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Goran P. Ilić*

Dixi et salvavi animum meum.

FREEDOM OF EXPRESSION AND *ULTIMA RATIO SOCIETATIS***

Abstract: Writing about freedom of expression and *ultima ratio societatis* essentially means engaging in the analysis of the relationship between the individual and the authorities. Freedom of expression is closely related to the principle of dignity and the free choice of each individual, providing a way for them to express their uniqueness, connect with other members of society, in one word, to establish social relations on which a certain legal and political system is based. It is precisely this system, which owes its existence significantly to “freedom of expression,” that can, provided certain conditions are met, turn against its founder. The analysis conducted in this paper confirms that this path begins in accordance with the well-known saying about good intentions. From the efforts to protect the values of the Roman Republic from acts but not from words, as the spoken or written word was responded to in the same way, it has come to the protection of the emperor who was not interested in conducting discussions or writing replies, but rather included the word under *crimen laesae maiestatis* and not just the act. The Church had no particular reason to deviate from the established standard, as heresy, blasphemy, and similar offenses against the Holy Scripture and church teachings pose a danger not only to religious but also to secular authorities. After all, Jesus is attributed with the words that what belongs to Caesar should be given to Caesar, and what belongs to God should be given to God. A period followed in which, after the values of the republic, the unlimited power of the emperor and church dogma, ideology and parties as their bearers came to the forefront, and freedom of expression was, as in previous cases, under attack from the new bearers of power. Regardless of whether it was an absolutist or totalitarian authority, the goal was the same; only the means of achieving it differed. Medieval bonfires on which heretics were burned have been replaced by the burning of books in the squares, persecution, sending to camps, or execution of political dissenters, where, unlike the procedures conducted by the Inquisition, in the

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not-so-distant history of state and political upheavals and turmoil, trials for verbal offenses were often seen as unnecessary because the outcome was known in advance or, when *raison d'état* required it, conducted with clearly defined roles and concluded with the conviction of the accused who was convinced that he would not be punished for spoken words or written works. Such behavior can be associated with an activist type of state in which the individual is subordinated to the common good, that is, the interest of the community, and it is not unusual that the shadow of "Big Brother" looms over his freedom of expression. On the other hand, the reactive type of state was supposed to represent a more favorable, and it could even be said a natural environment for freedom of expression. The change in the attitude towards freedom of expression occurs particularly after the terrorist attack on September 11, 2001, the year when mass surveillance, military interventions in the world, and the restrictions faced by media representatives testify that things are moving towards restrictions on freedom of expression. Political dictates come to the fore, and the role of the judiciary becomes secondary. Moreover, for certain states of Western democracies, it can be said that they use the criminal system in a way that, although not in the form of blatant repression, treats representatives of the journalistic profession as potential perpetrators.

Keywords: freedom of expression, *ultima ratio societatis*, verbal offense, political trial, reactive or activist state.

1. INTRODUCTORY NOTES

The epigram at the beginning of this work represents partially altered verses from the book of the Old Testament prophet Ezekiel, which read as follows: "And you, when you have warned the wicked of his way, to turn back from it, And he has not turned back from his way, He dies in his iniquity, And you have delivered your soul."² The author of the statement *I have spoken and saved my soul* is apparently Karl Marx³ who concluded the "Critique of the Gotha Programme" with the aforementioned Latin sentence.⁴ Although the spoken word saves the soul, and the word of God creates the world ("... and God says, "Let light be"; and light is."),⁵ Jesus opts for silence and non-recognition of the accusations, and by his death saves humanity from Adam's original sin.⁶

The accounts of the evangelists mainly confirm that Jesus did not respond to Pilate's questions or, at best, answered one question. Only the evangelist John records a more substantial conversation between Jesus and Pontius Pilate, which also reveals the essential reason for his execution.

"Pilate, therefore, entered into the Praetorium again, and called Jesus, and said to Him, "You are the King of the Jews?" Jesus answered him, "Do you say this from yourself? Or did others say it to you about Me?" Pilate answered, "Am I a Jew? Your nation and the

2 Ezekiel (33:9). *The Holy Bible Containing the Old and New Testaments*, Copyright © 2020 by Covenant Press of the Covenant Christian Coalition, www.ccc.one, p. 518.

3 V. Janković /2025/, *Antičke izreke: poreklo – smisao – upotreba*, Beograd, pp. 182–185.

4 *Dixi et salvavi animam meam* (Ich habe gesprochen und meine Seele gerettet). K. Marx /1946/, *Kritik des Gothaer Programms*, Neu durchgesehene und vermehrte Ausgabe, Berlin, p. 34.

5 Genesis (1:3). *The Holy Bible Containing the Old and New Testaments*, p. 11.

6 B. Pekić /2013/, *Godine koje su pojeli skakavci Uspomene iz Zatvora ili Antropopeja (1948–1954)* Knjiga I, Beograd, p. 208.

chief priests delivered You up to me; what did You do?” Jesus answered, “My kingdom is not of this world; if My kingdom were of this world, My officers had struggled that I might not be delivered up to Jews; but now My kingdom is not from here.” Pilate, therefore, said to Him, “Are You then a king?” Jesus answered, “You say [it], because I am a king; I have been born for this, and I have come into the world for this, that I may testify to the truth; everyone who is of the truth, hears My voice.”⁷

Before he was brought before Pontius Pilate, a trial was conducted against Jesus before the Sanhedrin regarding religious issues, and it was determined that he had sinned against the faith. Only at the end of the religious process was the question posed whether Jesus was the Messiah, which some authors interpret as manipulative strategy of the high priest Caiaphas who needed a crime that fits Roman law and allows for the presentation of the Nazarene before Pontius Pilate.⁸ This is about the efforts of the Jewish dignitaries to have Jesus executed, and the authority to impose the death penalty (*ius gladii*) belonged to the representative of the Roman authority.⁹

The words of Jesus, “...My kingdom is not of this world; ...” were the basis for him to be accused of *crimen laesae maiestatis*. This refers to the existing act¹⁰ by which Octavian Augustus (by enacting *lex Iulia maiestatis*) sought to comprehensively protect the princeps and his authority in the new political order. Accordingly, various violations of *maiestas populi Romani* (treason, desertion, rebellion, incitement to rebellion, violation of state magistrates including verbal insult,¹¹ knowingly

7 John (18:33–37). *The Holy Bible Containing the Old and New Testaments*, pp. 357, 358.

8 When he descended upon the Temple, the symbol of the identity of the chosen people and the guarantor of God's presence in Israel, Jesus touched the most sensitive point of Jewish faith and crossed the red line. Since the Sanhedrin was not authorized to impose the death penalty, it was necessary to present the religious offense as political, as this would allow the Roman governor to condemn Jesus to death. D. Margera /2021/, *Život i sudbina Isusa iz Nazareta*, Novi Sad [orig. D. Margerat /2019/, *Vie et destin de Jésus de Nazareth*, Éditions du Seuil, Paris], pp. 160–170.

9 *Ius gladii* (the right of the sword) did not fall under the general jurisdiction of the procurator, but rested on a special mandate from the emperor so that the procurator could not transfer it to another person. There is a possibility that the delegation of authority to impose the death penalty existed in the time of Augustus, but it is undoubtedly true that initially it referred to a precisely defined case. T. Mommsen /1907/, *Le droit pénal romain* Tome premier, Paris [orig. T. Mommsen /1899/, *Römishes Strafrecht*, Verlag von Duncker & Humbolt], p. 285.

10 The Law of Octavian Augustus covered the insults to the majesty of the Roman people that were foreseen by Sulla's *lex Cornelia de maiestate* (81 BC), but it supplements it by sanctioning verbal insults to the princeps and his father (meanwhile, Augustus' law did not define the criminal content of the term *crimen maiestatis*). I. Jarmaz Reskušić /2006/, Augustove reforme kaznenog prava i pravosuđa, *Hrvatski ljetopis za kazneno pravo i praksu*, № 1, p. 304. Katančević points out that Cornelius Sulla expanded the use of private prosecution from injuria, but there is no evidence that he introduced public prosecution. The oldest known source of law, which provides for the possibility of initiating *iudicium publicum* in the case of writing or spreading offensive writings, is a senatorial decision. It is testified in Justinian's Digests by Paul's fragment, and based on Tacitus' report, it can indirectly be attributed to Augustus. A. Katančević /2020/, Nastanak krivičnog dela uvrede, *Srpska politička misao*, № 3, pp. 337, 338.

11 Tacitus records that Augustus expanded the application of this law in the case of the scandalous writings of Cassius Severus (Casisus Sévérus) who brazenly insulted men and women of high rank. Tacite /1965/, *Annales*, Paris, p. 77.

introducing false content into public records) were defined in a casuistic manner.¹² For the aforementioned act, the penalty of *interdictio aqua et igni* was prescribed, which, according to Foucault's classification of penal tactics,¹³ consisted of the society's ability to exclude the convicted person (*exclure*). Although Augustus had already taken a step in that direction, Tiberius abandons the ancient rule that deeds are subject to condemnation while words remain unpunished,¹⁴ and subjects new punishable actions under the offense of majesty, prescribing the death penalty for the act.¹⁵

The accelerated transition from exclusion to marking testifies to the need to protect the princeps from attacks that could question his authority. It could be said that *crimen laesae maiestatis* has taken on the character of *ratio initialis*, and this property has remained even after the Enlightenment adopted the stance on *ultima ratio* of criminal law.¹⁶ Despite the fact that criminal law represents the strongest instrument in the arsenal of state coercion, and that its application would be justified as a last resort to defend society from undesirable phenomena and behaviors,¹⁷ this did not apply to crimes of exceptional severity (*crimina atrocissima*). In addition to the possibility that criminal law could be applied as *ratio initialis*, in the formative years of the inquisitorial process that its rules could be disregarded in prosecuting the most heinous offenses.¹⁸ Although the doctrine was not unified in its stance on which crimes should be considered particularly severe, agreement existed only that the crime of offending divine majesty (*crimen laesae maiestatis divinae*)¹⁹ and the crime of offending human majesty (*crimen laesae maiestatis humanae*) belonged in this group.²⁰

12 I. Jarmaz Reskušić, *op. cit.*, pp. 303, 304. Some authors make a distinction between high treason and *crimen laesae maiestatis*. They believe that it refers to an act that was easier than high treason, a consisted of acts tending to impair the power, dignity or honour of the Roman state. The dividing line between these two types of crime was not precisely delineated. G. Mousourakis /2007/, *A Legal History of Rome*, Abingdon, New York, p. 284.

13 "This punitive tactic involves prohibiting an individual's presence in communal or sacred places, removing or prohibiting all the laws of hospitality concerning him." M. Foucault /2013/, *La société punitive Cours au Collège de France. 1972–1973*, Paris, pp. 8, 9.

14 Tacite, *op. cit.*, p. 77.

15 I. Jarmaz Reskušić, *op. cit.*, pp. 304, 305. According to Foucault's division of punitive tactics, the question is the possibility of society marking the convicted. "In any case, it involves leaving something like a trace on the visible or symbolic, physical or social, anatomical or statutory body. ... In this system, the visible or social body must be the blazon of the penalties, and this blazon refers to two things: [on the one hand,] to the offense, of which it has to be the visible and immediately recognizable trace: I know full well that you are a thief because you no longer have hands; and, [on the other hand,] to the power that imposed the penalty and that, with this penalty, has left the mark of its sovereignty on the tortured body." M. Foucault /2013/, *op. cit.*, p. 9.

16 Some authors remind us "the practical significance and influence of the principle has, however, often been questioned since criminal law is often used without properly considering alternative legislative solutions. Its character as a legal principle has been questioned in scholarly literature, which may diminish its role or at least affect the way in which it could operate." S. Melander /2013/, *Ultima Ratio in European Criminal Law, Oñati Socio-legal Series*, № 1, p. 45.

17 I. Vuković /2021/, *Krivično pravo: opšti deo*, Beograd, p. 3.

18 M. Damaška /2019/, *Evaluation of Evidence Pre-Modern and Modern Approaches*, Cambridge University Press, p. 83.

19 "After the recognition of Christianity as the official religion of the Roman empire, acts of opposition to the established religious doctrine were punished as crimes." G. Mousourakis, *op. cit.*, p. 176.

20 "Beyond the inclusion of these two crimes in the category of *crimina atrocissima*, only the general formula seems to have gained currency that crimes punishable by aggravated death penalty should be regarded as 'most atrocious'." M. Damaška /2019/, *op. cit.*, p. 84.

2. THE TRIAL OF GIORDANO BRUNO

One of the prevailing understandings in medieval canon law related to heresy, which was classified among the most serious crimes against the religious and social order. Because of this, the fight against heresy was called *negotium pacis et fidei*, as it was necessary to defend the state order (*pax*) and the Catholic faith (*fides*).²¹ Heretics were equally dangerous to the church and the state, so it was implied that these institutions closely cooperated in suppressing and punishing heresy.

After excommunication by the ecclesiastical court, heretics were handed over to secular authorities (*brachium saeculare*) for the only possible punishment prescribed for such cases – the death penalty. The justification for imposing the harshest penalty was found in Roman law, which equated heresy with the crime of majesty insult (*crimen laesae maiestatis*).²²

The punitive reaction to heresy by imposing the death penalty as the only prescribed punishment can also be viewed as an effort by medieval popes to establish control over scattered ecclesiastical courts and ensure a unified penal policy.²³ It was necessary to determine whether certain criminal acts have been committed and appropriate punishment should be imposed on the perpetrators, which implied abandoning the previous medieval view that the primary task of the judiciary is to eliminate (*concordia*) conflicts and unrest caused by crime.²⁴

The words spoken by Giordano Bruno on May 26, 1592, when he was brought before the Religious Court in Venice after his arrest were:

“I will tell the truth: many times have I been threatened that I would be made to come to this Holy Office, and I always thought it a joke, because I am ready to account for myself.”

Some authors express surprise that these words have not been interpreted from a stricter procedural point of view, as it represents a condemnation of the intimidation of which Bruno was a victim.²⁵ Although during the trial before the

21 P. Kras /2020/, *The System of the Inquisition in Medieval Europe*, Berlin, New York, p. 385.

22 P. Kras, *ibid.*, p. 385.

23 M. Damaška /2021/, *Dokaz krivnje Od rimsko-kanonskog do suvremenog prava*, Zagreb, p. 190. The comparison with the current situation in the Republic of Serbia is inevitably emerging, whereby it seems that the Roman popes managed to find better ways to unify judicial practice than has been the case in the last decade. The ban on conditional release for certain criminal offenses (which is contrary to the position of the European Court of Human Rights – hereinafter: ECtHR), a significant restriction on the possibility of imposing conditional sentences, an increase in the number of criminal offenses for which a life sentence is prescribed, can hardly be marked as the result of aligning “penal policy with the modern needs of society and international obligations” as stated in the proposed amendments to the law. I. Đokić /2025/, *Nekoliko zapažanja o noveli Krivičnog zakonika – usvojena i planirana rešenja*, in: *Izazovi međunarodnog krivičnog prava I krivičnog prava (Tom 1)*, Beograd, pp. 155–159. In one word, it is a matter of penal populism that has been particularly pronounced since 2019. M. Škulić, N. Lukić /2025/, *The explanation of the main characteristics of penal populism and examples of penal populism in some criminal law provisions and planned amendments of the Criminal Code of Serbia, CRIMEN – časopis za krivične nauke*, № 1, pp. 19–28.

24 M. Damaška /2021/, *op. cit.*, p. 190.

25 G. Maifreda /2022/, *The Trial of Giordano Bruno*, New York, Abingdon, p. 40.

Venetian Inquisition he stated that: “My profession has been, and is, that of letters, and all sciences.”²⁶ he was accused of several crimes against the Catholic faith, including blasphemy and heresy regarding issues of dogmatic theology. Giordano Bruno referred to his own philosophical views and scientific work, but this did not prevent the Roman Inquisition from demanding his extradition, which was done in 1593 (during the entire trial in Rome, which ended after seven years, Bruno was in prison). The request for extradition stated, among other things:

“Bruno da Nola, accused not only of heresy, but also of [being a] heresiarch, having written various books, in which he greatly praises the Queen of England and other heretic princes, wrote some things concerning a particular of the religion which are not suitable, even if he was speaking philosophically; and that he was apostate, having first been a Dominican friar, who lived for many years in Geneva and England, and who in Napoli and other places has been investigated for the same charge.”²⁷

The key “evidence” against Giordano Bruno was a written accusation (“in scriptis”) that is now lost, submitted by Capuchin Fra Celestino da Verona. Of the 13 accusations made by the friar, one should mention the one about Jesus’ mortal sin during prayer in the garden, as well as the claim that Christ was not crucified but was hanged on two pieces of wood in the form of a gallows, from which the name gallows originates.²⁸ Between Bruno and Celestino, there was animosity dating back to 1592 when they were imprisoned in Venice, so the claim Carmelite friar Giulio da Salò, who was also a fellow prisoner with Bruno in Venice that the Capuchin’s mission must have called for the extortion of compromising statements from Bruno:

“While Giordano was discoursing with the prisoner friar Celestino, [I] heard [Giordano] say that Christ Our Lord had mortally sinned in this world, because he had wanted to oppose the will of the Father when, orating in the garden, he said: “*Si possibile est, transeat a me calix isse*” [“If it be possible, let this cup pass from me”]; and Francesco Marangon Napolitano was also there, and I said: „Listen to the blasphemy that man speaks!”; and it seems to me that this was September 1592 in the prison of the above.”²⁹

Giordano Bruno was tried by a council consisting of the inquisitor Gabriele da Saluzzo, Patriarch Lorenzo Priuli, and the nuncio Ludovico Taverna. Bruno’s appearance before the inquisitors on September 10, 1599, halted the proceeding anew, as the defendant again linked his willingness to abjure to the presentation of a new written brief, this time addressed directly to the pope.³⁰ At the same time or immediately afterwards of Celestino da Verona burned alive at the stake, Giordano Bruno, despite multiple injunctions ordering his retraction, withdrew his stated

26 G. Maifreda, *ibid.*, p. 15.

27 G. Maifreda, *ibid.*, pp. 131, 132.

28 For other accusations see G. Maifreda, *ibid.*, pp. 138, 139. Otherwise, Fra Celestino da Verona was burned at the stake in 1599 at Rome’s Campo de’ Fiori.

29 G. Maifreda, *ibid.*, p. 15.

30 G. Maifreda, *ibid.*, p. 219.

willingness to abjure and was condemned to death. The last words he addressed to the judges were:

“Perhaps it is with greater fear that you pronounce the sentence against me, than what I feel in receiving it”.³¹

Giordano Bruno was burned at the stake on February 17, 1600, in Rome’s Campo de’ Fiori. This act is immortalized in a notarial drawing.



Figure 1 Notarial representation of the execution of Giordano Bruno.³²

3. THE TRIALS FOR VERBAL OFFENSES IN YUGOSLAVIA IN THE SECOND HALF OF THE 20TH CENTURY

3.1. *The Bare Island (Goli otok)*

Before referring to several cases in which the spoken or written word resulted in the filing of criminal charges and trials, it should be noted the position of the Grand Chamber of the European Court of Human Rights (hereinafter: ECtHR (G.Ch)) expressed in the case *Kononov v. Latvia*.³³ The Court in Strasbourg considered the conviction based on the law from 1993 for a war crime committed during World War II, specifically in 1944. The Court’s position in Strasbourg was that civil-

31 G. Maifreda, *ibid.*, p. 231.

32 G. Maifreda, *ibid.*, p. 220.

33 ECtHR (G. Ch.), *Kononov v. Latvia*, 36376/04, 17 May 2010, §§ 204, 221, <https://hudoc.echr.coe.int/fre?i=001-98669>, 1 November 2025.

ians suspected of violating *jus in bello* (specifically, for providing the German military command with information about the positions of partisan units), could not be arrested, convicted, and executed without a proper trial as this is contrary to international customary law. *The proceedings conducted in the absence of the accused, without their knowledge or participation in the trial after which the death penalty was carried out, cannot be qualified as a fair trial (italic – G. P. Ilić).*³⁴

The legal point of view of an event fundamentally differs from its political perspective, which leads Foucault to the thought that war (and it could also be added that in the post-war times while a new government is being established) is characterized by armed justice (*la justice armée*).³⁵ In one word, the legal system comes after armed force, and serves solely as a cover for the implementation of repression against the internal enemy.

In the calculation with the internal enemy, the communist regime in Yugoslavia applied, following its Soviet models, repressive methods. At the same time, the communist leadership sought to strengthen its international position, and in March 1945, people's courts were established for "collaborators" and "enemies" of the people. This did not hinder the implementation of revolutionary justice, whose goal was the removal of opponents of the new regime, which included cases of executions based on decisions from courts that were found to be nonexistent, or naked executions devoid of unnecessary legal formalities.³⁶ The reckoning with political enemies became particularly pronounced after the adoption of the Resolution of the Information Bureau of Workers' and Communist Parties regarding the situation in the Communist Party of Yugoslavia in June 1948. The largest number of detained civilians labeled as "informbirovci" were convicted in misdemeanor proceedings for verbal offenses, with misdemeanor penalties of up to two years of "socially useful work" imposed by misdemeanor commissions in larger centers, and there are reports that this was sometimes done by party committees. In reality, this was done by republican or other larger branches of the State Security Administration.³⁷ The penalty was most often imposed without appearing before the competent misdemeanor commission and without the delivery of an indictment, and decisions were received only for signature. During the announcement of the decision on punishment did not mention the possibility of filing an appeal or it was done with a hint of reprisals, which was then carried out against the "rebel."³⁸

34 G. P. Ilić /2024/, Rat i pravično suđenje – *contradictio in adiecto?*, in: *Odnos međunarodnog krivičnog prava i nacionalnog krivičnog prava (Tom 1)*, Beograd, pp. 304, 305.

35 M. Foucault /2021/, *Théories et institutions pénales Cours au Collège de France 1971–1972*, Paris, pp. 60, 61.

36 G. P. Ilić /2024/, *op. cit.*, p. 300. This behavior resembles the "trials" by summary procedure during the Night of the Long Knives when a large number of his opponents were liquidated without any judicial process, by Hitler's order. Lenin's position was essentially no different, as he believed that violence and terror were necessary means in the fight against political opponents, and therefore one should not hesitate even from the threat of the death penalty as the most effective means of persuasion. K. Čavoški /1989/, *O neprijatelju*, Beograd, pp. 157, 202.

37 D. Mihailović /2005/, *Kratka istorija satiranja*, Beograd, pp. 28, 29.

38 D. Mihailović /2005/, *ibid.*, p. 29.

Among the military convicts, the president of the Military Court of the Belgrade area, Lieutenant Colonel Milonja Stijović, was particularly notorious, who is believed to have sentenced several hundred people to death.³⁹ During the trial, he had a habit of humming Montenegrin folk tunes, and as a passionate fan of “Partizan,” he listened to radio broadcasts of football matches during the trial.⁴⁰

That Bare Island remained a forbidden topic even several decades after Judge Stijović and his ilk performed judicial functions, as well as having worthy successors, is confirmed by a case from 1988. At that time, the great Serbian writer (and a Bare Island prisoner himself) Dragoslav Mihailović published an interview with doctor N. Nikolić in “Literary Newspapers.” On that occasion, he identified in a footnote “... the planted Zagreb UDBA agent Borivoje Viskiće in the camp, a villain who burned the feet of some Bare Island prisoners with lit newspapers and who participated in the murders, of a former young Ustaša and apparently, the latter UDBA liquidator.”⁴¹ Viskiće disputed Mihailović’s claims in the text “I Was Not a Thug,” and he responded with the writing “Criminals and Victims.” Then the reaction of the judicial authorities followed.

“... the deputy public prosecutor of Belgrade, Vojislav Dragojlović, temporarily banned the number, filing an indictment with a request for a permanent ban. ... Judge Vladan Vukčević, in that first-instance procedure, issued an acquittal ... prosecutor Dragojlović filed an appeal, which was accepted by the Supreme Court of Serbia. A judge for the retrial before the District Court was appointed, Judge Janko Lazarević, who “corrected” Vukčević’s “mistake” and permanently banned the number. (Judge Vladan Vukčević had to leave the judiciary and move to the bar, while the party-active Janko Lazarević was promoted to judge of the Supreme Court of Serbia ...).”⁴²

3.2. “*Deliberat Intrigues*”

There are two aspects of freedom of expression, the first being personal and the second social and political in nature.⁴³ The personal aspect of freedom of expression is manifested as the right of everyone to spiritual freedom, i.e. the right to have opinions and beliefs and to be able to express them freely without fear of harassment.⁴⁴ On the other hand, freedom of expression is necessary for social life, because it enables everyone to communicate with others. Properly from the social side of freedom of expression arises its political dimension, as pointed out by the European Court of Human Rights. Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for

39 D. Mihailović /2005/, *ibid.*, p. 33.

40 See G. P. Ilić /2024/, *op. cit.*, pp. 296–298.

41 D. Mihailović /2020/, Modernisti prećutkuju Goli otok, in: D. Mihailović, *Crveno i plavo*, Novo Miloševo, p. 83.

42 D. Mihailović /2020/, *ibid.*, p. 84.

43 L. Favoreu *et al.* /2009/, *Droit des libertés fondamentales*, Paris, p. 478.

44 G. P. Ilić /2020/, Freedom of Expression and the Right to Respect for Private Life, *Serbian Political Thought*, № 2, p. 250.

its progress and each individual's self-fulfillment. Subject to paragraph 2 of Article 10 (art. 10–2 ECHR),⁴⁵ it is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb; such are the demands of that pluralism, tolerance and broadmindedness without which there is no “democratic society”.⁴⁶

For the consideration of the case in question, it should be noted that the Socialist Federal Republic of Yugoslavia ratified the International Covenant on Civil and Political Rights in 1971.⁴⁷ Although it came into force only in 1976, Yugoslavia introduced this international act into its legal system by ratifying art. 19–2 ICCPR which guarantees everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

At that time, the Criminal Code of 1951 was in force in the Federal People's Republic of Yugoslavia⁴⁸ which, in Chapter ten titled: Criminal offenses against the people and the state, contains the criminal offense of hostile propaganda (Article 118 of the Criminal Code of FNRJ). This offense was often used for political persecution.⁴⁹ The amendment from 1959 significantly changed the criminal offense of hostile propaganda, which was explained in the parliamentary debate by the position that the offense does not exist if it is a “scientific analysis,” but only in the case of calling for the violent overthrow of government authorities. In short, it concerns a serious and untrue representation of socio-political relations.⁵⁰ In doctrine, the amendment to Article 118 of the Criminal Code of FNRJ from 1959 was understood as a significant expansion of the zone of punishability, whereby the interpretation of the new legal provisions depended on a specific judge and the needs of the political moment, as the judiciary was under the direct influence of the communist party.⁵¹ The example to be discussed attests to this.

Professor Mihailo Đurić was one of the best Serbian philosophers and professors at the University of Belgrade.⁵² He was not formally educated as a philosopher,

45 Zakon o ratifikaciji Evropske konvencije za zaštitu ljudskih prava i osnovnih sloboda (European Convention for the Protection of Human Rights and Fundamental Freedoms – ECHR) s dodatnim protokolima, sa izmenama i dopunama, *Službeni list SCG – Međunarodni ugovori* 9/2003, 5/2005 and 7/2005 – ispravka and *Službeni glasnik RS – Međunarodni ugovori* 12/2010 and 10/2015.

46 ECtHR (G. Ch.), *Vogt v. Germany*, 17851/91, 26 September 1995, § 52-(i), <https://hudoc.echr.coe.int/eng?i=001-58012>, 1 November 2025.

47 Zakon o ratifikaciji Međunarodnog pakta o građanskim i političkim pravima (International Covenant on Civil and Political Rights – ICCPR), *Službeni list SFRJ* 7/1971. This Covenant was adopted by the United Nations General Assembly on 16 December 1966 and entered into force on 23 March 1976. By May of 2012, the Covenant had been ratified by 167 states.

48 Krivični zakonik Federativne Narodne Republike Jugoslavije – KZ FNRJ, *Službeni list FNRJ* 13/1951.

49 S. Cvetković /2024/, Krivičnopravne osnove političke represije u Srbiji 1944–1985, *CRIMEN – časopis za krivične nauke*, № 2, p. 193.

50 S. Cvetković /2024/, *ibid.*, p. 194.

51 S. Cvetković /2024/, *ibid.*, p. 195.

52 J. Trkulja /2012/, Etos javnog delovanja Mihaila Đurića, in: *Čuvar dostojanstva filozofije Spomenica o godišnjici smrti akademika Mihaila Đurića (1925–2011)*, Beograd, p. 251.

but as a lawyer by education, he chose philosophy following the inner call of his spiritual being.⁵³ Professor Đurić did not only adhere to moral norms, arriving at them through reasoning or some moral feeling, but morality simply existed within him.⁵⁴ Sometimes he recognized what was moral mandatory and even where few of his contemporaries had previously noticed it, until the voice of Professor Đurić alerted him to it.⁵⁵

Professor Mihailo Đurić spoke in public only when he had something to say, when he felt an inner command to speak, and then he did so clearly and decisively regardless of the repression of the authorities and the consequences of his appearance.⁵⁶ The most famous such public appearance related to the amendments to the Constitution from 1963, and the speech he gave in connection with it, which is the title of this section – “Deliberat Intrigues”. This took place at a meeting of the Section of the Association of University Teachers held on March 18, 1971, at the Faculty of Law in Belgrade, and the presentation was printed the same year in the Annals of the Faculty of Law in Belgrade.

