall in particular take into account the circumstances under which an economic offence was committed and the gravity of its consequences.

(5) The penalty set in Article 18, paragraph 2 of the present Act cannot be aggravated.

It can be realized that **in the case of multi-recidivism**, the court can tighten the fine for legal entities and responsible persons from the executive board. The Law does not envisage the same treatment for first-time offenders and for recidivists, which is

[18] *Economic Offences Act*, Article 1.

[19] *Economic Offences Act*, Article 17.

understandable. The sole existence of multi-recidivism is defined in the Law itself, although separate criteria refer to legal entities and responsible persons from the executive board. It can be noticed that when it comes to legal entity, all criteria are objective, while in the case of responsible persons from the executive board, one subjective criterion is stipulated as well. Under subjective criterion it is envisaged that the perpetrator had propensity for committing criminal offences, i.e. economic offences.

We consider that certain issues shall appear in legal practice. If the rules for recidivism are to be applicable, the court must be aware of that fact. Therefore, based on previous records, the judge has to realize that a legal entity or a responsible person from the executive board had been sentenced for economic offence in the past. In accordance with the above mentioned, the Economic Offences Act stipulates keeping the record of verdicts for economic offences as well, which is applied through the courts of first instance.[20] The fact that the legal entity or responsible person from the executive board is in record of criminal offences, should not imply that the record shall be permanent. In accordance with that, the Economic Offences Act stipulates that sentences to a fine against a legal entity or responsible person from the executive board shall be removed from the record after a period of three years, with the condition that as of the moment of the legally binding verdict, the legal entity does not commit another economic offence, i.e. that the responsible person from the executive board does not commit criminal offence that contains characteristics of economic offence. Further, a legal entity or mentioned responsible person that had been **repeatedly sentenced** for economic offences will have their record deleted after three years, under the condition that as of the moment of the last legally binding verdict, the legal entity does not commit another economic offence, i.e. that the responsible person from the executive board does not commit a criminal offence that contains characteristics of economic offence. In the case that, beside a fine, legal entities or responsible persons have been sentenced to protective measurements as well, the **verdict cannot be removed** from the record before prescribed measurements are executed.[21] To conclude, for the whole time while a person is registered in official records, *i.e.* until the verdict is deleted from therein, we can consider this person (legal entity or responsible person from the executive board) to be recidivist. Therefore, if rehabilitation occurs, recidivism cannot be taken into consideration.

On the other hand, the Economic Offences Act envisages that if **conviction for economic offence had been deleted**, information about the conviction is not to be given to any subject, **except** the court, public prosecution, organs of internal affairs and organs of inspection which is in relation to process for economic offence which is conducted against persons whose conviction had been deleted.[22] Although the conviction against legal entity or responsible person from executive board had been deleted from official record, it can still be provided and used by specific organs, which authors find unjustified. Authors question how that certain information is to be deleted, but still kept available for certain organs which govern the process.

A fine can be tightened for perpetrators of economic offence, but in the same time it cannot be greater than twice the amount of the highest fine prescribed by this law. Even though it seems that this way of legal solution completely solves the issue of fine

[20] *Economic Offences Act*, Article 41(1).
[21] *Economic Offences Act*, Article 43(1-3).
[22] *Economic Offences Act*, 44(4).

amount, authors still consider that certain concerns are still possible to happen in practice. Authors pose the question whether a fine can be doubled in accordance with maximal fine which is prescribed for that particular economic offence, or it can be doubled in accordance with general maximal fee which is prescribed for economic offences, *i.e.* prescribed by the Economic Offences Act. Having that in mind, authors consider that a particular legal solution needs to be modified and defined precisely so that it stipulates that a fine cannot be higher than twice the amount of the fee for particular economic offence nor more than the fine for economic offences in general.

Debatable issue from the legal practice

As per the opinion of authors, the tightening of presented offences is not debatable. In fact, it is the matter of the judge`s subjective opinion whether he will or will not tighten the penalty. Of course, this process shall be in accordance with the fulfilment of legal conditions. However, an issue that may be encountered in practice is the purposefulness of penalty tightening.

Is it suitable to apply the institute of penalty tightening in accordance with the Article 22 of the Law on economic offences in case of multi-recidivism, when at the same time it is obvious that previous measurement did not meet their basic purpose? (having the posed question in mind, the following explanation has been provided: Legal entity – trading company appears as the perpetrator of several economic offences prescribed in the Law on health correctness of sustaining food and consumer goods. In official records there is information that it has committed the same economic offence seven times, while responsible natural persons were different – managers in particular shops. In regard to legal entity, it is social enterprise, which bank account is blocked, and workers receive the minimum of salary. It is also important to note that the most of economic offences are related to the expiration date of consumer goods, and the fact is that tightening of penalty would put this enterprise in an even more difficult position.

The institute of **multi recidivism**, as a foundation for **penalty tightening**, has been prescribed by provision of Article 22 of the **Economic Offences Act**, and it was introduced for the first time in economic-criminal process with the adoption of the Economic Offences Act in 1977. The first provision of Article 22 of the Economic Offences Act stipulates that the court has the right to tighten the penalty for committed economic offence for legal entities or responsible persons from the executive board up to **double the amount** of the maximum penalty, in case of recidivism. The second provision of this Article stipulates that same conditions apply if a legal entity has been sentenced at least two times for related economic offences to fines which are higher than 20,000.00 RSD, and if no more than 5 years has passed from the moment of the last legally binding fee sentence. The third provision of the Article stipulates that the condition of recidivism applies to a responsible person from the executive board in the case that the responsible person had been sentenced at least two times for related economic offences to prison sentence or to a fine which is higher than 4,000.00 RSD, if no more than 5 years has passed from the moment of the last legally binding fee sentence, and if the perpetrator shows a **tendency** to commit related criminal offences, i.e. economic offences. According to the fourth provision of this Article, in order to make a decision on penalty tightening, the court shall take in particular consideration circumstances under which the offence was committed, as well as the severity of its

consequences. According to the fifth provision of the same Article, the penalty prescribed in the second provision of Article 2 of this Law cannot be tightened.

The contents of specified provisions clearly indicates the fact that penalty tightening due to existence of multi-recidivism in committing economic offences is always optional, and the conditions stipulated in provisions 2, 3, and 4 of the Article must be fulfilled in order that the court could impose tightened fine for an economic offences rather than the prescribed one. However, whether the court will make such a decision should be decided on a case-by-case basis in light of its specifics, as well as in accordance with evaluation of the situation previously described in the posed question.[23]

Conclusion

The authors' intention is to emphasize provisions of three laws governing the field of punishable acts, i.e. the Criminal Code, the Law on Misdemeanours and the Economic Offences Act, particularly regarding tightening the penalty. The answer to the question whether it is possible to tighten the penalty for punishable act in the legal system of Serbia is clear –the penalty can be tightened. The penalty can be tightened for perpetrators of misdemeanours and economic offences. Therefore, for the so called light punishable acts, the penalty can be tightened, while it is not envisaged for the gravest punishable acts – criminal offences. Bearing in mind that in practice, imposed penalties are close to their minimum, or even below the envisaged minimum, we find that this possibility will take effect only as prevention for potential perpetrators of misdemeanours and economic offences.

[23] The answer was stipulated on the session of the Department for Economic Offences and Legal Counting Litigations of the District Commercial Court held on 20th September 2006.

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