At the beginning of his address to his faculty colleagues, Professor Đurić emphasizes that he will not speak about the letter of the proposed constitutional changes, as he believes it is not worth discussing at all.⁵⁷ He then continues:⁵⁸

“In the time we live in, there are more serious, weightier, far-reaching questions than those that have suddenly become so important. It is sad that in Yugoslavia the national question has once again become so acute, given that the greatest misfortune in our recent past was precisely the result of rampant nationalist frenzy. ... It is not at all difficult to see that even under current conditions, the Serbian people find themselves in an unequal position compared to other nations in Yugoslavia. ... More than anything else, today it is essential for the Serbian people to be sobered from the delusions of the past. ... Therefore, there should be no discussion about the submitted text of the constitutional amendment, nor should we engage in its linguistic correction and refinement, but rather we should seek, we should demand, we should advocate for the adoption of some other, more serious, more responsible, historically grounded solutions.”

The number of the Annals of the Faculty of Law in Belgrade in which this, as well as other presentations by university teachers and associates, was published, was immediately banned, and this decision was made by the Supreme Court of Serbia in a panel consisting of Vojislav Janković, the president of the panel, and Dušan Vujčić and Milivoje Seratlić, as members of the panel.⁵⁹ The criminal proceedings against Professor Đurić proceeded as expected, so Ljubomir Milić, the investigating judge

53 D. N. Basta /2011/, *Nekrolog akademiku Mihailu Đuriću (1925–2011)*, *Hereticus*, № 3–4, p. 337.

54 Č. D. Koprivica /2011/, *Misao i čast kao sudbina*, in: *Čuvar dostojanstva filozofije Spomenica o godišnjici smrti akademika Mihaila Đurića (1925–2011)*, Beograd, p. 343.

55 Č. D. Koprivica, *ibid.*, p. 344.

56 J. Trkulja /2012/, *op. cit.*, p. 257.

57 M. Đurić /1971/, *Smišljene smutnje*, *Analī Pravnog fakulteta u Beogradu*, № 3, p. 230.

58 M. Đurić, *ibid.*, pp. 231–233.

59 The Supreme Court of Serbia modified the decision of the District Court in Belgrade, which considered that there was no basis for banning the magazine. J. Trkulja /2013/, *Osuda, izgon i rehabilitacija Mihaila Đurića*, 2th ed., Beograd, p. 96.

of the District Court in Belgrade, issued a decision on April 13, 1972, to conduct an investigation against Mihailo Đurić due to reasonable suspicion that he committed the criminal offense of hostile propaganda under Article 118, paragraph 1 of the Criminal Code of the SFRY.⁶⁰ In addition to the review of the proposed constitutional amendments, the investigation was also initiated due to an article titled “The Stone of Discord,” published in the magazine “Art” for July and December 1971, in which Professor Đurić critically reflected on the intention of the Montenegrin authorities to place a Mausoleum designed by Ivan Meštrović on Lovćen, at the site of Njegoš’s chapel.⁶¹

There was no doubt for either the public prosecutor or the judges who acted in the investigation and later phases of this criminal proceeding that Professor Đurić expressed his opinions *with the intention* of undermining the constitutional order or the security of the state. This is about a subjective component that it represents the constitutive characteristic of a criminal offense and must be established.⁶² The intention is precisely *differentia specifica* distinguishing this act from possible criticisms and assessments regarding the state system, so that individual calls or encouragement of citizens to oppose certain measures of state authorities do not constitute this criminal offense.⁶³

The Deputy District Public Prosecutor in Belgrade, Božidar Đ. Marković, submits an indictment on June 7, 1972, against Mihailo Đurić due to reasonable suspicion that he committed the criminal offense of hostile propaganda under Article 118, paragraph 1 of the Criminal Code of SFRJ,⁶⁴ and the panel of the District Court in Belgrade confirms it. The trial is conducted before a panel chaired by Judge Đorđe Katić, with jurors Nikola Zdravković and Dušan Vukotić as members.⁶⁵ It should be noted that in his closing statement, Professor Đurić, among other things, stated:⁶⁶

“This trial is not just my affair and does not concern only me personally. Its initiation and maintenance have a much broader social significance. To that extent, the judgment that this court will render will not only affect me. It will decide the fate of a great principle that sees the courage for truth as the highest expression of human dignity and the strongest affirmation of social engagement, and thus, that judgment will indirectly influence the life prospects of many of my students with whom I have tried for so many years to awaken a love for truth as the greatest passion of the mind or, which is the same, a love for justice as the most important determinant of character. I hope that this court will have enough strength to render the judgment that all those who truly care for the good of this country expect from it.”

The District Court in Belgrade on July 17, 1972, rendered and publicly announced a judgment declaring the accused Mihailo Đurić guilty of the criminal

60 With the adoption of the Constitution in 1963, the name of the Federal People’s Republic of Yugoslavia was changed to the Socialist Federal Republic of Yugoslavia.

61 J. Trkulja /2013/, *op. cit.*, pp. 103, 104.

62 Lj. Lazarević /1995/, *Krivično pravo Jugoslavije: posebni deo*, 8th ed., Beograd, p. 61.

63 Lj. Lazarević, *ibid.*, 61.

64 J. Trkulja /2013/, *op. cit.*, pp. 116–118.

65 J. Trkulja /2013/, *ibid.*, p. 130.

66 J. Trkulja /2013/, *ibid.*, p. 151.

offense of hostile propaganda under Article 118, paragraph 1 of the Criminal Code of the SFRY and sentenced him to strict imprisonment for a duration of two years. In the proceedings on appeal, the Supreme Court of Serbia, in a panel consisting of Vojislav Janković, president of the panel, and Milutin Đukić and Milivoje Seratlić, as members of the panel, rendered a judgment on January 4, 1973, which amended the first-instance judgment regarding the decision on the sentence and sentenced the accused Mihailo Đurić to a prison term of nine months.⁶⁷

Although it can be debated whether the criminal proceedings against Professor Mihailo Đurić effectively and substantially fulfilled any of the guarantees of the right to a fair trial, there is no doubt that it was legally concluded within a reasonable time – it lasted almost as long as the sentence imposed on Professor Đurić by the Supreme Court of Serbia. It is a rhetorical question whether conducting and concluding the criminal proceedings in less than nine months was in the interest of the party state or the accused.

3.3. *Belgrade Six's*

Some authors emphasize⁶⁸ that the last wave of political trials in the first half of the eighties in the SFRY was a consequence of the death of Josip Broz and pronounced social instability. In one word, the political and economic crisis had already deeply affected the entire society and the authorities had become nervous.⁶⁹ In 1980, the number of political prisoners increased compared to the previous year, with 83% of reported individuals accused, 523 individuals, of which 94% for verbal offense. From 1981 to 1985, there were 1,652 political delinquents, while for the criminal act of hostile propaganda under Article 133 of the SFRY Criminal Code, 382 individuals were convicted.⁷⁰

After the expulsion of professors from the University of Belgrade and significant pressure from 1972 to 1977, informal gatherings began in 1976 in the apartments of certain Belgrade dissidents, known as the “free” or “open” university.⁷¹ Classes were held at several locations in rented apartments, and the gatherings had

67 J. Trkulja /2013/, *ibid.*, pp. 152, 155, 184 and 185. Although not so drastic, the consequences of the discussion on constitutional amendments, as well as the support given to Professor Mihail Đurić, were felt by other professors and associates at the Faculty of Law in Belgrade. One of them was Kosta Čavoški who was not re-elected to the position of assistant. The report cited as reasons his exclusion from the League of Communists and his conviction in February 1973 for the criminal offense of spreading false news. One of the signatories of the report was Professor Radomir Lukić who was never a party member but sought to always remain above the “chaos” as a scientist K. Čavoški /1989/, *O moralno-političkoj podobnosti*, in: K. Čavoški, *Revolucionarni makijavelizam i drugi eseji*, Beograd, pp. 156, 157.

68 S. Cvetković /2012/, „Proces šestorici” početak kraja ideološkog progona u socijalističkoj Srbiji, *Tokovi istorije*, № 3, časopis Instituta za noviju istoriju Srbije, p. 243.

69 S. M. Popović /2003/, *Poslednja instanca Knjiga 2*, Svedočanstva 17, Beograd, p. 931.

70 S. Cvetković /2012/, *op. cit.*, p. 244.

71 In December 1976, the main organizers proposed that certain groups unite, leading to the formation of the Great School of the Free University composed of professors and sixtyeighters, and from 1980, the Small School of the Free University began its work, focusing on working with students. S. Cvetković /2012/, *ibid.*, pp. 247, 248.

the character of a kind of debate club, where a topic would be predetermined, someone would prepare a presentation on it, and then a discussion would follow.⁷² There were always police cars parked in front of the building where these discussions were held. When Milovan Đilas was invited to speak about nationalism at one of these meetings, the State Security Administration concluded that his participation facilitated the task of branding these gatherings as “hostile.” A raid was conducted, and all participants were detained.⁷³

The criminal complaint was filed by Ranko Savić on behalf of the State Security Service.⁷⁴ The Deputy District Public Prosecutor in Belgrade, Danilo Nanović,⁷⁵ has raised an indictment against Vladimir Mijanović, Miodrag Milić, Dragomir Olujić, Gordan Jovanović, Pavluška Imširović, and Milan Nikolić due to reasonable suspicion that they, as accomplices, committed the criminal offense of association for hostile activities from Article 136 paragraph 1 in connection with Article 114 of the Criminal Code of the SFRY from 1977 to April 1984 in Belgrade.⁷⁶

Organizing criminal associations represents a special form of complicity, but the Belgrade Six is accused of creating a criminal association as a distinct criminal offense.⁷⁷ This refers to the criminal offense of association for hostile activities prescribed in Article 136 of the Criminal Code of the SFRY. In addition, the prosecution linked the criminal offense from Article 136 paragraph 1 of the Criminal Code of the SFRY with the criminal offense of attacking the constitutional order from Article 114 of the Criminal Code of the SFRY. This is a general criminal offense against the constitutional order and state security, so all other offenses from Chapter XV represent only special forms of this criminal offense.⁷⁸

The District Court in Belgrade, in a panel composed of judge Zoran Stojković, as the presiding judge, judges Dušan Komnenić and jurors Dušan Janković, Jovan Čeha, and Veliša Čaiković, as members of the panel, publicly announced the verdict on February 4, 1985, declaring Miodrag Milić, Dragomir Olujić, and Milan Nikolić guilty of the criminal act of hostile propaganda under Article 133 paragraph 1 of the Criminal Code of the SFRY, and sentenced Milić to two years in prison, Olujić to one year in prison, and Nikolić to one year and six months in prison.⁷⁹ The charges against the accused Pavluška Imširović for the criminal act of association for hostile propaganda under Article 136 paragraph 1 in connection with Article 114 of the Criminal Code of the SFRY were dismissed.⁸⁰

72 S. M. Popović, *op. cit.*, p. 931.

73 S. M. Popović, *ibid.*, p. 931.

74 S. Cvetković /2012/, *op. cit.*, p. 249.

75 This case was a “springboard” for prosecutor Nanović to become the republican public prosecutor. S. Cvetković /2012/, *ibid.*, p. 249.

76 S. M. Popović, *op. cit.*, pp. 932, 933 and 937.

77 Lj. Lazarević, *op. cit.*, p. 68.

78 In criminal law theory, this act is most commonly referred to as high treason. Lj. Lazarević, *ibid.*, p. 22.

79 S. M. Popović, *op. cit.*, pp. 953, 958.

80 S. M. Popović, *ibid.*, pp. 959, 960.

The basic stance of the court panel was that the falsehoods presented by the accused in their works aimed to deny the party everything positive that had been done, even the possibility of a revolutionary change in social relations, on the basis of which they claimed that we are allegedly an undemocratic society where fundamental rights and freedoms of man are suppressed, thus it is necessary to introduce a multiparty system. The court did not accept the defendants' claims that they were engaged in science and had no intention of carrying out propaganda, but expressed the view that these were pamphlet-like works that had nothing in common with science and that the defendants were doing this precisely for the purpose of propaganda.⁸¹

The Supreme Court of Serbia, in a panel composed of judges Dr. Jovan Pavlica, as the president of the panel, Sreten Veličković and Božidar Grujić, as members of the panel, rendered and publicly announced on July 9, 1985, a judgment by which, partially accepting the appeals of the accused Miodrag Milić, sentenced him to a prison term of one year and six months, and the accused Milan Nikolić to a prison term of eight months, while accepting the appeal of the accused Dragomir Olujić, he was acquitted of the charges.⁸²

After the trial of the Belgrade Six, the president of the panel of the District Court in Belgrade soon left his judicial position and moved to the bar. He attracted public attention when, as a member of the Democratic Party of Serbia, became the Minister of Justice. Milan Nikolić, one of the accused whom the judicial panel presided over by Judge Stojković found guilty, stated that at the time of the trial, Stojković was a young "hanging judge," eager to make a career, and the most effective way to do that was through political trials. Judge Stojković had previously banned the book by Nebojša Popov and made a decision to destroy the entire print run. After that, he received the case of the Belgrade Six's.⁸³

4. THE FREEDOM OF EXPRESSION AND CRIMINAL PROSECUTION OF JOURNALISTS

Due to the importance placed on media freedom, the ECtHR in the case *Prager and Oberschlick v. Austria*⁸⁴ stated that the freedom of expression is applicable not only to "information" or "ideas" that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any section of the community. In addition, the Court is mindful of the fact that journalistic freedom also covers possible recourse to a degree of exaggeration,

81 S. M. Popović, *ibid.*, p. 975.

82 S. M. Popović, *ibid.*, pp. 998, 999.

83 In the same radio show, Professor Dragoljub Mićunović says that Koštunica's negative attitude towards lustration is now confirmed. Everything that happened is forgotten, and we move on as if nothing happened. He reminds us of Santayana's famous quote recorded in the Dachau camp, which goes (unlike the version cited by Mićunović): "Those who cannot remember the past are condemned to repeat it". Ne pluj po podu, ili – nekoliko reči o pravdi, *Radio emisija Peščanik*, 5. mart 2004, <https://pescanik.net/ne-pluj-po-podu-ili-nekoliko-reci-o-pravdi/>, 1 November 2025.

84 ECtHR, *Prager and Oberschlick v. Austria*, 15974/90, 26 April 1995, § 38, <https://hudoc.echr.coe.int/eng?i=001-57926>, 1 November 2025.

or even provocation. Given that such an approach carries the risk of sensationalism in the media, there is an opinion in the doctrine⁸⁵ that the ECtHR should contribute to the discussion of topics of general interest and the development of standards for professional reporting.

One of the significant issues considered by the ECtHR in the plenary session (hereinafter: ECtHR (Plenary)) regarding media freedom of expression related to the right of access to information and the possibilities of its limitation. In the case *Observer and Gardian v. United Kingdom*⁸⁶ for the avoidance of doubt, the Court would only add to the foregoing that art. 10 ECHR does not in terms prohibit the imposition of prior restraints on publication, as such. This is evidenced not only by the words “conditions”, “restrictions”, “preventing” and “prevention” which appear in that provision, but also by the Court’s *Sunday Times* judgment of 26 April 1979⁸⁷ and its market intern *Verlag GmbH and Klaus Beermann v. Germany* judgment of 20 November 1989.⁸⁸ On the other hand, the dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Court. This is especially so as far as the press is concerned, for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest.

In the case *Magyar Helsinki Bizottság v. Hungary*⁸⁹ the Grand Chamber of the ECtHR determined the criteria for assessing the admissibility of requests for access to information in accordance with the existing Strasbourg case law: (α) the purpose of the information request, the Grand Chamber of the ECtHR determined the criteria for assessing the admissibility of requests for access to information in accordance with the existing Strasbourg case law: (α) the purpose of the information request,⁹⁰ (β) the nature of the information sought,⁹¹ (γ) the role of the applicant⁹² and (δ) ready and available information.⁹³

85 J.-F. Renucci /2012/, *Traité de droit européen des droits de l’homme Droit européen des droits de l’homme*, Paris, pp. 198, 199.

86 ECtHR (Plenary), *Observer and Gardian v. the United Kingdom*, 13585/88, 26 November 1991, § 60, <https://hudoc.echr.coe.int/eng?i=001-57705>, 1 November 2025.

87 ECtHR (Plenary), *The Sunday Times v. the United Kingdom*, 6538/74, 26 April 1979, <https://hudoc.echr.coe.int/eng?i=001-57584>, 1 November 2025.

88 ECtHR (Plenary), *Markt intern Verlag GmbH and Klaus Beermann v. Germany*, 10572/83, 20 November 1989, <https://hudoc.echr.coe.int/eng?i=001-57648>, 1 November 2025.

89 ECtHR (G. Ch.), *Magyar Helsinki Bizottság v. Hungary*, 18030/11, 8 November 2016, § 157, <https://hudoc.echr.coe.int/eng?i=001-167828>, 1 November 2025.

90 The Court has placed emphasis on whether the gathering of the information was a relevant preparatory step in journalistic activities or in other activities creating a forum for, or constituting an essential element of, public debate. ECtHR (G. Ch.), *Magyar Helsinki Bizottság v. Hungary*, § 158.

91 The Court considers that the information, data or documents to which access is sought must generally meet a public-interest test in order to prompt a need for disclosure under the Convention. Such a need may exist where, inter alia, disclosure provides transparency on the manner of conduct of public affairs and on matters of interest for society as a whole and thereby allows participation in public governance by the public at large. ECtHR (G.Ch.), *Magyar Helsinki Bizottság v. Hungary*, § 161.

92 While art. 10 ECHR guarantees freedom of expression to “everyone”, it has been the Court’s practice to recognise the essential role played by the press in a democratic society and the special position of journalists in this context. ECtHR (G. Ch.), *Magyar Helsinki Bizottság v. Hungary*, § 165.

93 In reaching its conclusion that the refusal of access was in breach of Article 10, the Court has previously had regard to the fact that the information sought was “ready and available” and did not

In investigative journalism, the issue of protecting sources of information is of particular importance. The Grand Chamber of the ECtHR expressed its opinion on this in the case *Goodwin v. the United Kingdom*.⁹⁴ Protection of journalistic sources is one of the basic conditions for press freedom, as is reflected in the laws and the professional codes of conduct in a number of Contracting States and is affirmed in several international instruments on journalistic freedoms. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result, the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with art. 10 ECHR unless it is justified by an overriding requirement in the public interest.⁹⁵

4.1. The case of Slavko Ćuruvija

Slavko Ćuruvija founded the daily newspaper “Dnevni telegraf” in 1996, and by October 1998, the financial and judicial persecution of Ćuruvija’s newspapers began. The legal basis for this was initially the Regulation of the Government of Serbia on special measures in conditions of a threat of NATO attacks on the country, and then the Law on Information proposed and implemented by the Ministry of Information, led by Aleksandar Vučić.⁹⁶ Fines grew to over four million dinars, and that same month, all the property of the company “De-Te pres” was seized.⁹⁷ It could be said that the essence of the Law on Information from 1998 was in the absurdly high fines for editors and publishers of media, which would represent an insurmountable obstacle even under today’s conditions. Monetary fines were imposed in amounts of several hundred thousand euros.⁹⁸ This was just the introduction to the criminal prosecution of Slavko Ćuruvija.

necessitate the collection of any data by the Government. On the other hand, the Court dismissed a domestic authority’s reliance on the anticipated difficulty of gathering information as a ground for its refusal to provide the applicant with documents, where such difficulty was generated by the authority’s own practice. ECtHR (G. Ch.), *Magyar Helsinki Bizottság v. Hungary*, § 169.

94 ECtHR (G. Ch.), *Goodwin v. the United Kingdom*, 17488/90, 27 March 1996, § 39, <https://hudoc.echr.coe.int/eng?i=001-57974>, 1 November 2025.

95 From recent case law on the violation of Article 10 ECHR see art. 10 ECHR vid. ECtHR, *Görmüş et autres c. Turquie*, 19 janvier 2016, <https://hudoc.echr.coe.int/eng?i=001-160244>; *Sedletska v. Ukraine*, 42634/18, 1 April 2021, <https://hudoc.echr.coe.int/eng?i=001-208882>; *Sergey Sorokin v. Russia*, 52808/09, 30 August 2022, <https://hudoc.echr.coe.int/fre?i=001-218918>, 1 November 2025.

96 Vučić publicly threatened Slavko Ćuruvija before the adoption of the Law that the “Daily Telegraph” would be banned if it continued to write like that. T. Spaić /2020/, *Zakon o informisanju iz 1998: Institucionalni zločin nad medijima i novinarima*, *Cenzolovka*, <https://www.cenzolovka.rs/pritisci-i-napadi/zakon-o-informisanju-iz-1998-institucionalni-zlocin-nad-medijima-i-novinarima/>, 1 November 2025.

97 Obračun države sa Ćuruvijom: Uzeli mu novine i novac. Osudili ga na robiju. Ubili /2016/, *Fondacija Slavko Ćuruvija Foundation*, <https://www.slavkocuruvijafondacija.rs/obracun-drzave-sa-curuvijom-uzeli-mu-novine-i-novac-osudili-ga-na-robiju-ubili/>, 1 November 2025.

98 T. Spaić /2020/, *Zakon o informisanju iz 1998: Institucionalni zločin nad medijima i novinarima*, *Cenzolovka*.

In December 1998, “Dnevni telegraf” was convicted due to an article about Aleksandar Popović, a murdered doctor from the “Dedinje” Institute, who “was in a group of doctors of this hospitals that have long warned the relevant state authorities and institutions, as well as the public, that the director and those responsible for the import of medicines and equipment for this hospital are abusing their position”.⁹⁹ The judgment was pronounced by the city judge for misdemeanors Dobrivoje Glavinić and, based on the Law on Information, convicted the responsible editor Dragan Novaković and the newspaper “Dnevni telegraf” for “publishing false information” that harmed Milovan Bojić.

The conviction for the misdemeanor did not prevent the initiation of proceedings for the criminal offense of spreading false news under Article 218 of the Criminal Code of the Republic of Serbia.¹⁰⁰ In addition to Slavko Ćuruvija and Dragan Novaković, who were convicted of misdemeanors, journalists Zoran Luković and Srđan Janković were also included in the charges.¹⁰¹ The stance of domestic theory was that the specificity of the criminal offense under Article 218 of the Criminal Code of the Republic of Serbia, in relation to similar offenses, lies in the existence of a special intent with which it is committed.¹⁰² It is about the intent to cause public disturbance or to endanger public order or peace, or the intent to obstruct the implementation of decisions and measures of state authorities and institutions (Article 218 of the Criminal Code of the Republic of Serbia). Intent as a subjective characteristic of this criminal offense expresses the true meaning of the act: spreading false news is merely a means to achieve the intent.¹⁰³

The criminal proceedings were conducted before the First Municipal Court in Belgrade, presided over by Judge Krsto Bobot (who later became a lawyer). Although the law stipulated that under certain conditions the accused does not have to be questioned, according to the words of the accused Srđan Janković, Slavko Ćuruvija and Zoran Luković were questioned at the main hearing on Friday, and he was supposed to give a statement on Monday, three days later.¹⁰⁴ Instead of questioning the accused Janković, a first-instance verdict was delivered on Monday. Judge Bobot declared the accused Slavko Ćuruvija, Zoran Luković, and Srđan Janković guilty of the criminal offense of spreading false news under Article 218 of the Criminal Code of the Republic of Serbia and sentenced them to prison terms of five months each, while the accused Dragan Novaković was acquitted of

99 T. Tagirov /2012/, Presude, pobude, posledice, *Vreme*, <https://vreme.com/vreme/presude-pobude-posledice/>, 1 November 2025.

100 Krivični zakon Republike Srbije – KZ RS, *Službeni glasnik SRS*, 26/1977, 28/1977, 43/1977, 20/1979, 24/1984, 39/1986, 51/1987, 6/1989, 42/1989 and 21/1990 and *Službeni glasnik RS*, 16/1990, 49/1992, 23/1993, 67/1993, 47/1994, 17/1995, 44/1998 and 10/2002.

101 T. Tagirov /2012/, Presude, pobude, posledice, *Vreme*.

102 L. Lazarević, *op. cit.*, p. 728.

103 L. Lazarević, *ibid.*, p. 729.

104 B. Trivić /2012/, Ćuruvija – kostur u ormaru g-đe Mesarović, *Radio Slobodna Evropa*, https://www.slobodnaevropa.org/a/curuvija_kostur_u_ormaru_gospodje_mesarovic/24523300.html, 1 November 2025.

the charges.¹⁰⁵ Slavko Ćuruvija was murdered on April 1, 1999, so the First Municipal Court suspended the criminal proceedings against him by a decision on April 16, 1999. The second-instance verdict rejecting the appeals of the accused, and the public prosecutor was delivered on May 14, 1999, by the judicial panel consisting of Siniša Važić, the president of the panel and reporting judge, and judges Nata Mesarović and Nada Zec, members of the panel.¹⁰⁶

4.2. *The case of Julian Assange*

In short,¹⁰⁷ the chronology of events related to Julian Assange begins in 2006 when the WikiLeaks website was launched to publish confidential or sensitive information. Key events occur in 2010, specifically on April 5 when he publishes a video from an American military helicopter showing an airstrike and the killing of civilians in Baghdad, including two journalists. Already on July 25 of the same year, WikiLeaks publishes more than 91,000 documents, mostly secret reports from the U.S. military about the war in Afghanistan. In October of the same year, WikiLeaks released 400,000 confidential military documents about the war in Iraq, and the following month thousands of U.S. diplomatic documents were published.

In August 2010, Assange was in Sweden where the public prosecutor issued an arrest warrant because two women accused him of rape and molestation. Assange denies the charges. In December 2010, Assange surrendered to the police due to the Swedish arrest warrant and after posting bail was released until the hearing on the extradition request. The magistrates' court in February 2011 made a decision allowing extradition, and Assange filed an appeal which was rejected. In June 2012, Assange took refuge in the Ecuadorian embassy in London and applied for political asylum. His request was accepted in August 2012 and the Ecuadorian government granted him permission to stay in the Ecuadorian embassy in London. Assange also sought to contest the arrest warrant before the Swedish court, but in July 2014, his request was rejected as unfounded.¹⁰⁸ A legal turnaround occurred

105 Mesarović: Demanti povodom teksta o Ćuruviji /2012/, *Radio Slobodna Evropa*, https://www.slobodnaevropa.org/a/demanti_nade_mesarovic_povodom_teksta_rse_o_slavki_curuviji/24525077.html, 1 November 2025.

106 Mesarović: Demanti povodom teksta o Ćuruviji /2012/, *Radio Slobodna Evropa*.

107 B. Hutchinson /2024/, Timeline of Julian Assange's 14-year-long saga to dodge extradition, *abcNEWS*, <https://abcnews.go.com/US/timeline-julian-assanges-14-year-long-saga-dodge/story?id=111398254>, 1 November 2025; M. Armstrong /2024/, Julian Assange: A Timeline of Events, *statista*, https://www.statista.com/chart/17695/julian-assange-arrest/?srsltid=AfmBOormrkRDKEgZNO4rCiN1ULisgyJc8xUdqoHt3F3dc_oEeSBVpNEn, 1 November 2025.

108 It has been rightly noted that Sweden has played a curious game in being unwilling to use the usual international judicial cooperation in criminal matters and let the interview happen in London. Pored toga, Since 9/11, Sweden has been condemned 17 times by international judicial bodies (the European Court of Human Rights, the UN Human Rights Council and the UN Committee against Torture) for not respecting the basic standards of the Geneva Convention on Refugees or the prohibition to extradite to countries where there is a risk of torture or inhumane and degrading treatment — with unacceptable and bloody consequences for the individuals involved and their families. C. Marchand /2016/, The detention of Julian Assange is inhumane, *European*

in May 2017 when Swedish authorities dropped the rape and molestation charges against Assange.

In April 2019, Assange was arrested in the Ecuadorian Embassy in London for failing to appear in court, thereby violating the conditions under which he had been granted bail, and he was sentenced to 50 weeks in prison. At that time, U.S. prosecutors also unsealed an indictment charging him with conspiring with Chelsea Manning¹⁰⁹ to hack into U.S. Department of Defense computers in March 2010 in “one of the largest compromises of classified information in the history of the United States.” Then, in June 2019, the U.S. Department of Justice submitted a request to a British court for the extradition of Assange to the United States to stand trial on charges of hacking confidential documents. The request for extradition is decided by Judge Vanessa Baraitser in January 2021. Her position is that Julian Assange’s mental health could deteriorate in the conditions that exist in American prisons. She orders that Assange be released. In July 2021, the U.S. government receives permission from the British High Court to appeal the decision that denied extradition. Already in June of the following year, the British government decides that Assange should be extradited to the United States, and Assange appeals that decision.

In February 2024, the judges of the British High Court ruled that Assange could appeal the extradition decision, arguing that he could raise the dilemma of whether to obtain constitutionally guaranteed free-speech protections or be at a disadvantage because he is not a U.S. citizen. The Supreme Court of the United States in *Cohen v. California* (403 US15.24 [1971]) pointed out that the guarantee in Amendment I (*The US Bill of Rights*) on freedom of speech and expression stems from “the belief that no other position is linked to the principle of dignity and free choice of every individual, on which the American political system”.¹¹⁰

The judicial-political odyssey of Julian Assange ended on June 24, 2024. Assange pleads guilty to a single felony count of conspiring to unlawfully obtain classified information and is sentenced to 63 months, which coincided with the time he was deprived of his freedom. Although Julian Assange is a free man today, it could be said that the journey he has taken has a certain symbolism *via dolorosa*. Media attention was primarily focused on Assange’s defense and attacks on press freedom, while the essential issues raised by this case remained somewhat in the background. It is about an impressive network of geopolitical pressure exerted on the British judicial system and a method of governance hidden from the public, characteristic

Center for Constitutional and Human Rights, <https://www.ecchr.eu/en/publication/the-detention-of-julian-assange-is-inhumane/>, 1 November 2025.

109 Chelsea Manning was formerly known as Bradley Manning. In August 2013, a trial was initiated against Manning in a military court for espionage charges. Manning was sentenced to 35 years in prison. In January 2017, President Barack Obama granted clemency to Chelsea Manning.

110 P. Wachsmann /2012/, La liberté d’expression, in: *Libertés et droits fondamentaux*, Paris, p. 450.

of the American state since September 11.¹¹¹ The case of Julian Assange was also addressed by Nils Melzer, the UN Special Rapporteur on Torture.¹¹² He found irrefutable evidence of political persecution and judicial arbitrariness, as well as torture and deliberate mistreatment. Assange faced serious and systematic violations of prescribed procedures, judicial bias, collusion, and fabricated evidence. The medical evidence collected by Melzer confirms that Assange suffered prolonged psychological torture in prison.

Is no doubt that Mr. Assange's situation meets the legal definition of detention in inhumane and degrading treatment and that this is contrary to our 21st century human rights standards.¹¹³ Moreover, approving a resolution based on a report by Thórhildur Sunna Ævarsdóttir, the Parliamentary Assembly of the Council of Europe has expressed deep concern at "the disproportionately harsh treatment" faced by Julian Assange and said this has had a "dangerous chilling effect" which undermines the protection of journalists and whistleblowers around the world.¹¹⁴ The Assembly said Mr Assange's treatment warranted his designation as a "political prisoner". Julian Assange had no doubt about the treatment towards him. He told parliamentarians:¹¹⁵

"I want to be totally clear. I am not free today because the system worked. I am free today because after years of incarceration I pleaded guilty to journalism. I pleaded guilty to seeking information from a source, and I pleaded guilty to informing the public what that information was."

5. FINAL NOTES

Damaska believes that there are two types of states, and the difference is based on the understanding of the relationship between the state and society. The first type is the reactive state, and its task is limited to providing a supporting framework within which its citizens pursue their chosen goals.¹¹⁶ Such a "minimalist" government does two basic things: it protects order, and it provides a forum for the reso-

111 V. Ortiz /2021/, *Ce que l'affaire Assange révèle du pouvoir américain depuis le 11 septembre, Le Vent Se Lève*, <https://lvsl.fr/ce-que-laffaire-assange-revele-du-pouvoir-americain-depuis-le-11-septembre/>, 1 November 2025.

112 A. Ilić /2024/, *Ekstradicija između prava i politike*, in: *Odnos međunarodnog krivičnog prava i nacionalnog krivičnog prava (Tom 1)*, Beograd, p. 389.

113 C. Marchand, *op. cit.*

114 Parliamentary Assembly recognises Julian Assange as a 'political prisoner' and warns against the chilling effect of his harsh treatment (2024), *Council of Europe*, <https://www.coe.int/en/web/portal/-/pace-recognises-julian-assange-as-a-political-prisoner-and-warns-against-the-chilling-effect-of-his-harsh-treatment>, 1 November 2025.

115 Julian Assange at PACE hearing, ahead of a plenary debate on his case: "I pleaded guilty to journalism" /2024/, *Parliamentary Assembly*, <https://pace.coe.int/en/news/9600/julian-assange-at-pace-hearing-ahead-of-a-plenary-debate-on-his-case-i-pleaded-guilty-to-journalism->, 1 November 2025.

116 M. R. Damaška /1986/, *Faces of Justice and State Authority – A Comparative Approach to the Legal Process*, New Haven, London, p. 73.

lution of those disputes that cannot be settled by citizens themselves. On the other hand, the extreme activist state espouses or strives toward a comprehensive theory of the good life and tries to use it as a basis for a conceptually all-encompassing program of material and moral betterment of its citizens.¹¹⁷ The fundamental structural principle upon which the procedural edifice of the reactive state is erected thus becomes the idea that proceedings are a contest of two sides.¹¹⁸ In contrast, the activist proceedings must be structured so as to permit a search for the best policy response to the precipitating event. It is also clear that control over this search must be vested in state officials.¹¹⁹

This division could offer an answer as to why freedom of expression is retreating before criminal law as *ultima ratio societatis*. In an activist state that cares for the well-being of its citizens, striving to provide them with material and moral prosperity, the individual is, by the logic of things, subordinated to the social community, so a shadow of “Big Brother” looms over his freedom of expression, embodied in *laesae maiestatis*, heresy, and blasphemy or party uniformity that has become state policy. When it comes to the last of the mentioned examples, one should remember the words of Hannah Arendt that also been frequently observed that the relationship between the two sources of authority, between state and party, is one of ostensible and real authority, so that the government machine is usually pictured as the powerless façade which hides and protects the real power of the party.¹²⁰ The inquisitorial model of procedure in which state officials play a leading role naturally fits into such a model of state organization.

The social environment provided by the reactive state for individuals represented a more favorable ground for the expression of freedom of speech. The circumstances changed significantly after the terrorist attacks on September 11, 2001, when the reactive state took on an activist dimension, the role of the global “Big Brother” gained importance, and military interventions around the world to protect national interests were accepted as a necessity. This is also reflected in freedom of expression, so, regardless of the accusatory model of criminal procedure, it is relatively easy to deviate from the guarantees of a fair trial. Julian Assange’s words sound prophetic that not free today because the system worked, but because after years of incarceration what he pleaded guilty to journalism. Could the next step be the move of the hero from the story “The Bridge on the Žepa” who first crosses out the inscription in verses made with the intention of being engraved on the bridge to immortalize the donor, paused for a moment at his motto: *In silence there is security*, and after a short reflection erased it too.¹²¹

The world we live in, the relationship between freedom of expression and *ultima ratio societatis*, but also the repressive traits that are at the core of every, even judicial authority, may have been best expressed by street artist Banksy on the

117 M. R. Damaška /1986/, *ibid.*, p. 80.

118 M. R. Damaška /1986/, *ibid.*, p. 79.

119 M. R. Damaška /1986/, *ibid.*, p. 87.

120 H. Arendt /1973/, *The Origins of Totalitarianism*, New Edition with added Prefaces, New York, p. 395.

121 I. Andrić /1980/, Most na Žepi, in: I. Andrić, *Put Alije Đerzezeza Izbor pripovedaka 1*, Beograd, p. 49.

building of the Royal Courts of Justice in London. It is not just freedom of expression that is at stake. The stakes are much higher.



Figure 2 A new artwork by Banksy, which shows a judge attacking a protester with a gavel, at the Royal Courts of Justice in London, 2025. Photo by Callum Parke. Image via Alamy.¹²²

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¹²² A new mural by Banksy appeared on an exterior wall of the Royal Courts of Justice in London on September 8th. Banksy did not offer any explanation of the content of the artwork. However, it comes shortly after London police detained almost 900 people during the Palestine Action protest on September 6th. M. Rabb /2025/, New Banksy mural appears at Royal Courts of Justice in London, *Artsy*, <https://www.artsy.net/article/artsy-editorial-new-banksy-mural-appears-royal-courts-justice-london#:~:text=A%20spokesperson%20for%20HM%20Courts%20and%20Tribunals%2C,building%2C%20is%20an%20obligation%20of%20the%20agency>, 1 November 2025.

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Goran P. Ilić*

Dixi et salvavi animum meum.

SLOBODA IZRAŽAVANJA I ULTIMA RATIO SOCIETATIS

REZIME

Pisati o slobodi izražavanja i *ultima ratio societatis* u osnovi znači baviti se analizom odnosa između pojedinca i vlasti. Sloboda izražavanja je tesno povezana sa načelom dostojanstva i slobodnog izbora svakog pojedinca, ona mu pruža način da ispolji svoju posebnost, da se poveže sa drugim članovima društva, jednom reči da uspostavi društvene odnose na kojima se temelji određeni pravni i politički sistem. Upravo taj sistem koji svoje postojanje u značajnoj meri „duguje” slobodi izražavanja može da se, pod pretpostavkom ispunjenja određenih uslova, okrene protiv svoje utemeljiteljke. Analiza koja je sprovedena u radu potvrđuje da taj put započinje u skladu sa poznatom izrekom o dobrim namerama. Od nastojanja da se vrednosti rimske republike zaštite od čina ali ne od reči, jer je na izgovorenu ili napisanu reč odgovarano na isti način, došlo se do zaštite cara kome nije bilo do vođenja rasprava ili

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pisanja replika, već je pod *crimen laesae maiestatis* podveo i reč a ne samo delo. Crkva nije imala naročitog razloga da odstupi od ustaljenog standarda, jer jeres, bogohuljenje i slična ogrešenja o Sveto pismo i crkveno učenje predstavljaju opasnost ne samo za verske, već i za svetovne vlasti. Uostalom, Isusu se pripisuju reči da caru sleduje carevo, a Bogu božje. Usledio je period u kojem je nakon vrednosti republike, neograničene careve vlasti i crkvene dogme u prvi plan izbila ideologija i stranke kao njeni nosioci, a sloboda izražavanja je, kao i u prethodnim slučajevima, bila na udaru novih nosilaca vlasti. Bez obzira da li se radilo o apsolutističkoj ili totalitarnoj vlasti cilj je bio isti, samo su se načini njegovog ostvarenja razlikovali. Srednjovekovne lomače na kojima su spaljivani jeretici zamenjene su spaljivanjem knjiga na trgovima, progonom, slanjem u logore ili egzekucijom političkih neistomišljenika, pri čemu je, za razliku od postupaka koje je vodila inkvizicija, u ne tako davnoj istoriji državnih i političkih prevrata i potresa suđenje za verbalni delikt često posmatrano kao nepotrebno jer je ishod bio unapred poznat ili je, kada je *raison d'état* to nalagao, sprovedeno s jasno podeljenim ulogama i okončavano osudom optuženog koji je bio uveren da se za izgovorenu reč ili napisano delo ne kažnjava. Takvo postupanje se može dovesti u vezu s aktivističkim tipom države u kojoj je pojedinac podređen opštem dobru, to jest interesu društvene zajednice, i nije neobično što se nad njegovom slobodom izražavanja nadvija senka „Velikog brata”. Na drugoj strani, reaktivni tip države trebalo da za slobodu izražavanja predstavlja povoljnije, a moglo bi se čak reći i prirodno okruženje. Do promene odnosa prema slobodi izražavanja dolazi naročito nakon terorističkog napada od 11. septembra 2001. godine kada masovni nadzor, vojne intervencije u svetu i ograničenja sa kojima se susreću predstavnici medija, svedoče da se stvari kreću u smeru ograničenja slobode izražavanja. Politički diktat dolazi do izražaja, a uloga pravosudnog sistema postaje drugorazredna. Štaviše, za pojedine države zapadne demokratije može se reći da krivični sistem koriste na način koji, istina ne u vidu ogoljene represije, sa predstavnicima novinarske profesije postupa kao sa mogućim učiniocima *crimen laesae maiestatis*, a ako im se već ne može suditi za verbalni delikt oni se mogu posmatrati kao unutrašnji neprijatelji. Nije bez značaja činjenica da ima institucija i nevladinih organizacija, umetnika i javnih ličnosti koji su prepoznali i ukazali na ovu opasnost. Reč je o *contradictio in adiecto* protivrečnosti, jer se sa novinarima koji predstavljaju *watchdogs of democracy* ne može nečovečno postupati i države ih ne smeju posmatrati kao političke protivnike, niti ih lišavati slobode i u suštini odnositi se prema njima kao prema političkim zatvorenicima.

Ključne reči: Sloboda izražavanja, *ultima ratio societatis*, verbalni delikt, političko suđenje, reaktivna ili aktivistička država.

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*Branko M. Rakić**

KOLONIJALNI GENOCIDI**

Apstrakt: U ovom radu autor se bavi pitanjem opravdanosti i utemeljenosti korišćenja pojma kolonijalni genocidi, mestom i značajem akata istrebljenja koju su kolonijalni osvajači činili prema starosedeocima osvojenih teritorija, kao i odnosom i vezom zlodela kolonizatora prema kolonizovanim narodima sa nacističkim genocidima. Najpre se postavlja pitanje primenjivosti kvalifikacije genocid na dela izvršena vremenski mnogo ranije u odnosu na momenat kada je delo pod tim nazivom inkriminisano. Autor konstatuje da je taj izraz primenjiv u opisnom, fenomenološkom smislu, a da je u pravnom smislu situacija mnogo složenija. U radu se takođe konstatuje da, počevši od samog autora naziva genocid Rafaela Lemkina, različiti autori pojam genocida koriste za širi ili uži krug događaja, tj. da ga shvataju na ekstenzivniji i na restriktivniji način. Autor konstatuje da neki od najgusnijih zločina koje su kolonijalni osvajači počinili prema starosedeocima ne mogu da budu nazvani genocidom jer im, iako je do fizičkog uništenja značajnog dela starosedelačkih naroda došlo, nedostaje genocidna namera. U radu su iznete i strukturalne sličnosti između nacističkog ekspanzionizma i kolonijalizma, kao i između nacističke genocidne politike, na prvom mestu Holokausta, i kolonijalnih genocida, da bi zatim bio dat prikaz genocida nemačkih kolonizatora nad plemenima Herero i Nama, prvog genocida počinjenog u XX veku, koji se smatra prvim modernim genocidom i nekom vrstom preteče Holokausta.

Ključne reči: kolonizator, starosedelac, istrebljenje, zločin, inkriminacija, konvencija, kvalifikacija, namera.

1. KORIŠĆENJE TERMINA „KOLONIJALNI GENOCIDI“ U SVETLU DEFINISANJA I INKRIMINACIJE KRIVIČNOG DELA GENOCIDA

Dana 9. decembra 1948. godine potpisana je Konvencija o sprečavanju i kažnjavanju zločina genocida, kojom je po prvi put inkriminisano, odnosno uneto u

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** Ovaj rad je nastao kao rezultat istraživanja u okviru strateškog projekta za 2025. godinu „Problemi stvaranja, tumačenja i primene prava“ (podtema: „Pravosuđe i izazovi današnjice“ – tema istraživačke grupe: „Pravosudna reforma sa stanovišta međunarodnog krivičnog prava i krivičnog prava“), koji finansira Pravni fakultet Univerziteta u Beogradu.

međunarodni pravni poredak, krivično delo genocida. U preambuli ove konvencije njeni potpisnici konstatuju da taj akt usvajaju „priznajući da je genocid u svim periodima istorije nanosio velike gubitke čovečanstvu“. Dan kasnije, 10. decembra 1948. godine, Generalna skupština UN je usvojila Univerzalnu deklaraciju o ljudskim pravima u čijem članu 11. stav 2. je proklamovano načelo *nullum crimen sine lege*, načelo odavno etablirano u pravnim sistemima prosvetljenih naroda. Postavlja se pitanje kako uskladiti ove dve odredbe, posebno imajući u vidu činjenicu da prema članu 31. stav 2. Bečke konvencije o ugovornom pravu (kojom su kodifikovana već postojeća pravila međunarodnog ugovornog prava) kod tumačenja međunarodnih ugovora tekst samog ugovora, njegovu preambulu i anekse treba tretirati kao celinu.

Kao što je široko poznato, reč genocid je skovao pravni stručnjak, advokat i profesor, Rafael Lemkin, poljski Jevrejin naseljen u SAD, upotrebivši je po prvi put u svojoj knjizi „Vladavina Osovine u okupiranoj Evropi“, i to u njenom „Poglavlju IX: Genocid“, dok je specifična inkriminacija zločina pod ovim nazivom, u značajnoj meri zahvaljujući takođe zalaganjima Rafaela Lemkina, uspostavljena, kao što smo rekli, Konvencijom o sprečavanju i kažnjavanju zločina genocida, odobrenom i predloženom za potpisivanje i ratifikaciju ili pristupanje rezolucijom Generalne skupštine 260 A (III) od 9. decembra 1948. godine, koja je stupila na snagu 12. januara 1951. godine. Članom V ove konvencije države potpisnice su se obavezale da će ovo krivično delo uneti i u svoju nacionalnu krivičnopravnu regulativu, tako da je zločin genocida pravno definisan i inkriminisan i na nivou međunarodnog prava i na nivou unutrašnjeg prava velike većine država u svetu. Kao i druga najteža krivična dela inkriminisana na međunarodnom nivou, zločin genocida ne zastareva, prema članu 1. tačka b) Konvencije o nezastarevanju ratnih zločina i zločina protiv čovečanstva, usvojene 26. novembra 1968. godine.¹

1 Odredba člana 1. Konvencije o nezastarevanju ratnih zločina i zločina protiv čovečanstva glasi: „Ne postoji vremensko zastarevanje u pogledu sledećih zločina bez obzira na datum kada su počinjeni:

- (a) ratni zločini prema definiciji u Povelji Međunarodnog vojnog suda, Nirnberg, od 8. avgusta 1945, potvrđenoj u rezolucijama 3 (I) od 13. februara 1946. godine i 95 (I) od 11. decembra 1946. godine, koje je usvojila Generalna skupština Ujedinjenih nacija, a naročito „teški prestupi“ nabrojani u Ženevskim konvencijama od 12. avgusta 1959. godine o zaštiti žrtava rata;
- (b) zločini protiv čovečanstva bilo da su počinjeni u doba rata ili u doba mira prema definiciji u Povelji Međunarodnog vojnog suda, Nirnberg, od 8. avgusta 1945, kao što je potvrđeno u rezolucijama 3 (I) od 13. februara 1946. godine i 95 (I) od 11. decembra 1946. godine, koje je usvojila Generalna skupština Ujedinjenih nacija, proterivanje putem oružanog napada ili okupacije i nehumana dela koja proističu iz politike apartheida, kao i zločin genocida shodno definiciji datoj u Konvenciji o sprečavanju i kažnjavanju zločina genocida iz 1948. godine, čak i kad takva dela ne predstavljaju povredu domaćeg zakona zemlje u kojoj su izvršena.“

Citirani tekst je preuzet iz Uredbe o ratifikaciji Konvencije o nezastarevanju ratnih zločina i zločina protiv čovečanstva („Službeni list SFRJ - Međunarodni ugovori i drugi sporazumi“, br. 50/70), u kojoj je izraz *“crimes against humanity”/“les crimes contre l’humanité”* preveden kao „zločini protiv čovečanstva“.

O nezastarevanju krivičnih dela videti detaljnije u: I. Radisavljević /2024/, Nezastarevanje međunarodnih krivičnih dela u užem smislu, u: *Odnos međunarodnog krivičnog i nacionalnog krivičnog prava*, Udruženje za međunarodno krivično pravo, Univerzitet u Beogradu – Pravni fakultet, Beograd, pp. 575–588.

Pre izrade i usvajanja Konvencije o sprečavanju i kažnjavanju zločina genocida Generalna skupština Ujedinjenih nacija je, tokom svog prvog zasedanja, usvojila Rezoluciju 96 od 11. decembra 1946. godine, pod nazivom „Zločin genocida“ (A/RES/96/I/). Ovom rezolucijom je potvrđeno da je genocid zločin po međunarodnom pravu, ali priroda rezolucije Generalne skupštine, kao neobavezujućeg akta, nije bila dovoljna za formalnu inkriminaciju, već je bilo neophodno donošenje konvencije.

Krivično delo genocida je u članu II Konvencije o sprečavanju i kažnjavanju zločina genocida definisano na sledeći način:

„U ovoj konvenciji pod genocidom se podrazumeva bilo koje od sledećih dela, počinjenih s namerom da se potpuno ili delimično uništi jedna nacionalna, etnička, rasna ili religiozna grupa:

- (a) ubistvo članova grupe (naroda);
- (b) izazivanje teških telesnih ili mentalnih povreda članovima grupe (pripadnika određenog naroda)
- (c) namerno podvrgavanje grupe takvim životnim uslovima koji dovode do njenog potpunog ili delimičnog fizičkog uništenja;
- (d) uspostavljanje mere s namerom sprečavanja rađanja u okviru grupe (naroda);
- (e) prinudno premeštanje dece iz jedne grupe u drugu.“

Ipak, do osnivanja *ad hoc* krivičnih tribunala za bivšu Jugoslaviju i za Ruandu devedesetih godina XX veka, niko nije nigde u svetu optužen za genocid. Iako je uvođenje pojma i krivičnog dela genocida bilo neposredno motivisano strahotama koje su nacisti i njihovi saradnici počinili tokom Drugog svetskog rata, nijednom nacisti nije suđeno za genocid. Na suđenju koje je održano između 20. novembra 1945. i 1. oktobra 1946. godine pred Međunarodnim vojnim tribunalom u Nirnbergu, protiv najviših nacističkih zločinaca, kao i u kasnijim suđenjima održanim od 1946. do 1949. godine, nije suđeno za genocid, jer u vreme tih suđenja Konvencija o sprečavanju i kažnjavanju zločina genocida još nije bila potpisana ili stupila na snagu, a od tri grupe krivičnih dela koja su bila predviđena članom 6. stav 2. Povelje Međunarodnog vojnog tribunala iz aneksa Sporazuma o gonjenju i kažnjavanju vodećih ratnih zločinaca evropskih sila Osovine, potpisanog od strane predstavnika pobedničkih sila u Londonu 8. avgusta 1945. godine, a to su zločini protiv mira, ratni zločini i zločini protiv čovečnosti, radnje koje bi odgovarale biću krivičnog dela genocida bile su obuhvaćene optužbama za zločine protiv čovečnosti, koji su zapravo širi inkriminacioni okvir kome pripada i kasnije nastala inkriminacija genocida. Definicija „zločina protiv čovečnosti“ iz navedenog člana 6. stav 2. Povelje Međunarodnog vojnog tribunala, koja uključuje i „istrebljenje“, koje suštinski odgovara genocidu, glasi:

„Zločini protiv čovečnosti, naime, ubistvo, istrebljenje, porobljavanje, deportacija i druga nehumana dela počinjena protiv bilo kog civilnog stanovništva, pre ili tokom rata, ili progoni na političkim, rasnim ili verskim osnovama u izvršenju ili u vezi sa bilo kojim zločinom u nadležnosti Tribunala, bez obzira na to da li su u suprotnosti sa domaćim zakonom zemlje u kojoj su počinjeni ili ne.“

Zabrana retroaktivnog dejstva krivičnog prava, izražena u obliku maksime *nullum crimen sine lege, nulla poena sine lege*, jedna je od tekovina modernog prava, jedan od osnova funkcionisanja vladavine prava i, posmatrano iz perspektive pojedinaca, jedno od u međunarodnim aktima i u skoro svim modernim nacionalnim zakonodavstvima zagwarantovanih ljudskih prava. Na međunarodnom planu, ova zabrana je sadržana u najznačajnijim kako univerzalnim (član 11. stav 2. Univerzalne deklaracije o ljudskim pravima iz 1948. godine, član 15. Međunarodnog pakta o građanskim i političkim pravima iz 1966. godine), tako i regionalnim instrumentima (član 7. Evropske konvencije za zaštitu ljudskih prava i osnovnih sloboda iz 1950. godine, član 9. Američke konvencije o ljudskim pravima iz 1969. godine naslovljen *“freedom from ‘ex post facto’ laws”*, član 7. stav 2. Afričke povelje o ljudskim pravima i pravima naroda).²

U već pomenutoim članu 11. stav 2. Univerzalne deklaracije o ljudskim pravima od 10. decembra 1948. godine predviđeno je:

„Niko se ne sme osuditi za dela ili propuštanja koja nisu predstavljala krivično delo po unutrašnjem ili međunarodnom pravu u vreme kada su izvršena. Isto tako ne sme se izricati teža kazna od one koja se mogla primeniti u vreme kada je krivično delo izvršeno.“

Ono što je posebno relevantno za našu studiju je činjenica da pod zabranu retroaktivne primene krivičnog prava ne potpadaju radnje koje su prema opštim pravnim načelima koja su smatrana za izvor međunarodnog prava od ranije smatrana za krivična dela. Kao i sama zabrana retroaktivne primene krivičnog prava i ovo pravilo je postojalo od ranije kao običajno pravilo, da bi bilo uneto i u međunarodne ugovore iz oblasti ljudskih prava.

Tako, član 7. Evropske konvencije za zaštitu ljudskih prava i osnovnih sloboda, potpisane u Rimu 4. novembra 1950. godine, koji u stavu 1. sadrži zabranu poput navedene iz Univerzalne deklaracije, u stavu 2. sadrži sledeću odredbu:

„Ovaj član ne utiče na suđenje i kažnjavanje nekog lica za činjenje ili nečinjenje koje se u vreme izvršenja smatralo krivičnim delom prema opštim pravnim načelima koja priznaju civilizovani narodi.“

I Međunarodni pakt o građanskim i političkim pravima potpisan u Njujorku 16. decembra 1966. godine u članu 15. stav 1. sadrži zabranu retroaktivnog dejstva krivičnog prava, da bi u stavu 2. sadržao odredbu veoma sličnu onoj iz člana 7. stav 2. Evropske konvencije za zaštitu ljudskih prava i osnovnih sloboda:

„Ništa u ovom članu neće uticati na suđenje i kažnjavanje bilo koje osobe za bilo koje činjenje ili nečinjenje koji je, u vreme kada je izvršeno, bilo krivično delo prema opštim pravnim načelima koje priznaje zajednica naroda.“

Kao što se može primetiti, Evropska konvencija u citiranoj odredbi govori o „opštim pravnim načelima koja priznaju civilizovani narodi“ (*“the general principles of law recognised by civilised nations”*), a Međunarodni pakt o „opštim pravnim principima koje priznaje zajednica naroda“ (*“the general principles of law reco-*

2 M. Paunović, B. Krivokapić, I. Krstić /2023/, *Međunarodna ljudska prava*, Pravni fakultet Univerziteta u Beogradu, Beograd, pp. 177–178.

gnized by the community of nations”/“les principes généraux de droit reconnus par l'ensemble des nations”). Iz izraza upotrebljenih u jednom i drugom teksta moglo bi se zaključiti da između izvora međunarodnog prava koje predviđa član 38. Statuta Međunarodnog suda pravde, formulacija iz Evropske konvencije se prvenstveno odnosi na izvor iz člana 38. stav 1. tačka c), „opšta pravna načela priznata od strane prosvetljenih/civilizovanih Naroda“, a formulacija iz Međunarodnog pakta na izvor iz člana 38. stav 1. tačka b), „međunarodni običaj, kao dokaz opšte prakse prihvaćene kao pravo“, ali mišljenja smo da i jedna i druga formulacija zapravo pokrivaju obe vrste izvora.

U vreme kada je donošena Povelja o Međunarodnom vojnom tribunalu (8. avgust 1945. godine), činjenja i nečinjenja koja bi odgovarala kasnije definisanom i inkriminisanom zločinu genocida već su bila smatrana za kažnjiva kao zločini protiv čovečnosti. Poreklo pojma zločina protiv čovečnosti, odnosno njihove inkriminacije, nalazi se u preambuli Haške konvencije o zakonima i običajima rata potpisane 29. jula 1899. godine tokom Prve haške konferencije mira (Haška konvencija iz 1899. godine bila je prvi sveobuhvatni međunarodni instrument koji je razvio pravila izvedena iz običajne prakse država u vreme rata), a zatim i u preambuli Konvencije o zakonima i običajima rata na kopnu, potpisane na Drugoj haškoj konferenciji mira, 18. oktobar 1907. godine (Četvrta haška konvencija iz 1907. godine). Preambule dve konvencije koristile su, u klauzuli nazvanoj (De) Martensova klauzula po ruskom predstavniku Fjodoru Fjodoroviču Martensu, na čije traženje je ta klauzula, inače do dana današnjeg predmet različitih tumačenja,³ uneta u preambulu Konvencije iz 1899. godine, termin „zakoni čovečnosti“ kao široki opseg vrednosti na kojima su zasnovana pravila i zabrane sadržane u njima:

„Dok se ne usvoji potpuniji kodeks ratnih zakona, Visoke strane ugovornice smatraju da je ispravno izjaviti da u slučajevima koji nisu obuhvaćeni pravilima koja su one usvojile, stanovništvo i zaraćene strane ostaju pod zaštitom i vladavinom principa međunarodnog prava, kako proizilaze iz običaja uspostavljenih između civilizovanih naroda, iz zakona čovečnosti i zahteva javne savesti.“

Haške konvencije odnosile su se na ratne zločine. Međutim, ti zločini su proisticali i predstavljali manifestaciju kršenja „zakona čovečnosti“, kao sveobuhvatnog koncepta kojim bi bila obuhvaćena i ona nedopustiva i nedopuštena postupanja koja još nisu stekla potpunu pravnu artikulaciju, poput „zločina protiv čovečnosti“.⁴ Ovo je potvrdio i Međunarodni vojni sud iz Nirnberga, konstatujući u presudi od 1. oktobra 1946. godine sledeće u pogledu Četvrte haške konvencije iz 1907. godine:

„Pravila kopnenog ratovanja izražena u Konvenciji nesumnjivo su predstavljala napredak u odnosu na postojeće međunarodno pravo u vreme njihovog usvajanja. Međutim, Konvencija je izričito navela da je to bio pokušaj ‘revizije opštih zakona i običaja ratovanja’, koje je tako priznala kao tada postojeće, ali do 1939. godine ova pravila utvrđena

3 A. Cassese /2000/, The Martens Clause: Half a Loaf or simply Pie in the Sky?, *European Journal of International Law*, № 1, pp. 187–216.

4 C. Bassiouni /2011/, *Crimes against Humanity, Historical Evolution and Contemporary Application*, Cambridge, pp. 86–166.

u Konvenciji priznale su sve civilizovane nacije i smatrala su se deklaracijom zakona i običaja ratovanja na koje se odnosi član 6 (b) Povelje.⁵

Sud je takođe konstatovao da ratni zločini na koje se odnosi član 6. stav 2. tačka b) Povelje međunarodnog vojnog suda, za koje je prethodno konstatovao da su bili „pokriveni članovima 46, 50, 52, i 56 Haške konvencije iz 1907. godine i članovima 2, 3, 4, 46 i 51 Ženevske konvencije iz 1929“, zapravo posebno određeni i inkriminirani segment zločina protiv čovečnosti, s tim što je opseg zločina protiv čovečnosti znatno širi i obuhvata i „nehumana dela“ koja nisu određena kao ratni zločini:

„od početka rata 1939. godine počinjeni su u velikim razmerama ratni zločini, koji su takođe bili zločini protiv čovečnosti; i ukoliko nehumana dela sadržana u optužnici, a počinjena nakon početka rata, nisu predstavljala ratne zločine, sva su počinjena u izvršenju ili u vezi sa agresivnim ratom, i stoga su predstavljala zločine protiv čovečnosti.“

U svakom slučaju, nacističkim zločincima u Nirnbergu se sudilo i za dela koja odgovaraju pojmu krivičnog dela genocida, ali su te radnje okvalifikovane kao „zločin protiv čovečnosti“, tako da nije bilo nedozvoljene retroaktivne primene krivičnog prava, jer su te radnje bile smatrane za krivična dela prema „opštim pravnim načelima koja priznaju civilizovani narodi“, odnosno prema „opštim pravnim principima koje priznaje zajednica naroda“.

Ni Adolfu Ajhmanu, jednom od ključnih inspiratora i aktera nacističkog „konačnog rešenja“ jevrejskog pitanja, ⁶ odnosno Holokausta, iako mu suđeno 1961. godine, kada je zločin genocida već uveliko bio inkriminisan Konvencijom o sprečavanju i kažnjavanju zločina genocida i u nacionalnim zakonodavstvima velikog broja država, nije suđeno za sam genocid, barem ne pod tim nazivom. Naime, Ajhman je optužen i osuđen za krivična dela predviđena Zakon o kažnjavanju nacista i nacističkih kolaboracionista iz 1950. godine i na osnovu tog zakona je bio optužen i osuđen po 15 tačaka optužnice, između ostalog za „zločine protiv jevrejskog naroda“ i „zločine protiv čovečnosti“, koji obuhvataju radnje koje odgovaraju krivičnom delu genocida. Ovo posebno važi za „zločine protiv jevrejskog naroda“, za koje Me-tju Lipman kaže:

„Zločin protiv jevrejskog naroda zahtevao je izvršenje raznih nabrojanih dela sa name-rom da se jevrejski narod uništi u celini ili delimično. To je uključivalo ubijanje Jevreja; nanošenje teških telesnih ili mentalnih povreda Jevrejima; stavljanje Jevreja u životne uslove sračunate da dovedu do njihovog fizičkog uništenja; nametanje mera usmerenih na sprečavanje rađanja među Jevrejima; prisilno premeštanje jevrejske dece u drugu nacionalnu ili versku grupu; uništavanje ili sknavljenje jevrejskih verskih ili kulturnih dobara od vrednosti; podsticanje mržnje prema Jevrejima. Osim uništavanja kulturnih dobara, ova definicija se zasniva na Konvenciji o genocidu iz 1948. godine.“⁷

5 *Judgement: The Law Relating to War Crimes and Crimes Against Humanity*, Yale Law School, The Avalon Project, Documents in Law, History and Diplomacy, доступно на: <https://avalon.law.yale.edu/imt/judlawre.asp>, poslednji pristup: 10. 11. 2025.

6 M. Lippman /2002/, *Genocide: The Trial of Adolf Eichmann and the Quest for Global Justice*, *Buffalo Human Rights Law Review* 8, pp. 47–53.

7 M. Lippman, *ibid.*, p. 67.

Imajući sve navedeno u vidu, kada govorimo o kolonijalnim genocidima, koji su uglavnom izvršeni dugo vremena pre inkriminisanja zločina genocida u Konvenciji o sprečavanju i kažnjavanju zločina genocida, pre svega mislimo na genocid u fenomenološkom smislu, kao pojavu koja ima određena svojstva koja su prisutna u konkretnim situacijama, a ne na samo krivično delo u pravnom smislu reči.

Treba pritom imati u vidu i činjenicu da je većina masovnih zločina koji odgovaraju pojmu genocida izvršena pre Haških konferencija mira i prvog pozivanja na zakone čovečnosti iz De Martensove klauzule, a deo njih čak i vekovima ranije, kada međunarodno pravo u modernom smislu reči još nije počelo da se uspostavlja i razvija, kada su i nacionalni pravni sistemi bili na rudimentarnom nivou, a nasilje, čak i masovno, još uvek ni na planu morala nije bilo predmet osude, već je smatrano prihvatljivim. A osim toga, čak i kada je međunarodno pravo počelo da se razvija, u jednom dugom periodu je bilo u značajnoj meri rezervisano samo za „civilizovani svet“, a to su evropski narodi, pre svega na prostoru same Evrope, ali i na prostorima van Evrope na koje su se vremenom širili. Na vanevropske narode, kao necivilizovane, međunarodno pravo prema tom stavu nije trebalo da se primenjuje. A u te „necivilizovane narode“ spadalo je domorodačko stanovništvo u kolonijama.⁸ Tako je general Lotar fon Trota, kolonijalni upravitelj Nemačke Jugozapadne Afrike i vrhovni komandant njenih kolonijalnih snaga, koji je, kako ćemo videti kasnije, bio ključni naredbodavac, organizator i realizator genocida nad plemenima Herero i Nama na prostoru današnje Namibije, 1909. godine tvrdio (i time pravdao svoju brutalnost prema domorodačkom stanovništvu, koja je dostigla nivo genocida) da rat u Africi ne može biti vođen u skladu sa Ženevskom konvencijom (u to vreme moglo je biti reći o tzv. Prvoj ženevskoj konvenciji ili, zvanično, Ženevskoj konvenciji za poboljšanje stanja ranjenih u vojsci na bojnom polju iz 1864. godine, koja je zamenjena, za odnose između potpisnica kasnije konvencije, Drugom ženevskom konvencijom, zvanično Konvencijom za poboljšanje stanja ranjenih i bolesnih u vojsci na bojnom polju iz 1864. godine).⁹

2. RAFAEL LEMKIN I EKSTENZIVNO SHVATANJE – GENOCID I KOLONIJALNI GENOCIDI

Kao što smo rekli, Rafael Lemkin je skovao reč genocid (naziv od grčke reči *genos*, što znači rod, porodica, pleme, rasa, i latinske reči *occidere* što znači ubiti) i njime zatim naslovio poglavlje IX svoje knjige „*Vladavina Osovine u okupiranoj Evropi*” objavljene u novembru 1944. godine. Naravno, kao Jevrejину, koji je živio u Poljskoj do nemačke invazije 1939, motiv za stvaranje pojma genocida i kasnije za zalaganje za njegovu inkriminaciju bio je nacistički genocid, pre svega onaj nad Jevrejima, Holokaust.

8 W. A. Schabas /2023/, *The International Legal Order's Colour Line: Racism, Racial Discrimination, and the Making of International Law*, Oxford, pp. 1–24 (Chapter entitled: “Civilized Nations’ and the Colour Line”).

9 J. Zimmerer /2024/, *From Windhoek to Auschwitz? Reflections on the Relationship between Colonialism and National Socialism*, Berlin, Boston, p. 190.

Ipak, Lemkin u okviru poglavlja IX svoje knjige „*Vladavina Osovine u okupiranoj Evropi*“, govori i o „ratovima za istrebljenje“ iz prošlosti, za koje nacistički postupci ukazuju da nisu prevaziđeni, navodeći (u fusnoti) sledeće:

„Kao klasični primeri ratova za istrebljenje u kojima su narodi i grupe stanovništva potpuno ili skoro potpuno uništeni, mogu se navesti sledeći: razaranje Kartagine 146. godine pre nove ere; razaranje Jerusalima od strane Tita 72. godine nove ere; verski ratovi islama i krstaški ratovi; masakri Albigena i Valdenza; i opsada Magdeburga u Tri-desetogodišnjem ratu [maj 1631]. Posebni masovni masakri dogodili su se u ratovima koje su vodili Džingis-kan i Tamerlan.“¹⁰

Da je Lemkin, koji je sam ukazivao na to da su masovna ubijanja kojima će kasnije dati ime bila predmet njegovog interesovanja od detinjstva,¹¹ kod osmišljavanja koncepta genocida imao u vidu i one zločine istrebljenja koji su se odigrali pre nacističkog genocida, sasvim jasno potvrđuje činjenica da je on u jesen 1933. godine uputio Društvu naroda jedan predlog u kome je izneo koncept onoga što će desetak godina kasnije nazvati genocidom, s tim što je za taj fenomen koji će kasnije tretirati kao jedinstven pojam u tom ranom predlogu koristio termine „varvarstvo“ (*“barbarity”*) i „vandalizam“ (*“vandalism”*), pri čemu je varvarstvo opisao kao pokušaj uništenja etničkih, verskih i drugih društvenih grupa, a vandalizam kao sistematski i organizovani napad na nasleđe ili prepoznatljivi duh i kreativnu prirodu jedne grupacije, koji čine njen jedinstveni kolektivni identitet.¹² Ovaj predlog naravno nije mogao da bude motivisan nacističkim genocidom do koga je došlo kasnije, a svakako nije bio ni plod neke apstraktne, teorijske spekulacije. Po prirodi stvari je bio zapravo posledica Lemkinovih saznanja o zlodelima iz bliže i dalje prošlosti.

A kao što se vidi, već te 1933. godine Lemkin je pojavu čijem je specifičnom inkriminisanju težio (i konačno uspeo u tome) i kojoj je dao ime, shvatao daleko šire od onoga kako je ona definisana u Konvenciji o sprečavanju i kažnjavanju zločina genocida, gde se ograničava samo na fizičko uništavanje grupe, a ne i na uništavanje drugih vrednosti vezanih za datu grupu, i to na njeno uništavanje samo kao „nacionalne, etničke, rasne ili religiozne grupe“, a ne na osnovu njenih drugih distinktivnih svojstava. Lemkin će takvo gledanje eksplicitno i na razrađen način izneti i u knjizi „*Vladavina Osovine u okupiranoj Evropi*“, gde će pod naslovom „tehnike genocida u različitim poljima“, navesti osam oblasti za koje kaže sledeće:

„Tehnike genocida, koje je nemački okupator razvio u različitim okupiranim zemljama, predstavljaju koncentrisani i koordinisani napad na sve elemente koji jedan narod čine narodom.“¹³

10 R. Lemkin /1944/, *Axis Rule in Occupied Europe*, Washington, p. 80.

11 Tako se navode sledeće Lemkinove reči autobiografskog karaktera:

„Čim sam mogao da čitam, počeo sam da gutam knjige o progonu verskih, rasnih ili drugih manjinskih grupa. Bio sam zapanjen opisom uništenja hrišćana od strane Nerona. Bačeni su lavovima dok je car sedeo smejući se u rimskoj areni.“

– preuzeto iz: H. Gallito /2025/, *A Usable Past: Raphael Lemkin on the Intersection of Colonialism, Religion, and Genocide*, *Webster Review of International History*, №. 2, p. 2.

12 H. Gallito, *ibid.*, p. 5.

13 R. Lemkin /1944/, *op. cit.*, p. 82.

A „svi elementi” o kojima je reč su: politički,¹⁴ društveni,¹⁵ kulturni,¹⁶ ekonomski,¹⁷ biološki,¹⁸ fizički,¹⁹ religiozni²⁰ i moralni.²¹ U Konvenciji o sprečavanju i kažnjavanju zločina genocida će se ovaj krug polja i za svako od polja karakterističnih tehnika koje su sprovodili nacisti svesti na fizičko uništenje, koje predstavlja samo segment nacističkog ostvarivanja genocida po Lemkinu, koji ima šire značenje od samog nameravanog „potpunog ili delimičnog uništenja” iz Konvencije. Po Lemkinovim rečima, sprovođenje genocida na fizičkom planu predstavlja „fizičko oslabljivanje, pa čak i uništenje nacionalnih grupa na okupiranim teritorijama” i ostvarivano je od strane nacista na tri načina: rasnom diskriminacijom u ishrani, ugrožavanjem zdravlja i fizičkim uništavanjem.

Naravno i kada se genocid posmatra kao pojava sadržana u biću krivičnog dela iz Konvencije, svi navedeni elementi iz Lemkinovog teksta, po pravilu su prisutni kao segmenti ukupnog tretmana date grupe. U svakom slučaju, kada su u pitanju kolonijalni genocidi, širi način na koji je Lemkin posmatrao koncept genocida u odnosu na ono što će ući u Konvenciju, čini da veći broj zlodela činjenih u kolonijama nad lokalnim stanovništvom od strane kolonizatora može biti smatran genocidom.

A krug masovnih zlodela koje su kolonizatori, pre svega evropski, sprovodili nad starosedelačkim stanovništvom kolonija je veoma širok i obuhvata i niz dela koja prema definiciji iz Konvencije ne mogu biti okvalifikovana kao genocid, iako nisu manje teška, a nekad su čak i po obuhvatu i po načinima izvršenja teža i gnušnija, što ćemo videti kasnije. I različiti stručnjaci, posebno oni van pravničke struke, će u „svoj” pojam genocida svrstavati širi ili užu krug takvih zlodela. O tome Hilari Galito, osvrćući se specifično na odnos doktrine prema kolonizatorskim zlodelima u Severnoj, Centralnoj i Južnoj Americi (ali njena konstatacija važi i za druga geografska područja), piše, ističući da postoji i tako široko shvatanje koje neka kolonizatorska zlodela u Južnoj Americi naziva holokaustom, što je izraz užu od genocida, koji se odnosi isključivo na nacistički genocid nad Jevrejima:

„Ulog je visok među naučnicima zainteresovanim za pitanje genocida u Americi (Severnoj, Centralnoj i Južnoj). S jedne strane, neki smatraju da je primena termina „genocid” na kolonijalizam doseljenika, posebno kada je povezan sa situacijama kada je uzrok smrti uglavnom nenameran (kao što je bolest), obmanjujuća. S druge strane, neki istoričari idu toliko daleko da koriste termin „holokaust” da bi opisali slučajeve genocida u Americi.”²²

Svoje shvatanje da u okviru pojma genocida spada širok krug istorijskih događaja i procesa, uključujući i neke od masovnih zločina izvršenih od strane ko-

14 R. Lemkin, *ibid.*, pp. 82–83.

15 R. Lemkin, *ibid.*, p. 83.

16 R. Lemkin, *ibid.*, pp. 84–85.

17 R. Lemkin, *ibid.*, pp. 85–86.

18 R. Lemkin, *ibid.*, pp. 86–87.

19 R. Lemkin, *ibid.*, pp. 87–89.

20 R. Lemkin, *ibid.*, p. 89.

21 R. Lemkin, *ibid.*, pp. 89–90.

22 H. Gallito, *op. cit.*, p. 2.

lonijalnih osvajača nad lokalnim, domorodačkim stanovništvom, Lemkin je izneo u nedovršenoj i neobjavljenoj knjizi o istoriji genocida, u čijem okončanju ga je osujetila prerana smrt 1959. godine, a u kojoj je Lemkin, kako navodi Džon Docker, „stvarao metod za analizu i diskusiju o genocidnim situacijama u antičkom svetu i evropskoj istoriji uopšte; metod koji je takođe nameravao da primeni na primere evropske kolonizacije širom sveta”.²³ Radi se o nedovršenom tekstu „Istorija genocida“ (*History of Genocide*), koji će Stiven Leonard Džejkobs objaviti, iza Lemkinovog dovršenog ali takođe za vreme autorovog života neobjavljenog „Uvoda u proučavanje genocida“ (*Introduction to the Study of Genocide*), kao drugi deo knjige pod naslovom „Lemkin o genocidu“ (*Lemkin on genocide*).²⁴ U knjizi „Istorija genocida“, tj. u napisanom delu te nedovršene knjige, u tri dela (toma/volumes) naslovljena „Antičko doba“ (*Antiquity*), „Srednji vek“ (*Middle Ages*) i „Moderna vremena“ (*Modern Times*) Lemkin govori o većem broju zločina i to među antičkim pod naslovima „Albigenezi“ (*The Albigensians*) i „Asirci“ (*Assyrians*), srednjovekovnim pod naslovima „Mongoli“ (*Mongols*) i „Mavari i Moriskosi“ (*Moors and Moriscos*), a o onima iz modernih vremena pod naslovima „Nemci u Africi“ (*The Germans in Africa*), „Asirci u Iraku ... hrišćani“ (*Assyrians in Iraq ... Christians*), „Hios“ (*Chios*), „Herero“ (*Hereros*), „Hugenoti“ (*Huguenots*), „Slučaj Mađarske“ (*The Case of Hungary*), „Progon katolika u Japanu u šesnaestom i sedamnaestom veku“ (*The Persecution of the Catholics in Japan in the Sixteenth and Seventeenth Centuries*), „Slučaj Poljske“ (*The Case of Poland*) i „Slučaj Španaca u Peru Inka“ (*The Case of the Spanish in the Peru of the Incas*). A prema onome što je navedeno u „Uvodu u proučavanje genocida“, u tri toma je planirano da se obradi i znatno veći broj zločina: Deo I – Antika: 1. Biblijski genocid, 2. Asirske invazije, 3. Genocid nad ranim hrišćanima, 4. Genocid nad paganima, 5. Kartagina, 6. Genocid u Galiji, 7. Genocid nad Keltima, 8. Genocid u Egiptu, 9. Genocid u Staroj Grčkoj; Deo II – Srednji vek: 1. Genocid nad Albigenzima, 2. Karlo Veliki, 3. Genocid u srednjovekovnoj Engleskoj, 4. Genocid od strane Gota, 5. Genocid od strane Huna, 6. Genocid nad Jevrejima, 7. Genocid od strane Mongola, 8. Genocid nad Mavarima i Moriskosima, 9. Francuzi na Siciliji, 10. Španska inkvizicija, 11. Genocid nad Valdenzima, 12. Genocid od strane Vikinga, 13. Krstaški ratovi; Deo III – Moderno doba: 1. Genocid Nemaca nad starosedeocima Afrike, 2. Asirci u Iraku, 3. Belgijski Kongo, 4. Bugarska pod Turcima, 5. Genocid nad Grcima, 6. Hios, 7. Grci pod Francuskom, 8. Grci u egzilu od turske okupacije, 9. Genocid Grka nad Turcima, 10. Genocid nad Romima, 11. Herero, 12. Haiti, 13. Hotentoti, 14. Hugenoti, 15. Mađarska pod Turcima, 16. Genocid nad američkim Indijancima, 17. Irska, 18. Genocid janjičara, 19. Genocid Japanaca nad katolicima, 20. Genocid nad poljskim Jevrejima, 21. Genocid nad ruskim Jevrejima, 22. Genocid nad Jevrejima u Jugozapadnoj Africi, 23. Genocid nad rumunskim Jevrejima, 24. Koreja, 25. Latinska Amerika, 26. Genocid

23 J. Docker /2004/, Raphael Lemkin's History of Genocide and Colonialism, *Paper for United States Holocaust Memorial Museum*, Center for Advanced Holocaust Studies, Washington DC, dostupno na: <chrome-extension://efaidnbmnnnibpcepclclefindmkaj/https://www.ushmm.org/m/pdfs/20040316-docker-lemkin.pdf>, poslednji pristup: 10. 11. 2025.

24 R. Lemkin /2012/, *Lemkin on genocide*, written by Raphael Lemkin, edited and introduced by Steven Leonard Jacobs, Lanham, Boulder, New York, Toronto – Plymouth.

nad Astecima, 27. Jukatan, 28. Genocid nad Inkama, 29. Genocid nad Maorima sa Novog Zelanda, 30. Genocid nad Menonitima, 31. Nirnberški procesi, 32. Parsi, 33. Srbi, 34. Sloveni, 35. Smirna, 36. Južna Afrika, 37. Genocid nad Stedingerima, 38. Tasmanci, 29. Jermeni, 40. Jugozapadna Afrika, 41. Starosedeooci Australije.

Iz ovog dugog spiska vidi se da je po Lemkinu veoma širok krug situacija mogao i trebalo da bude okvalifikovan kao genocid, tako da bi se moglo reći da je čitava istorija ljudskog roda obeležena zločinom kome je Lemkin dao ime. Kao što se može videti, na ovoj širokoj listi nalazi se i veći broj genocida koje su evropski kolonizatori izvršili nad kolonizovanim narodima praktično na svim kontinentima.

3. RESTRIKTIVNO SHVATANJE POJMA GENOCIDA I KOLONIJALNIH GENOCIDA

S druge strane, postoji i restriktivni pristup kod označavanja različitih istorijskih situacija, odnosno masovnih zločina nad domorodačkim stanovništvom od strane evropskih osvajača, kao kolonijalnih genocida. Taj pristup se, uz određene adaptacije i blaga proširenja, oslanja na Konvenciju o sprečavanju i kažnjavanju zločina iz 1948. godine i pridržava se nje. Tako je recimo izraelski Ariel univerzitetski centar za istraživanje i studije genocida (*The Ariel University Center for the Research and Study of Genocide*) na sledeći način određuje kolonijalne genocide:

„Termin „kolonijalni genocid“ pripisuje se genocidu koji su kolonijalne sile počinile u periodu pre 20. veka nad starosedelačkim narodima pod njihovom kontrolom, a posebno pre Holokausta. Slično savremenoj definiciji zločina genocida prema Konvenciji o sprečavanju i kažnjavanju zločina genocida („Konvencija o genocide“), kolonijalni genocid se takođe odnosi na slučajeve u kojima je došlo do masovnih namernih ubistava određene grupe. Međutim, kolonijalni genocid se razlikuje od modernog genocida u dva elementa: (1) Za razliku od uske definicije „genocida“ prema Konvenciji o genocidu, koja isključuje kulturne i političke genocide, kolonijalni genocidi se uglavnom odnose na slučajeve kulturnog i političkog genocida; (2) kolonijalni genocid karakteriše se kao genocid usporene prirode. To jest, u ovim slučajevima, fizičko uništenje starosedelačkog naroda možda nije direktno namećevano; nego, počiniozi značajno potkopavaju temelje postojanja starosedelačkih grupa kroz sistemsko ugnjetavanje ili namerno nepromišljenu politiku. Ove politike često su utemeljene u dehumanizujućem konstrukt autohtonosti, gde se autohtoni narodi opisuju kao „primitivne prepreke“ napretku civilizacije i kolektivnim interesima legitimne političke zajednice.

Moderni genocid i kolonijalni genocid se takođe razlikuju u pogledu odnosa između istrebljene grupe i grupe koja istrebljuje. Moderni genocid karakteriše istrebljenje manjinske grupe od strane vladajućih vlasti, dok kolonijalni genocid karakteriše istrebljenje autohtone većine od strane strane manjine pod pokroviteljstvom kolonija.

Kolonijalni genocid karakteriše invazija kolonijalnih sila u manje naseljena ili autohtona mesta, kako bi se preuzela kontrola nad prirodnim resursima koji se nalaze na tim mestima i obogatio se. Ove invazije su izazvale mnoge sukobe između

kolonijalnih sila i starosedelaca, jer su ogromne razlike u moći u korist kolonija učinile praktično nemogućim za starosedeoce da spreče preuzimanje.²⁵

Polazeći od ovakvog određenja, Ariel univerzitetski centar za istraživanje i studije genocida izdvaja šest istorijskih situacija, odnosno istorijskih procesa „u kojima su se dogodili kolonijalni genocidi, ili se tvrdi da su se dogodili“. To su:

1. *Kolumbovi genocidi nad narodom Taino na kraju XV i u prvoj polovini XVI veka* – prva dva kolonijalna genocida su izvršili, krajem XV i u prvoj polovini XVI veka, dakle koju deceniju nakon otkrivanja Amerike, vojnici Kristifora Kolumba protiv domorodačkog naroda Taino na Karipskim ostrvima. Prvi kolonijalni genocid počinjen je na Hispanjoli (ostrvo u Velikim Antilima koji danas čine države Dominikanska Republika i Haiti), od 1492. do 1514. godine. Genocid je počinila vojska Kristifora Kolumba nad domorodačkim Taino stanovništvom. Drugi je bio kolonijalni genocid u susednom Portoriku od 1509. do 1552. godine. I ovaj genocid je izvršila vojska Kristifora Kolumba nad pripadnicima naroda Taino.
2. *Genocid Engleza nad Indijancima u Konektikatu u XVII veku* – u Mistiku, Konektikat, od 1637. do 1638. godine, engleske snage su masakrirale Pekvot Indijance.
3. *Australija, XIX vek, genocid nad Aboridžinima i drugim domorocima* – Tokom praktično čitavog 19. veka, u australijskim kolonijama je počinjen genocid nad aboridžinskim narodima i stanovnicima Toresovog moreuza.
4. *Kalifornijski genocid u XIX veku* – Kolonijalni genocid u Kaliforniji počinile su Sjedinjene Države nad indijanskim plemenskim grupama. Ovaj genocid se dogodio u periodu od 1846. do 1873. godine, nakon američkog osvajanja Kalifornije u Meksičko-američkom ratu i kasnijeg priliva američkih doseljenika u taj region tokom kalifornijske zlatne groznice.
5. *Nemački genocid u Namibiji* – Kolonijalni genocid nad plemenima Herero i Nama, koji je počinila Nemačka Jugoistočna Afrika, odigrao se od 1904. do 1909. godine. Ovaj se genocid, o kome će biti više reči kasnije, smatra prvim modernim genocidom i nekom vrstom preteče Holokausta.

4. KLJUČNA DISTINKTIVNA SVOJSTVA KRIVIČNOG DELA GENOCIDA I NJIHOVO PRISUSTVO U ZLODELIMA KOLONIZATORA PREMA STAROSEDEOCIMA

Iz okvira definicije genocida iz Konvencije o sprečavanju i kažnjavanju zločina genocida možemo izdvojiti četiri ključna distinktivna svojstva koja su sva zapravo elementi postupanja „sa namerom da se potpuno ili delimično uništi jedna nacionalna, etnička, rasna ili religiozna grupa“:

25 Preuzeto sa internet stranice Ariel univerzitetskog centra za istraživanje i studije genocida (*The Ariel University Center for the Research and Study of Genocide*): <https://campuscore.ariel.ac.il/wp/rsg/colonial-genocide/>, poslednji pristup: 10. 11. 2025.

- a) Potrebno je postojanje namere – dakle, da bi postojao genocid nije dovoljno samo umišljajno postupanje. Naime, svako krivično delo ima svoj objektivni element (*actus reus*) i subjektivni element (*mens rea*). Objektivni element genocida čine radnje sadržane u tačkama od a) do e) člana II Konvencije o sprečavanju i kažnjavanju zločina genocida. Subjektivni element kod krivičnog dela genocida obuhvata dve stvari. Najpre, neophodno je postojanje direktnog umišljaja u odnosu na te radnje i njihove posledice (eventualni umišljaj ili nehat nisu dovoljni). Drugi segment je genocidna namera (*dolus specialis*). Zahtev za postojanjem direktnog umišljaja je nužna posledica zahteva za genocidnom namerom: naime, nemoguće je imati nameru da se izvršenjem određenih radnji i izazivanjem posledica tih radnji ostvari nameravani cilj (uništenje, potpuno ili u značajnom delu, određene grupe), a da se nema odnos htenja u odnosu na te radnje i njihove zabranjene posledice (a ne samo pristajanja na zabranjene posledice, što se traži kod eventualnog umišljaja, čije postojanje nije dovoljno za krivično delo genocida).²⁶
- b) Namera (*dolus specialis*) mora da se odnosi na fizičko uništenje, potpuno ili u značajnom delu, određene grupe – dakle sve van fizičkog uništenja, poput proterivanja stanovništva sa određene teritorije („etničko čišćenje“),²⁷

26 B. M. Rakić /2022/, Ustaški genocid nad Srbima – *dolus specialis* koji traje, *Časopis za političku teoriju i praksu „Napredak“*, № 2, pp. 73–74.

27 U presudi od 26. februara 2007. godine u sporu između Bosne i Hercegovine i Srbije (i Crne Gore) u slučaju koji se odnosi na primenu Konvencije o sprečavanju i kažnjavanju zločina genocida, Međunarodni sud pravde je konstatovao sledeće u pogledu pojma „etničkog čišćenja“, za koje je bosanskohercegovačka strana tražila da ga Sud podvede pod pojam genocida:

„Termin „etničko čišćenje“ često se koristio za označavanje događaja u Bosni i Hercegovini koji su predmet ovog slučaja ... U ovom trenutku biće zgodno razmotriti kakvo pravno značenje taj izraz može imati. U praksi se koristi, pozivajući se na određeni region ili područje, u smislu „činjenja područja etnički homogenim upotrebom sile ili zastrašivanja radi uklanjanja osoba datih grupa iz tog područja“ (S/35374 (1993), stav 55, Privremeni izveštaj Komisije stručnjaka). Ne pojavljuje se u Konvenciji o genocidu; zapravo, predlog tokom izrade Konvencije da se u definiciju uključe „mere koje imaju za cilj da obavežu članove grupe da napuste svoje domove kako bi izbegli pretnju naknadnog zlostavljanja“ nije prihvaćen (A/C.6/234). To može biti oblik genocida u smislu Konvencije samo ako odgovara ili spada u jednu od kategorija dela zabranjenih članom II Konvencije. Ni namera, kao pitanje politike, da se neko područje učini „etnički homogenim“, niti operacije koje se mogu sprovesti radi sprovođenja takve politike, ne mogu se same po sebi označiti kao genocid: namera koja karakteriše genocid jeste „uništenje, u potpunosti ili delimično“ određene grupe, a deportacija ili raseljavanje članova grupe, čak i ako se vrši silom, nije nužno ekvivalentno uništenju te grupe, niti je takvo uništenje automatska posledica raseljavanja. To ne znači da dela opisana kao „etničko čišćenje“ nikada ne mogu predstavljati genocid, ako su takva da se mogu okarakterisati kao, na primer, „namerno nametanje grupi životnih uslova sračunatih da dovedu do njenog fizičkog uništenja u potpunosti ili delimično“, suprotno članu II, stavu (c) Konvencije, pod uslovom da se takva radnja sprovodi sa neophodnom specifičnom namerom (*dolus specialis*), to jest sa ciljem uništenja grupe, za razliku od njenog uklanjanja iz regiona.“

– Predmet koji se odnosi na primenu Konvencije o sprečavanju i kažnjavanju zločina genocida (Bosna i Hercegovina protiv Srbije i Crne Gore), presuda, ICJ Reports 2007, stav 190.

O odnosu genocida i etničkog čišćenja videti u: U. V. Šuvaković, B. M. Rakić /2017/, Genocid i etničko čišćenje ili o odnosu dispozicije jednog međunarodnog krivičnog dela i jednog sociološko-politikološkog pojma, *Strani pravni život*, № 2, pp. 59–75.

uništenja kulture, identiteta i slično („kulturocid“), ne predstavlja konstitutivni element genocida, ali može da bude i često jeste njegov prateći element. Nakon Drugog svetskog rata, tokom osmišljavanja i rada na tekstu Konvencije o sprečavanju i kažnjavanju zločina genocida, bilo je pokušaja da se u inkriminaciju koja je stvarana unese širi krug postupaka, poput „kulturocida“ i „etničkog čišćenja“, ali ti pokušaji nisu urodili plodom, pa su takva postupanja ostala izvan obuhvata pravnog pojma genocida, već potpadaju pod neka druga dela, poput zločina protiv čovečnosti i, eventualno, nekih drugih krivičnih dela.²⁸

- c) Grupa koja predstavlja kolektivnu žrtvu genocida mora da bude nacionalna, etnička, rasna ili religiozna grupa – fizičko uništavanje drugih grupa, npr. političkih protivnika („politicide“) i slično, uprkos postojanja svih drugih elemenata, ne može činiti genocid.
- d) Genocidna namera mora da se odnosi, prema samoj odredbi člana II Konvencije o sprečavanju i kažnjavanju zločina genocida, na „potpuno ili delimično uništenje“ date grupe kao takve. Iako u Konvenciji, kada je u pitanju broj pripadnika grupe, nije određena donja granica neophodna za postojanje genocida, smatra se da je neophodno da se radi o „značajnom“, tj. „substancijalnom“ („*substantial*“) delu grupe,²⁹ odnosno, kako je Rafael Lemkin istakao 1950. godine tokom debate u američkom Senatu o ratifikaciji Konvencije o sprečavanju i kažnjavanju zločina genocida, „delimično uništenje mora biti znatnog karaktera, tako da utiče na celinu“.³⁰

28 Vilijam Šabas piše:

„Kada je radeno na nacrtu Konvencije, kažnjiva dela su podeljena u tri kategorije: fizički, biološki i kulturni genocid. Generalna skupština Ujedinjenih nacija je sasvim određeno glasala za isključenje kulturnog genocida iz Konvencije. Takođe je odbacila amandman Sirije prema kome bi kao čin genocida bilo uključeno ponašanje koje bi se danas moglo nazvati 'etničkim čišćenjem'. Sirijski amandman je glasio: 'nametanje mera kojima je cilj da se članovi grupe primoraju da napuste svoje domove kako bi izbegli pretnju naknadnog zlostavljanja'. Kada se Generalna skupština složila da uključi prisilno premeštanje dece, to je predstavljeno kao izuzetak od dogovorenog isključenja kulturnog genocida. Shodno tome, tumačenje definicije Konvencije koje uzima u obzir nameru njenih autora težiće da odbaci uključivanje kulturnog genocida i etničkog čišćenja i tumači reči „uništiti“ kao da su modifikovane rečima 'fizički' i 'biološki'“. W. A. Schabas /2009/, *What is genocide? What are the gaps in the convention? How to prevent genocide?*, *Politorbis*, № 2, p. 14.

29 B. M. Rakić /2022/, *op. cit.*, pp. 75–76.

U obrazloženju pojma genocida iz svog Nacrta Zakonika o zločinima protiv mira i bezbednosti čovečanstva (*Draft Code of Crimes against the Peace and Security of Mankind*), koji je sačinjen 1996. godine na zahtev Generalne skupštine UN, a u kome je delo genocida definisano jednako kao u Konvenciji iz 1948. godine, Komisija za međunarodno pravo je konstatovala:

„... namera mora biti uništavanje grupe 'u celini ili delimično'. Nije neophodna namera da se postigne potpuno uništenje grupe sa svih strana zemaljske kugle. Bez obzira na to, zločin genocida po svojoj prirodi zahteva nameru da se uništi barem značajan deo određene grupe.“

– Document A/51/10: Report of the International Law Commission on the work of its forty-eighth session (6 May–26 July 1996), p. 45, in *Yearbook of the International Law Commission* 1996, Volume II, Part Two, dostupno na: https://legal.un.org/ilc/publications/yearbooks/english/ilc_1996_v2_p2.pdf, poslednji pristup: 10. 11. 2025.

30 Preuzeto iz presude Žalbenog veća Međunarodnog krivičnog suda za bivšu Jugoslaviju od 19. aprila 2004. godine u slučaju Tužilac protiv Radislava Krstića (predmet broj: IT-98-33-A), pa-

Dok kod zločinačkih postupanja kolonijalnih osvajača prema domorodačkom stanovništvu kolektivnu žrtvu čini po pravilu određena nacionalna, etnička, rasna ili religiozna grupa, mnoga od njih, čak i neka od najgnusnijih, sadržinski ne odgovaraju pojmu genocida, jer nije postojala „namera da se potpuno ili delimično uništi jedna nacionalna, etnička, rasna ili religiozna grupa“, a u nekim slučajevima čak ni direktni umišljaj u odnosu na radnje i posledice radnji koje bi odgovarale radnjama iz člana II tačke a) do e) Konvencije o sprečavanju i kažnjavanju zločina genocida.

Tako je, recimo, značajan deo stradanja, može se reći u nekim područjima bukvalno pomora, lokalnog stanovništva u Južnoj, Centralnoj i Severnoj Americi, bio prouzrokovan širenjem zaraznih bolesti koje su doneli Evropljani, a koje nisu do njihovog dolaska postojale na tim prostorima, pa lokalno stanovništvo nije posedovalo nikakav imunitet u odnosu na te bolesti, niti je znalo za lekove i druga sredstva koji bi ublažili simptome. Prema podacima koje iznosi Univerzitet Džordž Mejson iz Virdžinije, „... neke procene kažu da je 90-95% domorodačkog stanovništva Novog sveta umrlo od velikih boginja“ koje su doneli kolonizatori. Tako je broj stanovnika Astečkog Carstva, na prostoru današnjeg Meksika, sa 30 miliona 1518. godine pao na 3 miliona 1568. godine, i to zahvaljujući tome što su španske kolonizatorske trupe koje su na taj prostor sa Kube došle 1519. godine (trupe Hernana Kortesa) i 1520. godine (trupe Kortesovog rivala Panfila de Narvaesa) i koje su inicijalno trpele poraze od Asteka (čemu su, pored brojčane nadmoći domorodaca, doprineli i međusobni sukobi kolonizatora), donele virus varirole. Naime u jednom Narvaesovom brodu bio je vojnik zaražen velikim boginjama, koji je umro i čije je telo ostavljeno prilikom povlačenja španske vojske. U dodiru sa lešom tog vojnika bolest je prešla na Asteke, proširila se i izazvala pomor, nakon koga je Kortes (koji je prethodno eliminisao de Narvaesa kao konkurenta) lako osvojio taj prostor. Slično se dogodilo i sa Inkama nekoliko godina kasnije, kada je po nekim procenama njih 60% do 90% pomrlo od velikih boginja, kao i sa severnoameričkim Indijancima sa obale Masačuseca, kojih je 1617–1619. godine pomrlo čak 90%.³¹ Najgore su prošli starosedeoci karipskih ostrva, koje je variola „zbrisala sa lica zemlje”.³² Iako se u ovim slučajevima radilo o masovnom pomoru usled bolesti koje su među lokalno

ragraf 10, preuzeto sa: <https://www.icty.org/x/cases/krstic/acjug/bcs/kras-aj040419b.pdf>, poslednji pristup: 10. 11. 2025.

31 Dostupno na sledećoj internet adresi: <chrome-extension://efaidnbmnnnibpcajpcgclefindmkaj/https://mason.gmu.edu/~alaemmer/disease/smallpox.pdf>, poslednji pristup: 10. 11. 2025.

32 U jednoj studiji koju je objavila Svetska zdravstvena organizacija, o demografskom uticaju velikih boginja u Latinskoj Americi rečeno je sledeće:

„Najdublje demografsko dejstvo evropskih osvajanja, izazvano u velikoj meri velikim boginjama, proizvedeno je na domoroce na Karipskim ostrvima, gde je čitavo stanovništvo praktično zbrisano, da bi na njegovo mesto došli afrički robovi i španski osvajači i njihovi potomci. Na samom kontinentu, brojnost indijanskog stanovništva carstva Asteka i Inka je omogućio njihov opstanak; preko polovine sadašnjeg stanovništva Meksika, zemalja Srednje Amerike, Bolivije, Kolumbije, Ekvadora, Paragvaja, Perua i Venecuele su indijanskog porekla; na drugim mestima u Severnoj i Južnoj Americi, oni čine malobrojnu manjinu.“

Naravno, procentualna zastupljenost indijanskog stanovništva u pobrojanim državama ne dovodi u pitanje činjenicu da je pomor njihovih predaka nakon dolaska španskih konkvistadora imao

stanovništvo doneli kolonijalni osvajači i iako je taj pomor olakšao kolonizatorima osvajanje Novog sveta, nema dokaza da je bolest širena namerno, pa se ne može govoriti o postojanju genocidne namere (čak ni umišljaja, pa možda čak ni nehata), a samim tim ni genocida.

Ipak, postoji bar jedna situacija kada su kolonijalni osvajači svesno, sa namerom izazivanja pomora, sproveli širenje velikih boginja među domorocima. Naime, u vreme tzv. „Francuskog i indijanskog rata“ (*French and Indian War*) koji je vođen od 1754. do 1767. godine između britanskih i francuskih kolonizatora u Severnoj Americi, uz podršku lokalnih plemena i jednoj i drugoj strani, došlo je i do tzv. „Pontijakove pobune“ (*Pontiac Rebellion*), oružanog sukoba koji je vođen između 1763. i 1766. godine u regionu Velikih jezera između Britanaca i saveza starosedećkih plemena koje je predvodio poglavica plemena Otava (*Ottawa* ili *Odawa*) Pontijak, a čiji je razlog bilo britansko zauzimanje indijanskih teritorija nakon poraza Francuza i novog, nepovoljnijeg tretmana starosedećih. Tokom te pobune, u proleće 1763. godine, starosedeoci iz indijanskih plemena Delaver, Šoni i Mingo (*Delaware, Shawnee, and Mingo Indians*) su opkolili britansko vojno utvrđenje Fort Pit (*Fort Pitt*) i Britanci su uspeli da pobede zahvaljujući tome što su uspeli da, svesno i sa namerom, indijanskim pregovaračima predaju ćebice iz bolnice gde su lečeni bolesnici od velikih boginja, što je izazvalo pomor među Indijancima. Elizabet Fen, polazeći od dokumenata iz tog vremena, iznosi detalje ovog događaja. Fort Pitom je komandovao kapetan Simeon Ekije (Simeon Ecuyer), koji je o stanju u utvrđenju, uključujući i slučajeve obolelih od velikih boginja koji su izolovani u posebnu bolnicu, obavestio pismom od 16. juna 1763. godine, svog pretpostavljenog pukovnika Henrija Bukea (*Henry Bouquet*) u Filadelfiji, a ovaj zatim svog nadređenog, generala Džefrija Amhersta (*Jeffery Amherst*) vrhovnog komandanta britanskih snaga u Njujorku. U razmeni pisama između dvojice oficira zabeležena je razmena mišljenja, predloga i naređenja o namernom širenju velikih boginja među Indijancima. Primivši informaciju o stanju u utvrđenju sadržanu u Bukeovom pismu od 23. juna 1763. godine, Amherst je Bukeu u pismu od 7. jula predložio sledeće: „Zar se ne bi moglo smisliti da se velike boginje pošalju među ta nezadovoljna plemena Indijanaca? Moramo, u ovoj prilici, upotrebiti svaku moguću strategiju da ih (brojčano) smanjimo.“ Buke mu je u pismu od 13. jula odgovorio: „Pokušaću da zarazim Indijance pomoću ćebadi koja im padnu u ruke, vodeći računa da se i sam ne zarazim.“ Na to mu je Amherst, u pismu od 16. jula dao odobrenje, odnosno imajući u vidu odnos subordinacije, naređenje: „Dobro bi bilo da pokušate da zarazite Indijance pomoću ćebadi, kao i da isprobate svaku drugu metodu koja može poslužiti istrebljenju ove odvratne rase.“ Postoje pokazatelji da je do predaje zaraženih stvari Indijancima došlo i pre citirane prepiske (dnevnik jednog trgovca, Vilijama Trenta/*William Trent*/, koji je bio u utvrđenju, u kome je na dan 23. juna upisano da su dvojici izaslanika plemena Delaver koji su došli da pregovraju u utvrđenju data dva zaražena ćebeta i jedna maramica iz bolnice specijalno napravljene za velike bogi-

genocidne razmere. Pitanje je samo da li je do zaraze došlo slučajno ili je, makar u nekim oblastima, bila namerno izazvana.

– F. Fenner *et al.*, /1988/, *Smallpox and its eradication*, Geneva, p. 238.

nje, kao i faktura Trentove firme u kojoj se govori o „nadoknadi uaturi stvari koje su oduzete od ljudi u bolnici radi prenosa malih boginja Indijancima”, pri čemu je navedeno da se radi o dva čebeta i jednoj maramici). U svakom slučaju, ovde se radi o situaciji korišćenja neke vrste „biološkog oružja” kojim su pripadnici određene etničke grupe ubijani sa namerom da budu istrebljeni.³³

Jedno od najmračnijih poglavlja sveukupno mračnog evropskog kolonijalizma širom sveta bio je period vladavine belgijskog kralja Leopolda II Slobodnom Državom Kongo u periodu od 1885. do 1908. godine. Teritorija Slobodne Države Kongo je data na upravljanje Leopoldovoj „humanitarnoj” organizaciji na Berlinskoj konferenciji održanoj 1884. i 1885. godine i belgijski monarh je preko svojih kolonijalnih upravnika uveo brutalni sistem eksploatacije stanovništva koje je primoravano na prinudni rad na skupljanju prirodne gume u krajnje nehumanim uslovima za bednu naknadu. U rad su uključena i deca, neispunjenje visoko postavljanih radnih normi (kvota skupljene prirodne gume) kažnjavano je ubijanjem od strane pripadnika kolonijalnih snaga reda (*Sprovođenje zakona*), a kao dokaz izvršene kazne odsecane su ruke ubijenih i predavane nadređenima, s tim što bi nekad, da bi uštedeli municiju (koja je bila u deficitu), pripadnici snaga reda „varali” tako što bi kažnjeniku samo odsecali ruke i pustili ga (mnogi su ipak umirali od sepse). Radi primoravanja na besomučan rad primenjivana je i praksa zatvaranja i držanja kao talaca članova porodica zaposlenih crnaca ili seoskih starešina sela koja nisu dostigla traženu kvotu skupljene gume. Zbog nametnutih uslova života vladali su glad i bolesti. Postojali su i posebni kampovi za kidnapovanu decu, koja su pokrštavana, primoravana da rade i izrabljivana na druge načine, a u kojima je ogroman procenat dece umirao. Gubitak u ljudstvu (usled ubistava, bolesti, gladi i smanjenja nataliteta) je teško proceniti, ali su svi saglasni da se broji milionima, a neke procene idu i do 10, pa čak i 15 miliona. Ovo po gnusnosti teško dostižno postupanje kolonijalnih vlasti prema lokalnom stanovništvu neki autori označavaju izrazom genocid, neki čak koriste i reč holokaust. Ipak, namera kolonijalnih vlasti na čelu sa monarhom bila je besomučna radna eksploatacija, a smrt lokalnih stanovnika nije bila ono čemu se težilo, već je bila prateća pojava, zastrašujuća i masovna, ali ipak prateća u odnosu na nameru izvlačenja što većeg profita zastrašujućim iskorišćavanjem rada domorodaca. Kako nema genocidne namere, nema ni genocida. Ali ovaj zločin u skoro četvrtvekovnom trajanju pokazatelj je da je moguće i veće i gnusnije zlo od „zločina nad zločinima”.³⁴

33 E. A. Fenn /2000/, Biological Warfare in Eighteenth-Century North America: Beyond Jeffery Amherst, *The Journal of American History*, № 4, pp. 1553–1558.

34 A. C. Doyle /1909/, *The Crime of the Congo*, London; A. Roes /2010/, Towards a History of Mass Violence in the Etat Indépendant du Congo, 1885–1908, *South African Historical Journal*, № 4, pp. 634–670; B. Beal /2014/, An Examination of the Instability and Exploitation in Congo From King Leopold II's Free State to the 2nd Congo War, *HIM 1990-2015*, p. 1655; S. Johnson /2014/, King Leopold II's Exploitation of the Congo from 1885 to 1908 and its Consequences, *HIM 1990-2015*, p. 1642; F. Losing /2020/, *A Crisis of Whiteness in the Heart of Darkness, Racism and the Congo Reform Movement*, transcript Verlag, Bielefeld; R. G. Weisbord /2003/, The King, the Cardinal and the Pope: Leopold II's genocide in the Congo and the Vatican, *Journal of Genocide Research*, № 1, pp. 35–45.

5. NACISTIČKI GENOCIDI I KOLONIJALNI GENOCIDI

Iako je, kao što smo videli, kod osmišljavanja pojma genocida i zalaganja za njegovu inkriminaciju Rafael Lemkin imao u vidu ne samo nacističke genocide, već i niz masovnih zločina prema različitim nacionalnim, etničkim, rasnim, religijskim i drugim grupama praktično tokom čitave pisane istorije čovečanstva, ipak su nacistički zločini istrebljenja, a pre svega onaj izvršen prema Jevrejima, tj Holokaust, odigrali ključnu ulogu kod etabliranja genocida kao „zločina nad zločinima“ kako na međunarodnopravnom, tako i na nacionalnim pravnim nivoima. Zbog same težine nacističkih zločina istrebljenja, pre svega Holokausta, nacistički genocidi su na neki način, uprkos činjenici da su inkriminacija iz Konvencije o sprečavanju i kažnjavanju zločina genocida i na njoj zasnovane definicije genocida iz nacionalnih zakonodavstava dovoljno široke i uopštene da mogu da pokriju i pokrivaju daleko širi krug situacija, ostali centralni reper kod utvrđivanja, na teorijskom i praktičnom nivou, da li je određene zločine moguće okvalifikovati kao genocid.

Konstatujući da je „(n)emački rat protiv Poljske i SSSR-a bio ... nesumnjivo najveći kolonijalni osvajачki rat u istoriji“,³⁵ i citirajući Hitlerove reči, kada on kaže: „(t)eritorija Rusije je naša Indija, i kao što Englezi vladaju Indijom sa samo šačicom ljudi, tako ćemo i mi upravljati ovom našom kolonijalnom teritorijom“,³⁶ ali i primetivši da se „Treći rajh i njegovi ekspanzionistički poduhvati generalno ne razmatraju u akademskom svetu iz perspektive istorije kolonijalizma“,³⁷ Jirgen Cimerer, u knjizi „Od Vindhuka do Aušvica? Razmišljanja o odnosu između kolonijalizma i nacionalsocijalizma“, analizira strukturalne sličnosti između nacističkog ekspanzionizma i kolonijalizma, kao i između nacističke genocidne politike, na prvom mestu Holokausta, s jedne, i kolonijalnih genocida sa druge strane, i zaključuje sledeće:

„Evropski kolonijalizam ... i nacistička politika ekspanzije i ubistava počivaju na fundamentalno sličnim konceptima ‘rase’ i ‘teritorije’, ili ‘rase’ i (životnog) ‘prostora’ ...

Razmatrajući različite fenomene koji su oblikovali nacističku politiku u Istočnoj Evropi – rat za uništenje, okupacionu politiku i genocid – stalno se suočavamo sa dva koncepta koja povezuju ove fenomene. Prvi je rasizam, koji je objedinjujuća nit različitih aspekata nacističke ideologije i prakse; drugi je *Großraumpolitik* (politika velikog prostora) sa njom povezanom ‘ekonomijom uništenja’ ...

Oba koncepta, ‘rasa’ i ‘prostor’, takođe su bila u srži kolonijalizma.“³⁸

Rasizam je centralni element nacističke ideologije i, može se reći, ključni distinktivni element u odnosu na neke srodne autoritarne ideologije, poput italijanskog fašizma u ranijoj fazi (pre „prilagođavanja“ nacizmu) ili španskog falangizma. Objavljena i obrazložena u „Majn kampfu“, Hitlerova rasistička shvatanja, prema kojima su Nemci viša, arijevska rasa, a drugi narodi su poredani na nižim mesti-

35 J. Zimmerer, *op. cit.*, p. 125.

36 Hitler, 17 September 1941, in: A. Hitler, *Monologe im Führerhauptquartier*, ed. Werner Jochmann, Hamburg, 1980, pp. 60–64. Preuzeto iz: J. Zimmerer, *op. cit.*, p. 125.

37 J. Zimmerer, *op. cit.*, p. 125.

38 J. Zimmerer, *op. cit.*, pp. 130–132.

ma na hijerarhijskoj lestvici (na čijem dnu su narodi poput Jevreja i Roma, koji su postali predmet istrebljenja), svoj su izraz našla u Nirnberškim rasnim zakonima iz 1935. godine (Zakon o državljanstvu Rajha i Zakon o zaštiti nemačke krvi i nemačke časti), u prihvatanju i primeni eugeničkih principa i u nizu drugih elemenata ugrađenih u svakodnevnicu Nemačke i okupiranih teritorija, a kulminacija u realizaciji tih shvatanja dostignuta je sprovođenjem Holokausta nad Jevrejima i genocida nad Romima i nekim slovenskim narodima. Rasizam uopšte, pa i onaj nacistički, manifestuje se na dva načina: jedan je nipodaštavanje drugih naroda, odnosno njihovo tretiranje kao niže vrste do nivoa potpune dehumanizacije, a drugi je mržnja prema tim drugim narodima. Ova kombinacija je neophodna da bi pokrenula pripadnike jedne grupe na izvršenje tako gnusnog i masovnog zločina kakav je genocid.

Što se prostora tiče, on je u nacističkoj ideologiji izražen kroz ideju „životnog prostora“ (*Lebensraum*), geopolitičkog koncepta koji se vezuje za nemačkog geografa Karla Haushofera, koji je Hitler prihvatio i izneo ga u „Majn Kampf-u“, a prema kome nemački narod, kao pripadnici više, arijevske rase, ima potrebu za širokim životnim prostorom koji daleko prevazilazi granice Nemačke. Koncept „lebensrauma“ je svoj izraz našao na prvom mestu u tajnom planu nazvanom „Generalni plan Istok“ (*Generalplan Ost*), sačinjenom u periodu od 1939. do 1942. godine, koji je predvideo kolonizaciju istočne Evrope, koja je sprovedena kroz politiku „prodora na istok“ (*Drang nach Osten*), i koja je podrazumevala čišćenje osvojenih teritorija od stanovništva, pre svega slovenskog, koje je tu živelo (putem etničkog čišćenja i genocida). Treba ovde primetiti da Holokaust i genocid nad Romima, u čijem korenu je bio duboko usađeni rasizam, nisu bili skopčani sa prostornim širenjem, jer ni Jevreji ni Romi nisu bili koncentrisani na određenom prostoru već su bili rasuti u svim zemljama u kojima su živeli. Ali ta veza postoji kod masovnog ubijanja pripadnika slovenskih naroda, od kojih je jedan i srpski narod, koji je bio žrtva jednog od najtežih genocida u Drugom svetskom ratu, u nemačkoj marionetskoj Nezavisnoj Državi Hrvatskoj.

Kada je reč o kolonijalnim osvajanjima koja su evropske države vršile širom sveta, u samoj njihovoj suštini je bilo osvajanje i zauzimanje teritorija, sa prvenstvenim ciljem korišćenja prirodnih bogatstava sa njih i iskorišćavanja radne snage lokalnog domorodačkog stanovništva. Ambicije za prostornim širenjem su bile tako ogromne da su granice osvojenog prostora išle donde dokle su fizičke mogućnosti kolonizatora dozvoljavale. Najbolji pokazatelj je Britanska Imperija, „carstvo u kome sunce nikad ne zalazi“. Preduslov za besomučno osvajanje teritorija na kojima živi domorodačko stanovništvo, pljačkanje prirodnih bogatstava koje pripada tom stanovništvu, a neretko i lične imovine tog stanovništva i za iskorišćavanje radne snage domorodaca je po pravilu rasisički odnos prema tom stanovništvu. U slučaju kolonijalnih osvajanja taj rasizam je u najvećem broju slučajeva skopčan sa razlikama u boji kože koje predstavljaju dodatni osnov za nipodaštavanje i dehumanizaciju tog stanovništva, za indiferentnost prema bilo kakvoj njihovoj patnji i, konačno i za mržnju, posebno u situacijama ako bi domoroci pružili otpor pljačkanju i izrabljivanju koje je često dostizalo nepodnošljive razmere. Rasizam prema domorodačkom stanovništvu na osvajanim vanevropskim prostorima, odnosno njihov tretman kao niže vrste, nalazio je svoj izraz u pravu, i to kako u pravnim pravilima koja su ko-

lonizatori uspostavljali na osvojenim područjima, tako i na nivou međunarodnog prava. Naime, klasično međunarodno pravo, tj. oni principi i pravila međunarodnog prava koji su se razvijali od renesanse do početka 20. veka, bili su fokusirani na odnose između evropskih suverenih država i njihove globalne interese, uključujući kolonijalizam i intervenciju velikih evropskih sila u neevropskim državama, a nisu pružali nikakvu zaštitu neevropljanima i njihovim zajednicama. Izraz ovog stanja su reči Lotara fon Trote (*Lothar von Trotha*), komandanta kolonijalnih trupa u Nemačkoj Jugozapadnoj Africi, o kome će više reći biti kasnije, koji je izjavio da rat u Africi ne može biti vođen „u skladu sa Ženevskom konvencijom“.³⁹ Citirali smo napred naredbu britanskog generala Džefrija Amhersta, upućenu pukovniku Henriju Bukeu u pismu od 16. jula 1763. godine, kojom mu nalaže da pokuša da zarazi Indijance pomoću čebadi, kao i da „isproba svaku drugu metodu koja može poslužiti istrebljenju ove odvratne rase“.

6. GENOCID NAD PLEMENIMA HERERO I NAMA U NEMAČKOJ JUGOZAPADNOJ AFRICI KAO JASAN PRIMER KOLONIJALNOG GENCIDA I NJEGOVA VEZA SA NACISTIČKIM GENOCIDIMA

Kolonijalni genocid nad plemenima Herero i Nama, koji je počinila Nemačka Jugoistočna Afrika, a koji se dogodio od 1904. do 1909. godine, prvi je genocid počinjen u XX veku i smatra se prvim modernim genocidom i nekom vrstom preteče Holokausta.⁴⁰ Za razliku od mnogih drugih zlodela koja su kolonijalni osvajači širom sveta tokom vekova vršili nad lokalnim stanovništvom, gde nedostaje namera uništenja pa se, uprkos svom gnusnom karakteru, teško mogu podvesti pod pojam genocida, u pogledu zločina nad plemenima Herero i Nama, usled jasnog dokaza o genocidnoj nameri, postoji visok stepen saglasnosti da taj zločin odgovara pojmu genocida, onako kako je on definisan u Konvenciji iz 1948. godine.

Videli smo da su prema Jirgenu Cimereru i kolonijalizam i nacizam, tj. nacistički genocidi, skopčani sa rasizmom i sa borbom za prostor.

Nemački kolonijalizam, kao uostalom i svaki drugi, u osnovi je predstavljao osvajanje prostora za eksploataciju, ali on ima svoje istorijske specifičnosti, koje su verovatno bile od uticaja na postupke nemačkih kolonijalnih vlasti, kao što su iste istorijske specifičnosti uticale na ukupnu nemačku politiku, pre svega spoljnu. Nai-

39 Radi se o Prvoj ženevskoj konvenciji, tj. Konvenciji za poboljšanje položaja ranjenika u vojsci na kopnu, potpisanoj u Ženevi 22. avgusta 1864. godine. „Politik und Kriegsführung“, u *Der Deutschen Zeitung*, od 3. februara 1909. godine. Citirano prema: J. Zimmerer, *op. cit.*, p. 146.

40 O genocidu nemačkih kolonijalnih vlasti u Nemačkoj Jugozapadnoj Africi nad narodima Herero i Nama i odnosu tog genocida i nacističkih genocida detaljnije u: J. Zimmerer, *op. cit.*; I. V. Hull /2003/, *Military Culture and the Production of 'Final Solutions' in the Colonies: The Example of Wilhelminian Germany*, in: *The Specter of Genocide, Mass Murder in Historical Perspective*, Cambridge, pp. 141–162; M. Häußler /2011/, *From destruction to extermination: Genocidal escalation in Germany's war against the Herero*, *Journal of Namibian Studies* 10, pp. 55–81; H. Melber /2024/, *Colonialism, Genocide and Reparations: The German-Namibian Case*, *Development and Change*, № 4, pp. 773–799.

me, budući da je do formiranja/ujedinjenja nemačke države došlo tek 1871. godine posle Francusko-pruskog rata, Nemačka je kasno ušla u evropsku trku za kolonijama (slično je bilo i sa uspostavljanjem zona uticaja u na samom evropskom kontinentu).

Počev od 1884–1885. godine, kada je održana Berlinska konferencija sa ciljem upravo regulisanja kolonijalnih poseda u Africi, pa do 1900. godine, Nemačka je pristupila uspostavljanju svojih kolonijalnih poseda i to na sledeći način:

- 1884. godine Jugozapadna Afrika (današnja Namibija, tada Nemačka Jugozapadna Afrika), Kamerun i Togo su proglašeni za „posede pod nemačkom zaštitom“;
- Severni deo Papue-Nove Gvineje je od 1884. godine takođe bio nemački protektorat i zvao se Kaiser-Wilhelmsland;
- 1886. godine nemačkim kolonijalnim posedima je pridodata Istočna Afrika, tj. Nemačka Istočna Afrika, koju su činile današnja Tanzanija i delovi Ruande i Burundija;
- do kraja XIX veka nemačkim kolonijalnim posedima je pridodat i širok krug ostrva u Pacifiku;
- Zakup kineskog zaliva Đaodžou/Kjaučou uspostavljen je 1899. godine.

Nemačku kolonijalnu upravu u svim navedenim područjima karakterisao je visok stepen surovosti prema lokalnom stanovništvu. U osnovi te surovosti nalazila se potreba za što bržim i potpunijim stabilizovanjem kolonijalne uprave i što intenzivnijom eksploatacijom, ali i duboko rasistički odnos prema domorocima, koji su tretirani kao niža vrsta, ispod ljudskog nivoa.

U svim nemačkim kolonijama broj nastanjenih Nemaca nikada nije dostigao 50.000 ljudi, ali je nemački kolonijalizam odneo, na različit načine (pre svega kroz sukobe sa kolonizatorima i kolonizatorsko nasilje), više od milion života pripadnika kolonizovanih domorodačkih naroda.

Nasilje nad domorodačkim stanovništvom bilo je prisutno u svim nemačkim kolonijalnim posedima. Ono je bilo kontinuirano, ali je bilo perioda kada bi eskaliralo. Najveći intenzitet nasilje je dostiglo u sledećim epizodama:

- Od 1890. do 1898. rat protiv pobunjenog naroda Hehe u Nemačkoj Istočnoj Africi predstavljao je neku vrstu treninga i izgradnju nemačkog vojnog i oficirskog kadra koji će učestvovati u kasnijim zlodelima, koje sve karakteriše uništavanje grupa koja su pružala otpor surovoy nemačkoj vladavini.
- Od 1904-1908. godine Nemci su vodili rat protiv naroda Herero (koristi se i ime Ovaherero) i Nama u Nemačkoj Jugozapadnoj Africi i tada je počinjen prvi genocid u XX veku.
- Od 1905-1907. godine Nemci su ratovali protiv Madži Madžija (ili Magi Magi – *Maji Maji*) u Nemačkoj Istočnoj Africi, primenjujući politiku spaljene zemlje.
- U Kamerunu i u Togu su učestalo sprovedene „Kaznene ekspedicije“.

U navedenim sukobima likvidirano je ukupno više stotina hiljada domorodaca.

Nemački kolonisti su bili ohrabrivani da oduzimaju zemlju i stoku od starosjedelačkih naroda Herero i Nama, a da te stanovnike smeštaju u rezervate i da ih pokoravaju kao robove.

Jedan događaj je značajno doprineo nezadovoljstvu pripadnika naroda Herero. U januaru 1903. godine, nemački trgovac po imenu Ditrih pešačio je sa svog imanja do obližnjeg grada Omarurua da kupi novog konja. Na pola puta do Ditrihovog odredišta, zaustavila su se kola koja su prevozila sina poglavice Hereroa, njegovu ženu i njihovog sina. U znak ljubaznosti, prema uobičajenoj praksi u Hererolandu, poglavičin sin je ponudio Ditrihu da ga poveze. Međutim, te noći, Ditrih se jako napio i nakon što su svi zaspali, pokušao je da siluje ženu poglavičinog sina. Kako se ona opirala, Ditrih je pucao u nju i ubio je. Negirao je ubistvo, a u prvom stepenu je bio oslobođen optužbe, što je izazvalo ogromno nezadovoljstvo. Osuđen je tek u drugom stepenu.

Pritisnuti okrutnom nemačkom kolonijalnom vladavinom i eksploatacijom, pripadnici naroda Herero i naroda Nama pobunili su se tokom 1904. godine protiv nemačke kolonijalne vlasti.

Najpre su se pobunili pripadnici plemena Herero i 12. januara 1904. godine ubili su više od 100 nemačkih doseljenika. Nemački general Lotar fon Trota je u avgustu 1904. godine pobedio pobunjenike iz plemena Herero u bici kod Voterberga. Nakon pobede proterao ih u je pustinju Omaheke, zapadni deo pustinje Kalahari, gde je većina njih umrla od dehidracije. Kada su pripadnici naroda Herero pobjegli u pustinju, fon Trota je naredio svojim trupama da otroju pojlja, odnosno izvore pijaće vode, podignu stražarske položaje duž linije od 240 kilometara i da pucaju na svakog Herera koji pokuša da pobjegne, bilo da je muškarac, žena ili dete.

U oktobru 1904. pobunili su se pripadnici naroda Nama. I oni su poraženi i sa njima je postupljeno na isti način.

Procene variraju, ali se kreću od 65.000–100.000 u ovom genocidu ubijenih pripadnika naroda Herero i oko 10.000 pripadnika naroda Nama.

Ono što je nesumnjivi pokazatelj postojanja genocidne namere je činjenica da je general Lotar fon Trota 2. oktobra 1904. godine potpisao naređenje (*Vernichtungsbefehl*) za ubijanje svih pripadnika plemena Herero koji bi se našli na prostoru pod nemačkom upravom (ono zapravo ima formu proglasa upućenog narodu Herero). U tom proglasu/naređenju između ostalog stoji:

„Svaki Herero koji se nađe unutar nemačke granice, sa ili bez puške ili stoke, biće pogubljen. Neću poštediti ni žene ni decu.“

Fon Trota je 22. aprila 1905. godine poslao je poruku i Namama, predlažući im predaju i pominjući sudbinu Herera. 10.000 pripadnika plemena Nama je ubijeno, a 9.000 odvedeno u koncentracione logore.

Iako prema Konvenciji o sprečavanju i kažnjavanju zločina genocida ne postoji poseban zahtev u pogledu toga ko bi mogao da bude izvršilac tog krivičnog dela, priroda tog zločina je takva da gotovo da podrazumeva učešće državnih struktura neke države u njemu. Udaljenost kolonijalnih poseda od metropole i labava struk-

tura uprave u kolonijama (učešće kompanija, privatnih vojski i slično u ime kolonijalne metropole i po njenom ovlašćenju i nalogu u upravljanju kolonijama i njihovoj eksploataciji) po prirodi stvari čini nešto indirektnijom uključenost samih država, kolonijalnih metopola u zločine u kolonijama, uključujući i one koja imaju svojstva genocida. Ipak, to ne umanjuje težinu zločina i mogućnost njihovog, makar neformalnog, određivanja kao genocida.

U slučaju Nemačke Jugozapadne Afrike, naređenje za istrebljenje domorodaca nije došlo iz samog Berlina, ali je Lotar fon Trota na položaju vojnog komandanta nemačkih kolonijalnih snaga u Jugozapadnoj Africi bio kao nameštenik i predstavnik nemačke države. Inače, Fon Trota je 2. novembra 1905. godine, odlikovan ordenom *Pour le Mérite* za svoje zasluge u Africi. Ipak, međunarodne i delimično unutarnemačke reakcije na zločine primorale su carskog kancelara Bernharda fon Bilova da zamoli cara Vilhelma II da razreši fon Trotu komande.

Može se reći da su u slučaju masakra pripadnika plemena Herero i Nama od strane nemačkih kolonijalnih vlasti prisutni svi elementi bića krivičnog dela genocida, pa čak i da su sve radnje iz člana II tačke a) do e) Konvencije o sprečavanju i kažnjavanju zločina genocida iz 1948. godine zastupljene u postupcima nemačkih kolonizatora.

Tek 1985. godine međunarodna zajednica je priznala masakr nad pripadnicima plemena Herero kao genocid. Naime, Bendžamin Vitaker, specijalni izvestilac UN za sprečavanje i kažnjavanje zločina genocida, objavio je izveštaj u kojem je klasifikovao masakr Herera kao genocid.⁴¹ Definišući događaje iz perioda 1904–1908. kao zločine, izveštaj je utvrdio da je pokušaj ubijanja i istrebljenja naroda Herero i Nama bio jedan od najtežih genocida 20. veka. Nemačka se, međutim, u početku protivila izveštaju; tek 2015. godine (više od jednog veka nakon genocida) Nemačka je prvi put priznala genocid nad pripadnicima naroda Herero i Nama.

Nemačka je u maju 2021. godine, zvanično priznala genocid nad narodima Herero i Nama, izvinila se i zatražila oprostaj od namibijskog naroda i žrtava genocida za „zločine nemačke kolonijalne vladavine“. Naime, Vlada Savezne Republike Nemačke i Vlada Republike Namibije usvojile su Zajedničku deklaraciju Savezne Republike Nemačke i Republike Namibije, pod nazivom „Ujedinjeni u sećanju na našu kolonijalnu prošlost, ujedinjeni u našoj volji za pomirenjem, ujedinjeni u našoj viziji budućnosti“ (parafirana 15. maja 2021, a njeno potpisivanje je objavljeno 28. maja 2021. godine), u kojoj, između ostalog, stoji:

„8. Ukupno, desetine hiljada muškaraca, žena i dece bilo je podvrgnuto naredbama i povezanim nemačkim politikama. Streljani su, vešani, spaljivani, izgladnjivani, na njima su vršeni eksperimenti, porobljeni su, radili do smrti, zlostavljani, silovani i lišeni poseda, ne samo svoje zemlje, imovine i stoke, već i svojih prava i dostojanstva.

9. Kao posledica toga, značajan broj zajednica Ovaherero i Nama je istrebljen delovanjem nemačke države. Veliki broj zajednica Damara i San je takođe istrebljen.

...

41 UN ECOSOC, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Revised and updated report on the question of the prevention and punishment of the crime of genocide prepared by Mr. B. Whitaker*, E/CN.4/Sub.2/1985/6, 2 July 1985.

10. Obe vlade potvrđuju da Preambula Konvencije Ujedinjenih nacija o sprečavanju i kažnjavanju zločina genocida (1948) „priznaje da je u svim periodima istorije genocid nanosio velike gubitke čovečanstvu”. Nemačka vlada priznaje da su gnusni zločini počinjeni tokom perioda kolonijalnog rata kulminirali događajima koji bi se, iz današnje perspektive, nazvali genocidom.”⁴²

Nešto kasnije u tekstu, sledi izvinjenje i prihvatanje izvinjenja:

„13. Nemačka se izvinjava i klanja se potomcima žrtava. Danas, više od 100 godina kasnije, Nemačka traži oprostaj za grehe svojih predaka. Nije moguće poništiti ono što je učinjeno. Ali patnja, nečovečnost i bol koje je Nemačka nanela desetinama hiljada nevinih muškaraca, žena i dece tokom rata na teritoriji današnje Namibije ne smeju biti zaboravljeni. To mora poslužiti kao upozorenje protiv rasizma i genocida.

...

14. Namibijska vlada i narod prihvataju izvinjenje Nemačke i veruju da ono otvara put trajnom međusobnom razumevanju i konsolidaciji posebnog odnosa između dva naroda, kako je potvrđeno dvema rezolucijama Bundestaga iz 1989. i 2004. godine. Ovo će zatvoriti bolno poglavlje iz prošlosti i označiti novu zoru u odnosima između naše dve zemlje i naroda. Ovaj odnos će karakterisati mnogo temeljitiji i značajniji proces pomirenja i rekonstrukcije, odgovarajuća kultura sećanja, kao i novi nivo političkog, ekonomskog i kulturnog partnerstva.”⁴³

Nemačka se takođe obavezala da će podržati Namibiju i potomke žrtava genocida sa 1,1 milijardom evra.

Postoji ne samo sličnost, nego i tesna veza genocida nad pripadnicima plemena Herero i Nama sa Holokaustom i drugim nacističkim genocidima i drugim zlodelima. Može se reći da između njih postoji i sadržinski i personalni kontinuitet.

Genocid u Nemačkoj Jugozapadnoj Africi sa početka XX veka i nacistički genocidi iz od tri i po decenije kasnije, slični su po više elemenata:

- U oba slučaja je prisutna rasistička idejna podloga;
- Vršeno je fizičko istrebljenje naroda;
- U oba slučaja su postojali koncentracioni logori u kojima su vršeni zločini nad zatvorenim žrtvama genocidne politike (u Nemačkoj Jugozapadnoj Africi posebno su po zlu poznati logori Swakopmund i Shark Island);
- U oba slučaja nad žrtvama su vršeni medicinski eksperimenti, pre svega da bi se istražile, potvrdile i primenile postavke eugenike.

Između zločina u Nemačkoj Jugozapadnoj Africi i nacističkih zločina prisutne su i personalne veze:

42 Joint declaration of the Federal Republic of Germany and the Republic of Namibia, entitled 'United in Remembrance of Our Colonial Past, United in Our Will to Reconcile, United in Our Vision of the Future', May 2021., paragraphs 8-10. Доступно на: <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.deutsche-afrika-stiftung.de/wp-content/uploads/2021/06/deutsche-afrika-stiftung-joint-declaration-by-the-federal-republic-of-germany-and-the-republic-of-namibia.pdf>, poslednji pristup: 10. 11. 2025.

43 *Ibid.*, paras. 13–14.

- Profesor Eugen Fišer – jedan od vodećih organizatora i realizatora medicinskih eksperimenata u logorima u Nemačkoj Jugozapadnoj Africi, bio je kasnije rektor Univerziteta u Berlinu i profesor mnogim budućim nacističkim lekarima. Fišerov učenik Otmar Frajher fon Feršuer (*Otmar Freiherr von Verschuer*) je bio profesor Jozefu Mengeleu.
- Prvi nemački kolonijalni upravnik Nemačke Jugozapadne Afrike, od 1885. do 1890. godine bio je Hajnrih Ernst Gering (*Heinrich Ernst Göring*), otac Hermana Geringa. Sam Hajnrih Gering nije učestvovao u genocidu nad plemenima Herero i Nama, ali je učestvovao i imao vodeću ulogu u uspostavljanju sistema surove eksploatacije koji je kulminirao nakon dvadeset godina nemačke uprave tim prostorom i rezultirao genocidom.

Godine 1933, nacističke vlasti su nazvale jednu ulicu u Minhenu „Von Trotha StraÙe“. Godine 2006, gradsko veće Minhena je odlučilo da promeni ime ove ulice u „Herero StraÙe“ u čast generalovih ųrtava. Moųda ovaj detalj, šezdesetogodišnje slavljenje naredbodavca genocida u postnacističkoj Nemačkoj, najslikovitije govori o odnosu i Nemačke i sveta prema stradanju naroda u kolonijama.

Sa namerom da se spreči da posleratna Nemačka ponovo dobije teritorije pod kolonijalnu upravu, britanska vlada je 1918. godine objavila tzv. „Plavu knjigu“ (naslovljenu *“Report on the Natives of South-West Africa and their Treatment by Germany”*) u kojoj je detaljno opisala nemačke zločine nad domorodačkim stanovništvom Nemačke Zapadne Afrike. Kao odgovor na tu Plavu knjigu, Nemačka je 1919. godine objavila tzv. „Belu knjigu“ (naslovljenu *“The Treatment of Native and other Populations in the Colonial Possessions of Germany and England: An Answer to the English Blue Book of August 1918”*) u kojoj je iznela opis britanskih zločina nad domorodačkim stanovništvom u delovima Afrike koje je Velika Britanija držala pod kolonijalnom vlašću. Istoričari su se u početku ustručavali od toga da koriste ove knjige kao građu, smatrajući ih za propagandne instrumente. Ispostavilo se da one sadrųe ozbiljna i tačna svedočenja i da su koristan i dosta pouzdan izvor informacija.⁴⁴

7. ZAKLJUČAK

Jedno od najvećih dostignuća čovečanstva u drugoj polovini XX veka i verovatno najveće dostignuće Organizacije ujedinjenih nacija bio je proces dekolonizacije, tj. intenziviranje i okončanje procesa potlačenih naroda od kolonijalnih vlasti otpočetog u Severnoj Americi krajem XVIII i u Južnoj Americi početkom XIX veka. Verujemo i nadamo se da će jedno od bitnih dostignuća čovečanstva u XXI veku biti okončanje ere neokolonijalizma, tj. izrabljivanja bivših kolonija od bivših kolonizatora i novih eksploatatora drugim, prikrivenijim sredstvima i metodama.

Ono što bi svakako moralo da prati eliminaciju ove mračne strane ljudske istorije je istraživanje, izučavanje i očuvanje sećanja na patnje i stradanja koje su starijima kolonija naneli kolonijalni osvajači. A te patnje i stradanja su dosegle

⁴⁴ J. Silvester, J.-B. Gewald /2003/, *Words Cannot be Found, German Colonial Rule in Namibia: An Annotated Reprint of the 1918 Blue Book*, Brill, Leiden, Boston.

nivo praktično potpunog nestanka čitavih naroda, odnosno čitavih civilizacija. Na nizu mesta, u različitim epohama, istrebljenja ili pokušaji istrebljenja naroda činjeni su svesno i namerno i u takvim situacijama radi se o zlodelima koja dostižu nivo zločina genocida, prvobitno inkriminisanog putem Konvencije o sprečavanju i kažnjavanju zločina genocida iz 1948. godine, zatim unetog u nacionalna krivična zakonodavstva skoro svih država u svetu i, konačno, i u statute najpre *ad hoc* tribunala, a zatim i stalnog Međunarodnog krivičnog suda.

Iako je autor naziva „genocid“ i ključni pobornik inkriminisanja zločina pod tim nazivom, Rafael Lemkin, ukazivao na to da istorija poznaje brojne situacije kada su izvršena dela koja sadržinski odgovaraju pojmu genocida, iako su države potpisnice Konvencije o sprečavanju i kažnjavanju zločina genocida bile spremne da u preambuli Konvencije konstatuju da taj akt usvajaju „priznajući da je genocid u svim periodima istorije nanosio velike gubitke čovečanstvu“ i, konačno, iako je sasvim jasno da je veoma širok krug zlodela iz tih ranijih „perioda istorije“ koja u najvećoj meri odgovaraju pojmu genocida onakvog kakav je definisan u Konvenciji izvršen upravo od strane kolonijalnih osvajača, postoji iznenađujuće mala spremnost, kako u političkim krugovima, tako u nauci i, konačno, i u javnosti uopšte, da se zlodela iz kolonijalne ere koja imaju karakter nameravanog i realizovanog fizičkog istrebljenja čitavih rasnih, nacionalnih, etničkih ili religioznih grupa ili njihovih značajnih delova nazovu imenom genocid. Štaviše, za mnoga od tih zlodela zapadni čovek i šira svetska javnost i ne znaju da su se odigrala.

Razlozi za ćutanje o kolonijalnim genocidima su brojni, a i različiti subjekti i različiti krugovi imaju različite razloge za to.

Bivše žrtve kolonijalnog ugnjetavanja, uključujući i opstale delove naroda koji su bili žrtve kolonijalnih genocida, potisnuti i marginalizovani usled vekovnog stradanja pod kolonijalnom upravom i pritisnuti neokolonijalnim izrabljivanjem, nemaju dovoljno snažan glas, a ponakad i sposobnost artikulacije, da bi pred širu svetsku javnost izneli istinu o svojim patnjama iz prošlosti.

Sa arogancijom koja nužno mora karakterisati vekovne opresore brojnih naroda, bivše kolonijalne metropole potiskuju i samu ideju o priznanju zlodela iz prošlosti, zavaravajući i sebe i druge tvrdnjom da je njihova misija u kolonijama bila civilizovanje primitivnih starosedelaca, istovremeno zadržavajući opravdanje za neokolonijalna izrabljivanja koja još traju. Više nego jasan pokazatelj koliko je teško izvršiocu da prizna sasvim jasno postojeći i dokazima dobro dokumentovan genocid je činjenica da je za priznanje genocida u Jugozapadnoj Africi Nemcima bio potreban čitav vek. A tokom tog veka su izvršili još neke genocide.

Jedan od razloga za izbegavanje primenjivanja kvalifikacije genocid na zlodela iz kolonijalne ere koja u potpunosti odgovaraju biću ovog krivičnog dela sadržanom u Konvenciji iz 1948. godine i kasnijim nacionalnim i međunarodnim propisima, je i tendencija da se nacističkom genocidu, pre svega onom prema Jevrejima, dodeli neka vrsta ekskluziviteta (iako postoji reč Holokaust, koja se odnosi isključivo na taj zločin i koja zaslužno nosi zastrašujući prizvuk koji i treba da nosi), koji bi prime-na reči genocid na kolonijalna nameravana istrebljenja dovela u pitanje.

Za neke od najgnusnijih masovnih zločina, gde se žrtve broje milionima, poput zločina belgijskih kolonizatora u Kongu u vreme vladavine Leopolda II, postoji i dodatan razlog za nekorišćenje izraza genocid. Naime, uprkos gnusnosti i masovnosti izvršenih zlodela koje prevazilaze one koje su postojale kod nameravanih istrebljenja naroda, kod belgijskog terora nad stanovnicima Konga nedostaje namera fizičkog uništenja, već su milioni smrti bili posledica besomučnog radnog izrabljivanja. Slično je i sa pomorom domorodaca na američkom kontinentu usled njima do tada nepoznatih zaraznih bolesti koje su im doneli kolonizatori bez namere da prošire bolest, pa čak i ne znajući da je šire i u određenoj meri bivajući i sami pogođeni zarazama.

Konačno, ono što je takođe u značajnoj meri uticalo na to da se izbegava da se reč genocid koristi za zlodela kolonijalnih osvajača koja ispunjavaju sve sadržinske uslove da bi mogla da se nazovu genocidom je činjenica da su ta zlodela izvršena daleko pre inkriminisanja ovog dela, pa bi takva kvalifikacija, makar i u teorijske svrhe, predstavljala neku vrstu neformalne retroaktivne primene inkriminacije nastale 1948. godine (uprkos činjenici da sama Konvencija iz 1948. godine u preambuli konstatuje da je „genocid u svim periodima istorije nanosio velike gubitke čovečanstvu“).

S druge strane, u novije vreme se za neka skorija krivična dela olako koristi reč genocid, ne samo u literaturi i u običnom govoru, već i u sudskim kvalifikacijama. Sami smo i svedoci i žrtve olakog korišćenja ovog termina i, možemo slobodno reći, njegove zloupotrebe zarad ostvarivanja određenih političkih ciljeva.

Čini nam se da kada je reč o masovnim zločinima istrebljenja iz kolonijalne ere suština problema nije u tome kojim će nazivom biti označavani, već o tome da su nedovoljno poznati svetskoj javnosti, čak i stručnoj, a posebno onoj široj, i da treba raditi na širenju znanja o njima nezavisno od korišćenih naziva i kvalifikacija (mada je činjenica da tako snažna reč kakva je reč „genocid“ može mnogo da doprinese privlačenju pažnje javnosti i ukazivanju na težinu zlodela o kojima je reč). Cilj ovog članka je da pruži makar mali doprinos tom širenju znanja.

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COLONIAL GENOCIDES

SUMMARY

In this paper, the author addresses the question of the justification and validity of using the term colonial genocides, as well as the place and significance of acts of extermination committed by colonial conquerors against the Indigenous peoples of the territories they seized, and the relationship and connection between the crimes of colonizers against colonized peoples and the Nazi genocides. The paper first raises the question of whether the qualification genocide can be applied to acts committed long before the term was legally defined and criminalized. The author notes that the term is applicable in a descriptive, phenomenological sense, whereas in the legal sense the situation is much more complex. The paper also observes that, starting with the very creator of the term genocide, Raphael Lemkin, various authors use the concept to describe a broader or narrower set of events—i.e., they understand it either more extensively or more restrictively. The author concludes that some of the most heinous crimes committed by colonial conquerors against Indigenous peoples cannot be called genocide because, although a significant portion of Indigenous populations was physically destroyed, the genocidal intent is absent. The paper also outlines the structural similarities between Nazi expansionism and colonialism, as well as between Nazi genocidal policies—especially the Holocaust—and colonial genocides. It then presents an overview of the genocide committed by German colonizers against the Herero and Nama peoples, the first genocide of the 20th century, considered the first modern genocide and a kind of precursor to the Holocaust.

Keywords colonizer, Indigenous peoples, extermination, crime, incrimination, convention, qualification, intent.

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*Vladan Petrov**

IZAZOVI PRAVOSUĐA U OSTVARIVANJU I ZAŠTITI SLOBODE MIRNOG OKUPLJANJA – MEĐUNARODNI, USTAVNI I KRIVIČNI ASPEKTI**

Apstrakt: U radu je najpre dato savremeno teorijsko određenje slobode mirnog okupljanja. Potom su analizirani relevantni međunarodni standardi, naročito oni iz jurisprudencije Evropskog suda za ljudska prava i Venecijanske komisije, koji normativno modeluju slobodu mirnog okupljanja. Analizirano je i domaće zakonodavstvo, a manjim delom i praksa Ustavnog suda u vezi sa zaštitom ovog političkog prava. Ukazano je na to kako se u praksi pravo na slobodu mirnog okupljanja pretvara u pravo na nasilno okupljanje i kako se protesti ili demonstracije sprovode neretko bez adekvatnog pravnog odgovora nadležnih organa, uključujući i pravosudne organe – tužilaštva i sudove. Sva ova pitanja stavljena su u širi okvir međunarodno-pravnih standarda i principa vladavine prava.

Ključne reči: sloboda mirnog okupljanja, neprijavljena okupljanja, spontana okupljanja, ograničenja slobode okupljanja, protesti.

1. UVOD

Svaka moderna država ima ustav koji garantuje prava svojim građanima, pojedincima i kolektivitetima. Politička prava, među kojima su, na primer, izborno pravo, sloboda izražavanja mišljenja, sloboda okupljanja, sloboda udruživanja, služe da omoguće građanima da se, sami ili udruženi sa drugima, uključe u javni život, učestvuju u njemu, manifestujući svoje zadovoljstvo ili nezadovoljstvo nosiocima državne vlasti, ali i da, neposredno ili posredno, utiču na njeno vršenje i donošenje najvažnijih političkih odluka. Politička prava, zbog svoje posebne namene, nikada nisu apsolutna niti neograničena. Njih svaki demokratski ustav omeđuje, pre svega,

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zaštitom prava drugih, njihovog fizičkog i psihičkog integriteta, njihove lične slobode i prava na dostojanstvo, na zdravlje, slobodu kretanja itd.

U Republici Srbiji, pravo na protest doživljava ozbiljne devijacije u poslednjih nekoliko godina. Ono se od strane određenih političkih aktivista i neformalnih grupa građana tretira kao gotovo apsolutno pravo koje ne trpi nikakva ustavna i zakonska ograničenja i ostvaruje se bez obzira na vreme, mesto i način. Nadilazi ustavno pravo na slobodu mirnog okupljanja i praktično ga negira, suspendujući u svemu Ustav, Zakon o javnom okupljanju i druge relevantne propise.

U radu će najpre biti dato savremeno teorijsko određenje slobode mirnog okupljanja. Biće reči o relevantnim međunarodnim standardima, naročito onim iz jurisprudencije Evropskog suda za ljudska prava i Venecijanske komisije, koji normativno modeluju slobodu mirnog okupljanja. Analiziraće se i domaće zakonodavstvo i spomenuti praksa Ustavnog suda u vezi sa zaštitom ovog političkog prava. Biće reči i o tome kako se u praksi pravo na slobodu mirnog okupljanja pretvara u pravo na nasilno okupljanje i kako se protesti ili demonstracije sprovode neretko bez adekvatnog pravnog odgovora nadležnih organa, uključujući i pravosudne organe – tužilaštva i sudove. Sva ova pitanja biće stavljena u širi okvir međunarodno-pravnih standarda i principa vladavine prava.

2. TEORIJSKO ODREĐENJE SLOBODE MIRNOG OKUPLJANJA

Iako bi *stricto sensu* najispravnije bilo govoriti o pravu na slobodu mirnog okupljanja, u teoriji, ali i u ustavnim dokumentima, gotovo unisono se koristi izraz „sloboda mirnog okupljanja”. Pojam javnog okupljanja nigde se ne definiše u ustavima. U teoriji se nailazi na različite, po pravilu, nedovoljno određene definicije. „Pojam okupljanje označava namerno i privremeno prisustvo na javnom mestu nekog broja osoba radi izražavanja zajedničkih stavova.”¹ Ovo je jedna od mogućih radnih ili polaznih definicija. „Namera” u ovakvoj definiciji ne isključuje mogućnost spontanog okupljanja. Ona više ukazuje na neophodnost da svako javno okupljanje, bilo unapred prijavljeno bilo spontano, mora imati dovoljno određen cilj. Pri tom, taj cilj mora biti legitiman u demokratskom društvu. Javno mesto može biti otvoreni (park, trg, livada) ili zatvoreni prostor (sportska hala, koncertna dvorana, dom kulture). Privremenost okupljanja se podrazumeva, ali je ona relativna kategorija i procenjuje se u svakom konkretnom slučaju (nekada je za slanje određene poruke dovoljno okupljanje koje traje nekoliko sati, a nekada nekoliko dana ili znatno duže).

Javna okupljanja moraju imati miran karakter, jer samo nenasilna okupljanja uživaju pravnu zaštitu. Dakle, ne uživa pravnu zaštitu svako okupljanje bez obzira na vreme, mesto, način i iskazane namere. S druge strane, „sloboda mirnog okupljanja može biti zabranjena jedino ukoliko se na osnovu procene svih okolnosti slučaja može utvrditi postojanje jasne i neposredne opasnosti po druge zaštićene vrednosti i interese u društvu i da je to nužno u demokratskom društvu.”² Pri tom, javni skupovi na otvorenom, po pravilu, moraju biti prijavljeni nadležnom državnom

1 Z. Mršević /2007/, *Ka demokratskom društvu – sloboda javnog okupljanja, pravo svih*, Beograd, p. 13.

2 D. Simović, M. Stanković, V. Petrov /2018/, *Ljudska prava*, Beograd, p. 188.

organu. Nenajavljeni, spontani skupovi samo izuzetno i pod određenim striktnim zakonskim uslovima uživaju pravnu zaštitu.

Prema predmetu zaštite, sloboda mirnog okupljanja jeste političko pravo. Prema smislu, obuhvatu i značaju fundamentalno ljudsko pravo. Osnov, odnosno neophodna pretpostavka slobode mirnog okupljanja jeste sloboda izražavanja.³ Ljudi se ne okupljaju tek tako na određenom mestu, u određeno vreme i na određeni način. Nije svrha okupljanje kao takvo. Okupljanja koja nemaju ili ne izražavaju određenu poruku, bilo političku bilo društvenu, nemaju svoj smisao. Stoga se i teško mogu podvesti pod pravni pojam „javnog okupljanja”.⁴ Otuda je važno isticati „posebnu relevantnost izražajne prirode okupljanja koja utiču na javno mnjenje”.⁵ To je ono što javnim okupljanjima daje snagu i demokratski legitimitet, a ne masovnost skupa koji možda i nema kapacitet da izluči određenju poruku i dovoljno artikulisanu volju učesnika skupa.

Bez garantija i delotvorne zaštite slobode mirnog okupljanja ne može se zamisliti savremena politička demokratija. „Zaštita slobode okupljanja jeste ključna za stvaranje tolerantnog i pluralističkog društva u kojem grupe sa različitim vero- vanjima, praksom ili politikama mogu egzistirati mirno zajedno.”⁶ Fundamentalni karakter ovog prava, dakle, ogleda se u tome što omogućava izražavanje različitih mišljenja i stavova uključujući i onih koji nisu društveno popularni ili su na različite načine manjinski (politički, religijski, seksualni). Ono snaži i razvija toleranciju u društvu. U tom smislu, „može se smatrati značajnim elementom u očuvanju i razvoju kulture i zaštite manjinskih identiteta”.⁷

Prema nosiocu, sloboda mirnog okupljanja jeste individualno pravo. Njen nosilac je svako, po pravilu, pod uslovom da je državljanin odnosno države. Ipak, sloboda mirnog okupljanja u svom ispoljavanju, odnosno ostvarivanju ima izrazito kolektivni karakter. To najpre proizlazi iz same činjenice da je za okupljanje neophodno prisustvo i učešće više ljudi (najmanje dvoje).⁸ Dakle, sloboda mirnog okupljanja jeste, prema svojoj prirodi, kolektivno pravo. Njeno ostvarivanje „pretpostavlja saradnju više subjekata, ujedinjenih jednim ciljem i nije ograničeno na odbranu sfere individualne autonomije već je usmereno ka ostvarivanju tih zajedničkih ciljeva.”⁹

U širem smislu, zajedno sa slobodom udruživanja i biračkim pravom, sloboda mirnog okupljanja čini „jezgro” političkog pluralizma. Okupljanja neretko mogu biti način ili predstavljati izvestan početak u političkoj artikulaciji određenih mišljenja i stavova. Ona mogu voditi i nastanku organizacija i udruženja formalno-pravnog karaktera. Dakle, ne moraju organizacije nužno biti te koje organizuju okupljanja. Nekada okupljanja koja imaju kontinuitet i dosledno izražavaju određene stavove

3 D. Simović, M. Stanković, V. Petrov /2018/, *ibid.*, p. 187.

4 „Javno okupljanje predstavlja kolektivni skup ili zbor radi nemog ili verbalnog javnog izražavanja kolektivnog stava ili mišljenja na otvorenom ili u zatvorenom prostoru”. D. Stojanović /2007/, *Ustavno pravo*, Niš, p. 357.

5 OSCE/ODIHR – Venice Commission /2010/, *Guidelines on Freedom of Peaceful Assembly (2nd edition)*, Strasbourg, Warsaw, p. 4, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2010\)020-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)020-e), datum pristupa: 10. oktobar 2025. godine.

6 OSCE/ODIHR – Venice Commission, *ibid.*, p. 7.

7 OSCE /ODIHR – Venice Commission, *ibid.*, p. 7.

8 Z. Mršević /2007/, *op.cit.*, p. 14.

9 P. Caretti, U. De Siervo /2012/, *Diritto costituzionale e pubblico*, Torino, p. 537.

i ciljeve mogu dovesti do odgovarajućeg povezivanja u politička udruženja, organizacije ili pokrete. „Kao takva, vrednost udruživanja jednog okupljanja može biti podjednako značajna kao i komunikacijska ili izražajna.”¹⁰

Sloboda mirnog okupljanja u vezi je i sa biračkim pravom i pravom na učestvovanje u javnom životu. Pravo na učestvovanje u javnom životu ne ostvaruje se samo kandidovanjem i izborom na određene javne funkcije nego i dijalogom, a jedan od načina za uspostavljanje javnog, odnosno društvenog dijaloga jeste okupljanje. Ono ne podrazumeva uvek povezivanje istomišljenika na jednom događaju nego ljudi koji imaju različite stavove koji žele da pošalju određenu jedinstvenu poruku ili ostvare zajednički cilj. Tako, na primer, u prvoj fazi studentskih protesta u Republici Srbiji (decembar 2024 – mart 2025), ne samo studenti nego i drugi građani vrlo različitih političkih stavova i orijentacija, okupljali su se i tražili od državne vlasti ispunjenje određenih zahteva u vezi sa ostvarivanjem vladavine prava i odgovornosti. Dakle, njihova raznorodnost koja je činila jednu „lepezu“ političkih mišljenja i stavova o ključnim pitanjima unutrašnje i spoljne politike bila je vezana istom, jedinstvenom porukom i bila je način, na momente, delotvornog vršenja pritiska na državnu vlast kroz učešće u javnom životu mimo izbora, političkih stranaka, predstavničkih institucija i sl. „Pravo na mirno okupljanje tako dopunjuje druge konvencionalne metode participacije (kao što su partijska politika i periodični izbori) i obezbeđuje osnovna sredstva za pojedince i grupe da izraze njihovo mišljenje o pitanjima od javnog interesa kao i da učestvuju u javnom životu.”¹¹

Obično se sloboda mirnog okupljanja izjednačava sa pravom na protest, što je pogrešno. Pravo na protest kao takvo nije ustavom niti međunarodnim konvencijama zagarantovano samostalno ljudsko pravo. Ipak, sloboda mirnog okupljanja i pravo na protest su tesno povezani. Sloboda mirnog okupljanja može se ostvarivati u konkretnom slučaju, a da ona istovremeno ne predstavlja ili nema za cilj protest. Na primer, pripadnici jedne političke stranke ili društvene grupe mogu se zakonito sastati na jednom mestu da bi izneli svoje ideje o budućnosti društva ili o nekim pitanjima od javnog značaja. S druge strane, protesti se mogu ispoljavati i u drugim oblicima, a ne samo okupljanjem građana (na društvenim mrežama, podnošenjem peticija, organizovanjem štrajkova). Ipak, oni uvek moraju imati legalnu formu i moraju biti organizovani tako da izražavaju određenu pravom dopuštenu i društveno prihvatljivu svrhu u demokratskom društvu, na način koji je miran i kojim se iskazuje odgovarajuća mera tolerancije prema drugima, njihovim pravima i različitim mišljenjima.

Iz prethodno izloženog mogu se izdvojiti sledeća bitna obeležja prava na slobodu mirnog okupljanja. *Prvo, to je fundamentalno političko pravo.* Ono ne samo da ima za pretpostavku slobodu izražavanja nego je jedan od ključnih načina njenog kolektivnog ostvarivanja i predstavlja jednu od nužnih pretpostavki demokratskog političkog pluralizma. *Drugo, to pravo nije apsolutno.* Ono se zajemčuje ustavom i međunarodnim konvencijama, ali ostvaruje u skladu sa zakonskom procedurom i vodeći računa o zakonskim ograničenjima neophodnim u demokratskom društvu. „Ograničenje slobode okupljanja nameće potreba zaštite prava drugih građana, s

10 OSCE /ODIHR – Venice Commission /2010/, *op.cit.*, p. 5.

11 OSCE /ODIHR – Venice Commission, *ibid.*, p. 6.

jedne strane, i zaštita opšteg dobra i opšteg interesa, s druge strane.”¹² *Treće, kao i svako političko pravo, ono pretpostavlja javnost delovanja.* Otuda, tajna okupljanja, što je pre moguće u zatvorenim prostorima, ne potpadaju pod oblik pravno dozvoljenog ostvarivanja ovog političkog prava. Padajući na kriterijumu legaliteta, takva okupljanja ne mogu izvlačiti legitimitet iz svog cilja ili svrhe ma koliko ovi izgledali demokratski opravdani. Javnost delovanja uvek povlači za sobom i određenu organizaciju, a ona neophodnost da skupovi na otvorenom prostoru budu na vreme, odnosno u zakonom propisanom roku, prijavljeni nadležnom državnom organu. Spontanost javnog okupljanja znači trenutnu reakciju određenog broja ljudi uzrokovanu konkretnim i neposrednim povodom, događajem koji je iznenađen i nepredvidljiv te nije mogao da izazove blagovremenu i u skladu sa zakonskim propisima pripremljenu organizaciju skupa. Stoga, nisu svi neprijavljeni mirni skupovi istovremeno i spontani. Redovnost neprijavljenih okupljanja povodom navodno istog događaja ili istog ili sličnog razloga, po prirodi stvari, nije spontanost. Samim tim, takvi neprijavljeni skupovi nisu ni legalni, jer su samo skupovi koji ispunjavaju kriterijume spontanosti legalni. Dakle, iz ugla ustavne teorije, koja polazi od prirode i smisla slobode mirnog okupljanja, spontana okupljanja su krajnje izuzetna i, po pravilu, ne potpadaju pod oblik pravno zaštićenog oblika ostvarivanja ovog političkog prava. Spontanost ima svoje opravdanje u nemogućnosti da se zakonski adekvatno reaguje zbog iznenadnosti i nepredvidljivosti događaja koji je je prouzrokovao okupljanje. Čim takvi skupovi postanu redovni i „redovno” neprijavljeni, oni izlaze iz okvira legalnog i legitimnog okvira pravno zaštićene slobode mirnog okupljanja. Četvrto, *pošto sloboda mirnog okupljanja za svoj osnov ima slobodu izražavanja, ona se ne ostvaruje u slučaju okupljanja koje nema svoju dovoljno definisanu, zakonitu i u demokratskom društvu opravdanu svrhu ili cilj.* Dakle, javna okupljanja koja nemaju jasan cilj i kojima se u kontinuitetu ugrožavaju ili povređuju prava drugih ne mogu uživati pravnu zaštitu, jer predstavljaju vid zloupotrebe prava koja je zabranjena u sistemu vladavine prava. Privremenost, koju pojedini autori navode kao bitno obeležje javnog okupljanja¹³ ili primerenost prostora za javno okupljanje¹⁴ elementi su koji su, u izvesnom smislu, podvedeni pod navedena suštinska obeležja slobode mirnog okupljanja, ali ne određuju presudno prirodu i smisao ovog prava.

3. POZITIVNO-PRAVNO ODREĐENJE SLOBODE MIRNOG OKUPLJANJA

3.1. Međunarodno-pravni okvir slobode mirnog okupljanja

Sloboda mirnog okupljanja je na međunarodno-pravnom nivou najpre zajemčena Univerzalnom deklaracijom o ljudskim pravima OUN iz 1948. U ovom dokumentu, ona je tesno povezana sa slobodom udruživanja. Član 20. st. 1. glasi: „Svako

12 D. Stevandić /2019/, Granice slobode okupljanja – standardi Evropskog suda za ljudska prava, *Anali Pravnog fakulteta u Beogradu*, № 1, p. 183.

13 V. Petrov, D. Simović, S. Jugović /2015/, Ostvarivanje i zaštita slobode mirnog okupljanja u Republici Srbiji, u: *Zbornik radova Razvoj javne uprave*, Vukovar, p. 334.

14 Đ. Gardašević /2011/, Pravo na javno okupljanje u hrvatskom i komparativnom pravu, *Zbornik radova Pravnog fakulteta u Splitu*, № 3, pp. 490-497.

ima pravo na slobodu mirnog okupljanja i udruživanja¹⁵. Iz ovakve formulacije bi se dalo zaključiti da je reč o jedinstvenom pravu koje obuhvata i slobodu mirnog okupljanja i slobodu udruživanja. U pitanju je, ipak, formulacija koja nije najsrećnija. Ova dva politička prava, kao što je gore konstatovano, najtešnje su povezana, ali svako ima svoju autonomnost. U tom smislu, sloboda mirnog okupljanja bi se još bliže mogla vezati za slobodu izražavanja.

Međunarodni pakt o građanskim i političkim pravima OUN iz 1966. zajemčuje slobodu mirnog okupljanja sasvim odvojeno od slobode udruživanja. Ovaj dokument koristi izraz „pravo”, a ne „sloboda” mirnog okupljanja. Član 21. glasi: „Priznaje se pravo mirnog okupljanja. Vršenje ovog prava može biti samo predmet ograničenja nametnutih u skladu sa zakonom, a koja su potrebna u jednom društvu u interesu nacionalne bezbednosti, javne bezbednosti, javnog reda ili radi zaštite javnog zdravlja ili morala ili prava i sloboda drugih lica”.¹⁶ Važnije od naziva i očitog strukturalnog razdvajanja dva politička prava, slobode mirnog okupljanja i slobode udruživanja, jeste to što ovaj dokument daje ovlašćenje nacionalnom zakonodavcu da ograniči pravo na mirno okupljanje, određujući uopšteno osnove ograničenja: 1) interes nacionalne bezbednosti; 2) interes javne bezbednosti; 3) interes javnog reda; 4) zaštita javnog zdravlja; 5) zaštita morala; 6) zaštita prava i sloboda drugih lica.

U skladu sa preporukama i komentarima relevantnih međunarodnih tela UN, sloboda mirnog okupljanja jeste individualno pravo koje se vrši kolektivno.¹⁷ Garantovanje ovog prava podrazumeva odgovarajuću obavezu države potpisnice da poštuje i obezbedi njegovo vršenje bez diskriminacije.¹⁸ Kad je reč o osnovima potencijalnih ograničenja ovog prava, ona se moraju usko tumačiti. Zaštitu slobode mirnog okupljanja nije moguće posmatrati i ostvarivati izolovano od zaštite koja se ostvaruje za druga, bliska ili tesno povezana, prava poput slobode izražavanja, slobode udruživanja ili prava na političku participaciju. „Kada ponašanje pojedinaca izlazi iz okvira zaštite člana 21, jer se primera radi ponašaju nasilno, oni zadržavaju svoja druga prava prema Paktu, podložno važećim ograničenjima i restrikcijama”.¹⁹ Spontana okupljanja, koja su neposredni odgovori na konkretne aktuelne događaje, zaštićena su po članu 21. Pravo mirnog okupljanja se, po definiciji, ne može ostvarivati upotrebom nasilja. „Nasilje” u kontekstu člana 21. tipično pretpostavlja upotrebu fizičke sile od strane učesnika protiv drugih koja će najverovatnije dovesti do povrede ili smrti ili ozbiljne štete po imovinu. Obično guranje ili poremećaj kretanja saobraćaja i pešačka ili svakodnevne aktivnosti se ne uračunavaju u ‘nasilje’.²⁰ Pošto, po pravilu, nije

15 UN/2015/, *Universal Declaration of Human Rights*, New York, p. 42, https://www.un.org/en/udhr-book/pdf/udhr_booklet_en_web.pdf#:~:text=Now%20available%20in%20more%20than%20360%20languages%2C,oppression%2C%20impunity%20and%20affronts%20to%20human%20dignity, datum pristupa: 15. 10. 2025. godine.

16 UN/1976/, № 14668 *Multilateral International Covenant on Civil and Political Rights, Treaty series*, p. 178, <https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf>, datum pristupa: 16. 10. 2025. godine.

17 UN Human Rights Committee /2020/, *General comment No. 37 (2020) on the right of peaceful assembly (article 21)*, p. 2, <https://docs.un.org/en/ccpr/c/gc/37>, datum pristupa: 16. 10. 2025. godine.

18 UN Human Rights Committee, *ibid.*, p. 2.

19 UN Human Rights Committee, *ibid.*, p. 2.

20 UN Human Rights Committee, *ibid.*, p. 3.

lako utvrditi u konkretnom slučaju razliku između mirnog okupljanja i onog koje to nije, postoji pretpostavka u korist mirnog okupljanja. Pojedinačni akti nasilja pojedinih učesnika ne mogu da se pripisu drugima, organizatorima ili skupu kao takvom. Otuda neki učesnici mogu da potpadaju pod član 21, a neki ne. U svakom slučaju, učesnici okupljanja koji su učinili prekršaje ili krivična dela, moraju biti gonjeni od nadležnih državnih organa i pravno odgovorni. Sloboda mirnog okupljanja ne može biti izgovor, odnosno razlog za nekažnjivost pravnih prestupnika.

Na nivou OUN, specifičan značaj ima i Konvencija o pravima deteta.²¹ Član 15. st. 1. jemči i slobodu okupljanja i slobodu udruživanja. U stavu 2. predviđeni su identični osnovi za potencijalna zakonska ograničenja ovih prava kao i u PGPP-u. Ipak, imajući u vidu da su titular ovih prava deca, slobodu okupljanja ne treba u sadržajnskom smislu poistovetiti sa onom koju uživa punoletno lice, odnosno državljanin države potpisnice. Sva prava iz ove konvencije moraju se tumačiti uzimajući u obzir preambulu, duh i celinu Konvencije, definiciju deteta iz člana 1. koja isključuje mogućnost da dete uživa biračko pravo, samim tim i da ostvaruje određena prava iz Konvencije u onom značenju i obimu u kojem ih inače ostvaruju punoletne poslovno sposobne osobe. Pri tom, sloboda okupljanja se uvek dovodi u vezu i sa slobodom izražavanja mišljenja, a u članu 12. Konvencije ona se garantuje u „pitanjima koja se tiču deteta”. „Pitanja koja se tiču deteta”, po prirodi stvari, ne mogu biti ona koja se odnose na vršenje političke vlasti ili ostvarivanje uticaja na nju, pošto deca nemaju biračko pravo niti mogu biti članovi političkih stranaka ili drugih političkih udruženja. Otuda i slobodu okupljanja deteta ne treba shvatati kao pravo na učešće u okupljanjima odraslih, odnosno punoletnih građana u kojima se iznose politički zahtevi prema nosiocima državne vlasti. Njihovo učešće u političkim skupovima, protestima i demonstracijama ne može odgovarati „najboljem interesu deteta”, kao i njegovom biološkom uzrastu i duševnoj zrelosti. To su, iznad svake sumnje, pitanja „koja se ne tiču deteta”. Uključivanje dece u takva okupljanja predstavlja zloupotrebu dece koja je pravno strogo zabranjena, kao i grubo kršenje prava i obaveza prema deci od strane samih roditelja.

Na regionalnom nivou, postoje brojne međunarodne multilateralne konvencije koje garantuju slobodu mirnog okupljanja. Za evropske države, bez sumnje, najvažnija je Evropska konvencija o zaštiti osnovnih ljudskih prava i sloboda Saveta Evrope iz 1950.²² Kao i Univerzalna deklaracija o ljudskim pravima, Konvencija u istom članu (član 11) vezuje slobodu mirnog okupljanja i slobodu udruživanja. „Za vršenje ovih prava ne smeju se postaviti nikakva ograničenja, osim onih koja su propisana zakonom i neophodna u demokratskom društvu u interesu nacionalne bezbednosti ili javne bezbednosti, radi sprečavanja nereda ili kriminala, zaštite zdravlja ili morala ili radi zaštite prava i sloboda drugih. Ovim se članom ne sprečava zakonito ograničavanje vršenja ovih prava pripadnicima oružanih snaga, policije

21 General Assembly of the UN /1989/, *Convention of the Rights of Child*, <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child>, datum pristupa: 17. 10. 2025. godine.

22 ECHR, CoE /2021/, *European Convention on Human Rights*, Stasbourg, https://www.echr.coe.int/documents/d/echr/convention_ENG, datum pristupa: 18. 10. 2025. godine.

ili državne uprave.”²³ U suštini, to su isti osnovi ograničenja kao u PGPP-u, osim što EKLJP navodi „sprečavanje nereda ili kriminala”, a ne „zaštitu javnog reda”.

Standarde u vezi sa slobodom mirnog okupljanja razvija Evropski sud za ljudska prava u Strazburu. U svojoj praksi, kada ocenjuje da li je jedno ograničenje slobode mirnog okupljanja u konkretnom slučaju bilo u skladu sa član 11. st. 2. EKLJP, Sud najpre proverava da li preduzeta mera države uopšte predstavlja ograničenje, a potom da li je ograničenje propisano nacionalnim zakonom. Ako utvrdi da je ograničenje zakonito ocenjuje da li je ono u skladu sa jednim od legitimnih ciljeva navedenih u Konvenciji. Ako utvrdi da jeste, Sud ocenjuje i da li je takvo ograničenje bilo nužno u demokratskom društvu. Tek nakon sprovedenih testova, Sud odlučuje o tome da li je povređen ili nije član 11. EKLJP.²⁴ Sud je u dosadašnjoj praksi „izbegavao da formuliše pojam okupljanja, koji smatra autonomnim konceptom, ili da iscrpno izlista kriterijume koji bi ga definisali”.²⁵

U vezi sa praksom ESLJP-a iznećemo nekoliko stavova koji neće biti detaljno eksplicirani. Pod član 11. EKLJP-a potpadaju različiti oblici okupljanja, a ne samo oni koji su izričito predviđeni nacionalnim zakonodavstvom. Ipak, da bi takva okupljanja uživala pravnu zaštitu moraju imati zajedničku svrhu učesnika, a ne mogu biti slučajna grupa pojedinaca.²⁶ Dakle, spontana okupljanja bez obzira na vreme, način i mesto, koja nemaju odgovarajuću organizaciju, ne ispoljavaju jasan zajednički cilj koji se može podvesti pod jedan od onih definisanih članom 11. st. 2. Konvencije, ne predstavljaju legalno i legitimno ostvarivanje slobode mirnog okupljanja i ne uživaju pravnu zaštitu.²⁷

Sud je u svojoj praksi koncept „mirnog okupljanja” postavio najšire moguće. Najpre, odredio je državnim vlastima brojne negativne i pozitivne obaveze.²⁸ Sud podvodi pod koncept mirnog okupljanja i određena ponašanja koja se ne bi mogla redovno smatrati mirnim ili nenasilnim. Ipak, „okupljanje gubi svoj mirni karakter kada su ljudi fizički napadnuti ili ugroženi, razbijeni izlozi, zapaljeni automobili, upotrebljeno kamenje ili Molotovljevi kokteli ili neko drugo oružje.”²⁹ Sud posebno obraća pažnju na ograničenja mirnog okupljanja koja se odnose na pripremu nereda i krivičnih dela, kao i na zaštitu prava i sloboda drugih. U svakom konkretnom slučaju se mora ispitati da li je „okupljanje imalo mirne namere i da li su organizatori imali nasilne namere; da li je aplikant imao nasilne namere kada je pristupio skupu; i da li je aplikant izazvao telesne povrede nekome.”³⁰

23 ECHR, CoE, *ibid.*, p. 12.

24 D. Stevandić /2019/, *op.cit.*, p. 185.

25 Navalny v. Russia (2018).

26 Navalny v. Russia (2018).

27 Na primer, The United Macedonian Organisation Ilinden and Ivanov v. Bulgaria (2005), Rai and Evans v. United Kingdom (2009), Tuskia and Others v. Georgia (2018), Ekrem Can and Others v. Turkey (2022).

28 Na primer, teret dokazivanja da su organizatori skupa imali nameru da koriste nasilje nalazi se na državnim vlastima (Christian Democratic People's Party v. Moldova (No. 2) (2010). Takođe, Sud traži od države da zaštiti pojedince protiv arbitrarnog postupanja javnih vlasti, ali insistira i na pozitivnim obavezama da one zaštite efektivno uživanje ovog prava.

29 M. Nowak, U. N. *Covenant on Civil and Political Rights: CCPR Commentary*, Arlington, 486-487.

30 Gülcü v. Turkey (2016).

Za sintezu prakse ESLJP-a, ali i razvijanje međunarodno-pravnih standarda slobode mirnog okupljanja, posebnu važnost ima i jedan dokument, koji je donet 2007. pod okriljem Venecijanske komisije i OEBS-a, a kasnije u nekoliko navrata noveliran. Reč je o Preporukama o slobodi mirnog okupljanja,³¹ dokumentu koji minuciozno izlaže principe i standarde slobode mirnog okupljanja iz ugla tumačenja i primene EKLJP, a sadrži i odgovarajuća objašnjenja (*explanatory notes*). U uvodnom delu, analizira se značaj slobode mirnog okupljanja, povezanost sa bliskim ljudskim pravima, ali i sa pojmovima kao što su „protest” i „građanska neposlušnost”. Na primer, ova referentna međunarodno-pravna tela vide građansku neposlušnost na sledeći način: „Postoje slučajevi kada način na koji se okupljanje sprovodi namerno predstavlja kršenje zakona tako da organizatori i/ili učesnici veruju da će pojačati ili na drugi način pomoći u prenošenju njihove poruke...Oni koji se bave građanskom neposlušnošću često teže da to čine na miran način i obično prihvataju propisanu zakonsku kaznu. Reagovanje države, uključujući hapšenja i kazne, trebalo bi da bude srazmerno odgovarajućim prekršajima.”³² Iz ovog nedvosmisleno proizlazi da građanska neposlušnost ne ispunjava prvi uslov i kriterijum vladavine prava, a to je legalitet, odnosno ustavnost i zakonitost. Ako bi se ona i mogla smatrati demokratski opravdanom u konkretnoj situaciji, oni koji se na nju pozivaju u svom delovanju morali bi prihvatiti podložnost pravnim sankcijama za kršenje zakona. Dakle, ona nije nekakav metafizički koncept koji izlazi iz okvira pozitivnog prava, niti svoje utemeljenje nalazi u konceptu demokratije i ljudskih prava *in abstracto*. Građanska neposlušnost je nezakonito postupanje i podrazumeva svest o tome, kao i prihvatanje pravnih sankcija koje su posledice takve nezakonitosti. Ona, dakle, nije osnov za isključenje protivpravnosti i za nekažnjivost.

U centralnom delu ovog dokumenta analiziraju se, na primer, upotreba savremenih tehnologija u organizovanju okupljanja; ključne obaveze države; obaveza prijave skupa; njegova organizacija i raspoloživa pravna sredstva zaštite; odgovornost države, ali i organizatora skupa; zadržavanje i hapšenje učesnika skupa itd. Istakli bismo dva pitanja. Jedno se odnosi na široko definisanje koncepta „mirnog okupljanja”. „Okupljanje može biti mirno čak i ako je nezakonito prema domaćem zakonu ... koncept ‘mirnog’ može uključiti ponašanje koje privremeno ometa ili sprečava aktivnosti trećih strana, na primer privremenim blokiranjem saobraćaja.”³³ Drugo se odnosi na spontana okupljanja. „Neophodnost zaštite spontanih okupljanja kao očekivana (pre nego izuzetna) obeležja zdrave demokratije prepoznaje se u mnogim domaćim zakonima i sudskim odlukama, i treba da budu tretirana i zaštićena kao okupljanja koja su unapred planirana.”³⁴ Čini se da se ovim stavom preterano širi koncept slobode mirnog okupljanja sa pretpostavkom koja je u savremenim globalnim i nacionalnim okvirima lako oboriva – da su okupljanja, po pravilu, demokratska i da nemaju nasilne intencije. Praksa protesta i drugih oblika okupljanja

31 Venice Commission, OSCE/ODIHR /2020/, *Guidelines on Freedom of Peaceful Assembly (3rd edition)*, Strasbourg, Warsaw, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2019\)017rev-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)017rev-e).

32 Venice Commission, OSCE/ODIHR, *ibid.*, p. 7.

33 Venice Commission, OSCE/ODIHR, *ibid.*, p. 16.

34 Venice Commission, OSCE/ODIHR, *ibid.*, p. 26-27.

široj sveti, ali i očita tendencija restriktivnosti nacionalnih zakonodavaca u tzv. tradicionalnim demokratijama, ne koincidira sa ovako velikim poverenjem koje ova međunarodno-pravna tela daju spontanim okupljanjima.³⁵

3.2. Ustavni okvir slobode mirnog okupljanja u Republici Srbiji

Ustav Srbije iz 1990. jemčio je „slobodu zbora i drugog okupljanja” (član 43).³⁶ Ovaj ustav predviđao je da svako okupljanje, bez obzira na to da li je na zatvorenom ili otvorenom prostoru, podleže prethodnoj prijavi nadležnom organu. Sloboda zbora i drugog okupljanja građana mogla je biti ograničena odlukom nadležnog organa radi: 1) sprečavanja ometanja javnog saobraćaja; 2) ugrožavanja javnog zdravlja; 3) ugrožavanja javnog morala ili 4) bezbednosti ljudi i imovine.

Ustav Srbije iz 2006. iako po mnogo čemu predstavlja sadržinski kontinuitet sa Ustavom iz 1990, na sasvim je drukčiji i moderan način uredio slobodu okupljanja. Najpre, ovaj ustav upotrebljava izraz koji je uglavnom prisutan u referentnim međunarodno-pravnim dokumentima – sloboda (mirnog) okupljanja. „Mirno okupljanje građana je slobodno” (član 54. st. 1).³⁷ Drugo, Ustav pravi razliku između okupljanja u zatvorenom i na otvorenom prostoru. Prva ne podležu ni odobrenju ni prijavljivanju (član 54. st. 2).³⁸ Druga, koja mogu biti zborovi, demonstracije i druga okupljanja, što znači da Ustav ne zatvara krug mogućih oblika okupljanja, „prijavljuju se državnom organu, u skladu sa zakonom”.³⁹ Iz ovakve formulacije jasno proizlazi da Ustav ne poznaje spontane skupove. Svako okupljanje na otvorenom prostoru mora biti prijavljeno, a zakon razrađuje način ili postupak organizovanja okupljanja. Najvažniju novost Ustav iz 2006. uvodi u oblasti osnova za zakonsko ograničenje ovog prava. U suštini, to je model iz EKLJP. Sloboda okupljanja se može ograničiti ako je to neophodno radi: 1) zaštite javnog zdravlja; 2) morala; 3) prava drugih ili 4) bezbednosti Republike Srbije. (član 54. st. 4).⁴⁰ Ključna promena odnosi se na „prava drugih” kao osnov za moguće zakonsko ograničenje slobode okupljanja čime se uvodi ideja balansiranja između ovog prava i šireg spektra prava koja ne smeju biti nesrazmerno ugrožena ili povređena ostvarivanjem slobode okupljanja. Pod taj osnov bi se mogli podvesti i „bezbednost ljudi i imovine” i „sprečavanje ometanja javnog saobraćaja” iz ranijeg Ustava, ali i druga Ustavom zajemčena prava koja mogu biti neposredno ili posredno ugrožena ili povređena održavanjem javnog okupljanja (sloboda izražavanja, sloboda kretanja, pravo na ljudsko dosto-

35 Zakon o javnom redu UK iz 2023. uvodi nova ograničenja slobode mirnog okupljanja. Propisana su nova kažnjiva dela poput „zaključavanja”, „iskopavanja tunela na mestu planirane gradnje” i „ometanje funkcionisanja važne državne strukture”. Vrlo široka diskreciona ovlašćenja poverena policiji u praksi su dovela do hapšenja ljudi koji su ometali saobraćajnu putnu infrastrukturu. Najnovije izmene ovog zakona predviđaju zabranu javnog okupljanja ispred kuća visokih javnih funkcionera. <https://www.politika.rs/sr/clanak/708225/britanija-zakonom-zabranjuje-proteste-ispred-domova-javnih-zvanicnika>, datum pristupa: 5. 11. 2025. godine.

36 „Službeni glasnik RS”, br. 1/1990.

37 „Službeni glasnik RS”, br. 98/2006 i br. 16/2022.

38 „Službeni glasnik RS”, br. 98/2006 i br. 16/2022.

39 „Službeni glasnik RS”, br. 98/2006 i br. 16/2022.

40 „Službeni glasnik RS”, br. 98/2006 i br. 16/2022.

janstvo, pravo na zdravlje). Osnov „bezbednost Republike Srbije” može se podjednako odnositi i na nacionalnu bezbednost i na javnu bezbednost, što su osnovi za ograničenje iz EKLJP-a.

Dakle, u odnosu na model iz Konvencije i standarde ESLJP-a, ustavna regulativa slobode okupljanja razlikuje se samo u jednom. Ustav bez izuzetka traži da javno okupljanje na otvorenom prostoru bude prijavljeno nadležnom državnom organu. *Stricto sensu*, samo prijavljena okupljanja na otvorenom su ustavna (legalna).

3.3. Zakonski okvir slobode mirnog okupljanja

3.3.1. Zakon o javnom okupljanju

Zakon o javnom okupljanju iz 2016.⁴¹ donet je nakon gotovo četvrt veka važenja starog Zakona o okupljanju građana⁴² i čak deceniju nakon donošenja novog Ustava iz 2006. Njegovom usvajanju prethodila je neobična ustavnosudska odluka.⁴³ Ustavni sud je *ex officio* pokrenuo postupak za ocenu ustavnosti ovog zakona.⁴⁴ Ovoj ustavnosudskoj inicijativi prethodio je niz odluka ovog organa o ustavnim žalbama povodom kojih je utvrđena sloboda okupljanja.⁴⁵ Kao suštinski problem ispoljila se nesaglasnost Zakona o okupljanju građana sa važećim Ustavom. Ustavni sud je, nakon utvrđivanja spornih ustavnopravnih pitanja i sprovedenog postupka, odlučio da kasira zakon u celini. Ukidanje zakona *in toto* izuzetno je retko u praksi bilo kog ustavnog suda, jer postoji (oboriva) pretpostavka da je zakon ustavan sve dok se ne utvrdi njegova očigledna neustavnost, a ta neustavnost se mora posmatrati restriktivno – dakle, uklanjaju se iz pravnog poretka samo očigledno neustavne odredbe, a teži se tome da zakon kao takav ipak ostane na snazi (Izdvojeno mišljenje u ovoj odluci sudije Dragana Stojanovića).⁴⁶ Ovom odlukom ukinut je ceo Zakon, jer je Sud utvrdio da se „ocene o ustavnopravnoj neutemeljenosti Zakona o okupljanju građana u odredbama Ustava od 2006. godine odnose na one zakonske odredbe na kojima počiva suština ostvarivanja slobode okupljanja, a to je njena zaštita itd.”⁴⁷

Zakon o javnom okupljanju definiše okupljanje kao „okupljanje više od 20 lica radi izražavanja, ostvarivanja i promovisanja državnih, političkih, socijalnih i nacionalnih uverenja i ciljeva, drugih sloboda i prava u demokratskom društvu” (član 3. st. 1).⁴⁸ Okupljanjem se smatraju „i drugi oblici okupljanja kojima je svrha ostvarivanje verskih, kulturnih, humanitarnih, sportskih, zabavnih i drugih interesa” (član 3. st. 2).⁴⁹ Dakle, iz ove definicije javnog okupljanja proizlaze neka bitna obeležja

41 „Službeni glasnik RS”, br. 6/2016.

42 „Službeni glasnik RS”, br. 51/92, 53/93, 67/93 i 48/94, “Sl. list SRJ”, br. 21/2001 - odluka SUS i „Službeni glasnik RS”, br. 101/2005 - dr. zakon.

43 „Službeni glasnik RS”, br. 88/15.

44 IUz br. 204/2013.

45 Na primer, Už br. 1918/2009 („Službeni glasnik RS” br. 8/12), Už br. 4078/2010 („Službeni glasnik RS” br. 24/12) itd.

46 „Službeni glasnik RS”, br. 88/15.

47 N. Plavšić et al (priredili) /2022/, *Evropska konvencija o ljudskim pravima i praksa Evropskog suda za ljudska prava u odlukama Ustavnog suda*, Beograd, p. 61.

48 „Službeni glasnik RS”, br. 6/2016.

49 „Službeni glasnik RS”, br. 6/2016.

ovog prava. Najpre, to je njegova ekspresivna komponenta, odnosno vezanost za slobodu izražavanja. Drugo, to je postojanje cilja okupljanja. Ciljevi mogu biti vrlo različiti, ali svi moraju biti dopušteni „u demokratskom društvu” (član 3. st. 1).⁵⁰ Ostaje dilema da li Zakon pod „javnim okupljanjem” smatra okupljanje najmanje 20 lica i da li isključuje iz ovog pojma ona okupljanja u kojima učestvuje manje od 20 lica. Svakako da nije pravno irelevantno da li se okupljanja manje od 20 lica smatraju okupljanjem u smislu ovog zakona, jer se postavlja pitanje pod koji pravni režim potpadaju takva okupljanja.⁵¹

Zakon ustanovljava pretpostavku o dostupnosti svakog prostora bez uslova ili pod istim uslovima individualno neodređenom broju lica da bude mesto okupljanja (član 4. st. 1).⁵² Ipak, Zakon predviđa na kojim mestima nije dozvoljeno okupljanje zbog karakteristika samog mesta ili njegove posebne namene usled čega pretpostavka od nastupanja ugrožavanja bezbednosti ljudi i imovine, javnog zdravlja, moralna prava drugih ili bezbednosti Republike Srbije (član 6. st. 1-3).⁵³ Predviđena je privremenost javnog okupljanja, tako da se oni mogu održavati, po pravilu, između 6 i 24 časa (član 7).⁵⁴ Zakon konkretizuje osnove za ograničenje slobode okupljanja, pri tom, ostajući u granicama onih koji su utvrđeni Ustavom (član 8).⁵⁵

U okviru posebnih odredaba, posebna pažnja posvećena je organizatoru okupljanja i njegovim dužnostima (čl. 10-11), kao i prijavi okupljanja i njenoj sadržini (čl. 12-15).⁵⁶ Iz ovog jasno proizlazi da i zakonodavac polazi od pretpostavke da sva javna okupljanja moraju biti unapred prijavljena i organizovana (moraju imati organizatora). Zakonodavac, ipak, predviđa, određene izuzetke, pored onog koje je navedeno u Ustavu (okupljanje u zatvorenom prostoru). On pristaje uz model slobode okupljanja iz prakse ESLjP-a, jer poznaje i priznaje spontana mirna okupljanja, koja su „bez organizatora, kao neposredna reakcija na određeni događaj, nakon tog događaja, koja se održavaju na otvorenom ili u zatvorenom prostoru, radi izražavanja mišljenja i stavova povodom nastalog događaja” (član 13. st. 1. t. 4).⁵⁷ Proširivanje zaštite i na spontana okupljanja jeste utemeljeno na tumačenju EKLjP-a, koja je sastavni deo našeg pravnog poretka i neposredno se primenjuje (član 16. st. 2. Ustava Srbije).⁵⁸ Stoga se ona ne može smatrati flagrantnom i po sistem zaštite ljudskih prava i vladavine prava štetnom neustavnošću. Ipak, spontana okupljanja moraju biti mirna i svakako moraju ostati izuzetan oblik ostvarivanja slobode okupljanja, jer u suprotnom mogu predstavljati, naročito u haotičnim i kriznim društvenim prilikama, polje ozbiljne zloupotrebe ovog i drugih sa njim povezanih ljudskih prava.

50 „Službeni glasnik RS”, br. 6/2016.

51 Ovo nije samo hipotetičko pitanje, imajući u vidu da su mnoga neprijavljena okupljanja u periodu od novembra 2024. godine do pisanja ovog rada (oktobar 2025. godine) čiji je cilj bio odavanje počasti žrtvama u padu nadstrešnice u Novom Sadu podrazumevala blokiranje najprometnijih saobraćajnica u gradovima širom Srbije.

52 „Službeni glasnik RS”, br. 6/2016.

53 „Službeni glasnik RS”, br. 6/2016.

54 „Službeni glasnik RS”, br. 6/2016.

55 „Službeni glasnik RS”, br. 6/2016.

56 „Službeni glasnik RS”, br. 6/2016.

57 „Službeni glasnik RS”, br. 6/2016.

58 „Službeni glasnik RS”, br. 98/2006 i br. 16/2022.

Zakon sadrži i odredbe o dvostepenoj pravnoj zaštiti za slučaj zabrane održavanja okupljanja (član 16), sprečavanju ili prekidu okupljanja, kada uoči ili u toku održavanja trajanja okupljanja nastupe okolnosti koje su osnov za zakonskog ograničenje ovog prava (član 18), mere u slučaju prekida okupljanja (član 19) i kaznene odredbe za fizička lica učesnike okupljanja i organizatora (čl. 20-23).⁵⁹

3.3.2. *Krivični zakonik i Zakon o javnom redu i miru*

Krivični zakonik Srbije⁶⁰ propisuje više krivičnih dela koja mogu biti izvršena u vezi sa javnim okupljanjima. U kategoriji krivičnih dela protiv sloboda i prava čoveka i građanina, to bi moglo biti krivično delo povreda slobode kretanja i nastanjanja („Ko protivpravno uskrati ili ograniči građaninu Srbije slobodu kretanja...”, član 133).⁶¹ U toj kategoriji je i krivično delo koje štiti slobodu okupljanja. Reč je o sprečavanju javnog skupa (član 151). „Ko silom, pretnjom, obmanom ili na drugi način spreči ili ometa javni skup koji je organizovan u skladu sa zakonom, ukoliko nisu ostvarena obeležja nekog drugog težeg krivičnog dela itd.”⁶² Krivično delo izazivanje opšte opasnosti (član 278) ima svoj kvalifikovani oblik ako je učinjeno na mestu gde je okupljen veći broj ljudi (st. 3).⁶³ Krivično delo ugrožavanje saobraćaja opasnom radnjom ili opasnim sredstvom (član 290) može biti izvršeno i postavljanjem prepreka na saobraćajnicama i time dovede u opasnost živote ili imovinu većeg obima.⁶⁴ Više krivičnih dela protiv ustavnog uređenja i bezbednosti Republike Srbije mogu biti izvršena u vezi sa ostvarivanjem slobode okupljanja kada okupljanje dobije nasilni karakter kao što su, na primer, napad na ustavno uređenje (član 308), pozivanje na nasilnu promenu ustavnog uređenja (član 309), oružana pobuna (član 311) itd.⁶⁵ I krivična dela protiv državnih organa kao što su sprečavanje službenog lica u vršenju službene dužnosti (član 322), napad na službeno lice u vršenju službene dužnosti (član 323) i učestovanje u grupi koja spreči službeno lice u vršenju službene dužnosti (član 324) predstavljaju moguće krivičnopravno sankcionisane protivpravne aktivnosti na ili u vezi sa javnim okupljanjem.⁶⁶ Krivično delo ometanja pravde (član 336b) može biti izvršeno u vezi sa nezakonitim ostvarivanjem slobode okupljanja. Osnovni oblik glasi: „Ko druge poziva na otpor ili na neizvršenje sudskih odluka ili na drugi način ometa vođenje

59 „Službeni glasnik RS”, br. 6/2016.

60 „Službeni glasnik RS”, br. 85/2005, 88/2005 - ispr., 107/2005 - ispr., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016, 35/2019 i 94/2024.

61 „Službeni glasnik RS”, br. 85/2005, 88/2005 - ispr., 107/2005 - ispr., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016, 35/2019 i 94/2024.

62 „Službeni glasnik RS”, br. 85/2005, 88/2005 - ispr., 107/2005 - ispr., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016, 35/2019 i 94/2024.

63 „Službeni glasnik RS”, br. 85/2005, 88/2005 - ispr., 107/2005 - ispr., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016, 35/2019 i 94/2024.

64 „Službeni glasnik RS”, br. 85/2005, 88/2005 - ispr., 107/2005 - ispr., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016, 35/2019 i 94/2024.

65 „Službeni glasnik RS”, br. 85/2005, 88/2005 - ispr., 107/2005 - ispr., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016, 35/2019 i 94/2024.

66 „Službeni glasnik RS”, br. 85/2005, 88/2005 - ispr., 107/2005 - ispr., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016, 35/2019 i 94/2024.

sudskog postupka itd.” (st. 1).⁶⁷ Među krivičnim delima protiv javnog reda i mira, učestalo je izvršenje u grupi prilikom nekog javnog okupljanja krivično delo nasilničko ponašanje na sportskoj priredbi ili javnom skupu (član 344a) i kao takvo predstavlja kvalifikovani oblik ovog dela (st. 2), a KZ propisuje još teže kažnjavanje za kolovođu grupe (st. 3).⁶⁸

Zakon o javnom redu i miru⁶⁹ propisuje još jedno krivično delo koje može biti izvršeno na ili u vezi sa javnim okupljanjem. Reč je o ometanju službenog lica u vršenju službene dužnosti (član. 23).⁷⁰ Ovaj zakon propisuje više prekršaja protiv javnog reda i mira, koji mogu biti izvršeni upravo na javnim okupljanjima i sankcioniše ih novčanom kaznom ili kaznom zatvora. Prekršaji protiv javnog reda i mira, u smislu ovog zakona, „jesu protivpravna dela kojima se na javnom mestu ugrožava ili narušava javni red i mir, stvara uznemirenje ili ugrožava sigurnost građana, ometa kretanje građana na javnim mestima ili ostvarivanje njihovih prava i sloboda, vređa moral, ugrožava opšta sigurnost imovine, vređaju ili ometaju službena lica ili se na drugi način narušava javni red i mir” (član 3. st. 1. t. 3).⁷¹

Iz ovog lapidarnog pregleda referentnih krivično-pravnih i prekršajno-pravnih propisa⁷² jasno se vidi da u pozitivnom pravu Srbije postoji široka lepeza pravnih sankcija za izvršioce krivičnih dela ili prekršaja na ili u vezi sa javnim okupljanjem koja, s jedne strane, obezbeđuju zaštitu slobode mirnog okupljanja, a s druge strane, štite građane od neodgovornih učesnika javnih okupljanja čijim pojedinačnim radnjama ili u grupi mogu biti povređena njihova prava. U svakom slučaju, sloboda mirnog okupljanja kao takva ne može biti izgovor za neodgovornost i nesankcionisanje organizatora ili pojedinih učesnika javnog okupljanja bilo da je ono dobilo nasilni karakter bilo da je na mirnom okupljanju došlo do pojedinačnih incidenata i protivpravnih aktivnosti kojima se ugrožavaju bezbednost, javni red i mir ili prava drugih.

4. OSVRT NA PRAKSU OSTVARIVANJA SLOBODE MIRNOG OKUPLJANJA U SRBIJI I ODSUPANJA OD PRAVNIH STANDARDA

Srbija je u poslednjih nekoliko godina zemlja protesta. Najveći među njima bili su „Jedan od pet miliona” (2018–2020), protest u vreme pandemije korona virusa (2020), tzv. ekološki protesti (protiv iskopavanja litijuma, 2021–2022, 2024), protesti „Srbija protiv nasilja” (maj–novembar 2023) i protiv navodne izborne krađe posle parlamentarnih izbora održanih u decembru 2023. godine (kraj 2023. i početak

67 „Službeni glasnik RS”, br. 85/2005, 88/2005 - ispr., 107/2005 - ispr., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016, 35/2019 i 94/2024.

68 „Službeni glasnik RS”, br. 85/2005, 88/2005 - ispr., 107/2005 - ispr., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016, 35/2019 i 94/2024.

69 „Sl. glasnik RS”, br. 6/2016 i 24/2018.

70 „Sl. glasnik RS”, br. 6/2016 i 24/2018.

71 „Sl. glasnik RS”, br. 6/2016 i 24/2018.

72 Zbog prostora i osnovne svrhe rada izostavljeni su pregled i analiza propisa koji se tiču legalne i legitimne upotrebe sile od strane policije i drugih nadležnih državnih organa na javnim okupljanjima koja su dobila nasilni karakter.

2024. godine). Ipak, erupcija protesta koji su održavani širom Srbije, a koji su vrlo često predstavljali blokadu gradskih i međunarodnih saobraćajnica, mostova, zgrada škola, fakulteta i univerziteta, sudova i javnih tužilaštava itd., nastala je posle tragičnog događaja pada nadstrešnice na železničkoj stanici u Novom Sadu 1. novembra 2024. godine. Ovde se nećemo baviti blokadama zgrada škola, fakulteta i univerziteta, jer bi to zahtevalo drukčiji pristup – ne samo iz vizure slobode mirnog okupljanja, nego prevashodno iz vizure autonomije univerziteta i prava na obrazovanje.

Od 1. novembra 2024. godine do početka oktobra 2025. održano je 25. 172 skupa, od toga na 13. 138 lokacija saobraćaj je bio blokiran. Oko 97-98 % skupova bilo je neprijavljeno.⁷³ Neprijavljeni skupovi nisu u skladu s Ustavom, jer naš Ustav traži da svaki skup na otvorenom bude prijavljen nadležnom državnom organu. Izuzetak je predviđen Zakonom o javnom okupljanju i tiče se spontanijih okupljanja. Pokazali smo šta su spontana okupljanja i sa stanovišta prakse ESLJP-a i u smislu našeg Zakona. Ako bi se prva okupljanja posle pada nadstrešnice u Novom Sadu mogla smatrati spontanom i neposrednom reakcijom na događaj koji je izazvao uznemirenje u javnosti, sva druga okupljanja, bez sumnje, ne potpadaju pod kategoriju okupljanja koja su spontana i koja, samim tim u skladu sa međunarodno-pravnim standardima i važećim nacionalnim propisima, uživaju pravnu zaštitu. Ipak, naročito od januara meseca 2025. godine, nakon nekoliko incidenata u kojima su povređeni učesnici protesta, policija je štitila učesnike svih tih neprijavljenih okupljanja, koja se više nisu mogla podvesti pod kategoriju spontanijih okupljanja.

Ukazali smo i na to da pravnu zaštitu uživaju samo mirna, odnosno nenasilna okupljanja, kao i da je ESLJP usvojio vrlo ekstenzivni koncept mirnijih okupljanja, koji, između ostalog, podrazumeva, da protivpravne i nasilne radnje pojedinaca, učesnika okupljanja ne čine automatski okupljanje nasilnim nego zahtevaju prekršajno-pravno i eventualno krivično-pravno sankcionisanje počinilaca odgovarajućih protivpravnih dela. Neprijavljena okupljanja, koja su bila na pojedinim lokacijama u gradovima redovna, odnosno svakodnevna, održavana su na raskrsnicama i drugim mestima, blokadom saobraćaja, što je dovodilo do privremenog, ali redovnog, odnosno praktično kontinuiranog ugrožavanja i povređivanja prava drugih. Ovde nije reč samo o slobodi kretanja, već i nizu drugih ustavom zajamčenijh prava (na primer, prava na ljudsko dostojanstvo, pravo na život, pravo na obrazovanje, pravo na rad, pravo na zdravu životnu sredinu). Dakle, mnoga okupljanja su se održavala na mestima i na način protivno Zakonu, a imajući u vidu konstantno stvarno i potencijalno povređivanje prava drugih, ona su bila i neustavna. Reakcije nadležnijh državnijh organa u cilju zabrane, rasturanja ili preusmeravanja okupljanja na odgovarajuću lokaciju nije bilo. To se nije dešavalo ni posle 28. juna 2025. godine, kada su mnoga okupljanja počela da dobijaju nasilni karakter, jer su neformalne grupe učesnika počele sa napadima na policiju, prostorije vladajućijh političkijh stranaka i ljude koji su se nalazili u njima, čak i prostorije javnog tužilaštva u Valjevu.⁷⁴ Nadležni državni organi nisu se upuštali u zvaničnu, pravnu kvalifika-

73 Ovo su podaci koje je u skupštinskoj raspravi izneo ministar unutrašnjijh poslova Ivica Dačić, https://rtv.rs/sr_lat/politika/dacic-od-1.-novembra-odrzana-25.172-skupa-na-13.138-lokacija-saobraćaj-bio-blokiran_1662374.html, datum pristupa: 22. 10. 2025. godine.

74 https://www.rtv.rs/sr_lat/drustvo/vrhovno-tuzilastvo-pazljivo-cemo-pratiti-procesuiranje-odgovornijh-za-napade-u-valjevu_1650574.html, datum pristupa: 22. 10. 2025. godine.

ciju nasilnog karaktera okupljanja, ali je počelo privođenje nasilnih pojedinaca zbog krivičnih dela, kao i kažnjavanje zbog prekršaja u smislu Zakona o javnom redu i miru. Bez sumnje, svako konkretno okupljanje na kojem je došlo do upotrebe sile bilo od strane učesnika okupljanja bilo od strane policije zahteva posebnu analizu kako bi se utvrdilo da li je okupljanje imalo nasilni karakter i moralo biti raspušteno ili je u konkretnom slučaju eventualno došlo do prekomerne upotrebe sile od strane nadležnih državnih organa. U vezi s ovim pitanjem treba istaći da dodatni problem stvara činjenica i da najveći broj ovih okupljanja nije prijavljen tako da organizator ovih okupljanja nije poznat. Samim tim postavlja se pitanje adekvatne realizacije pravne odgovornosti organizatora i pojedinaca učesnika u okupljanjima, u skladu sa zakonom. Čitav niz pravnih pravila i pravnih standarda upravo onih koji su nastali i razvijeni u praksi ESLJP-a nije ni moguće primeniti usled prethodno navedenih nedoumica i nejasnoća.

Naposletku, sloboda mirnog okupljanja ima za pretpostavku slobodu izražavanja, što podrazumeva da svako okupljanje mora imati jasno definisan cilj takav da ne sme dovoditi u pitanje demokratiju, ustavni poredak države i prava drugih lica. Ako se u početku, dok je u okupljanjima učestvovao i veliki broj studenata, moglo govoriti o neophodnosti da se brani vladavina prava i obezbedi odgovornost nosilaca javnih funkcija i drugih lica za pad nadstrešnice, vremenom su se ciljevi menjali i postojali čisto politički (na primer, zahtev za raspisivanje vanrednih parlamentarnih izbora). Problem nije u političkom karakteru ciljeva, već u njihovoj neodređenosti i ambivalentnosti i načinu na koji se oni ostvaruju protivno Ustavu i zakonu, a kao što smo videli i protivno međunarodno-pravnim standardima. Nijedan politički cilj ne može biti opravdan do mere da blokira normalan i dostojanstven život svih građana, a naročito onih koji imaju pravo da ne učestvuju u takvim okupljanjima bilo zato što imaju drukčije političke stavove bilo zato što imaju pravo da ne izražavaju političke stavove uopšte. Država, odnosno nadležni državni organi odlučili su se za strategiju tolerancije, ostavljajući otvorenim mnoga pravna pitanja koja su morala biti rešena upravo iz razloga elementarne pravne sigurnosti i bezbednosti svih građana koji u njoj život. U takvoj atmosferi tužilaštva i sudovi nisu pokazali veći stepen odanosti osnovnim postulatima i zahtevima pravne države. Konkretnim primerima trebalo bi posvetiti poseban rad.

5. ZAKLJUČAK

Sloboda mirnog okupljanja pripada kategoriji fundamentalnih političkih prava koja podležu ograničenjima neophodnim u demokratskom društvu, a posebno onim koji se tiču zaštite prava drugih lica. Međunarodno-pravni standardi u oblasti zaštite ovog političkog prava su vrlo razvijeni, a posebno bogatu jurisprudenciju ima Evropski sud za ljudska prava u Strazburu. Ovaj sud je do najsitnijih detalja razradio obeležja slobode mirnog okupljanja, njena potencijalna ograničenja u praksi i sistem pravne zaštite.

U Republici Srbiji, EKLJP je sastavni deo pravnog poretka i neposredno se primenjuje tako da bi svi relevantni standardi razvijeni u praksi ESLJP-a trebalo da imaju odgovarajući značaj u pravnoj praksi. Ustav Srbije iz 2006. je, u osnovi, pri-

hvatio model slobode mirnog okupljanja iz Konvencije. Zakon o javnom okupljanju iz 2016. prati taj model i dalje ga razvija, uz izvesne manjkavosti i nedoslednosti. Zaštita slobode mirnog okupljanja obezbeđena je i odgovarajućim krivično-pravnim i prekršajno-pravnim propisima. U načelu, pozitivno-pravni mehanizmi zaštite slobode mirnog okupljanja se mogu smatrati adekvatnim i dovoljnim da zaštite ovo pravo u praksi.

Ipak, kao i mnogim drugim oblastima, u zemlji sa još uvek krhkim demokratiskim institucijama i nedovoljno utemeljenim postulatima vladavine prava i pravne države, gde su protesti, demonstracije i slična okupljanja učestali, primetan je znatan raskorak između nominalne i stvarne pravne zaštite. U praksi, ima dosta problema, a jedan na kojem je u ovom radu naročito ukazano je nedovoljna spremnost nadležnih državnih organa, uključujući pravosuđe, da dosledno primenjuju važeće pravne propise. S jedne strane, prisutna je težnja aktuelne vlasti da "razvija duh tolerancije", koji podrazumeva da se neprijavljeni skupovi, koji nisu spontani i koji imaju izražene nasilne namere ili čak podrazumevaju primenu nasilja, tolerišu preko mere onog što su principi i standardi referentnih međunarodno-pravnih institucija. S druge strane, uvrežilo se jedno shvatanje da je pravo na protest neograničeno i da se može ostvarivati bez obzira na vreme, mesto i način. U tom smislu, neretko se suspenduju Ustav i čitav niz referentnih zakonskih propisa, a prevashodno Zakon o javnom okupljanju. Na toj liniji je učestalo nedosledno i nedovoljno proaktivno delovanje pravosuđa u slučajevima kada je neophodno sankcionisati nasilne učesnike neprijavljenih okupljanja i zaštititi prava drugih. Preterana, a neretko veštački nametnuta tolerancija državnih institucija vodi slabljenu autoriteta tih institucija, raslabljivanju demokratije kao takve i urušavanju osnovnih postulate vladavine prava. Otuda bi u narednom periodu valjalo insistirati, naučnim i stručnim argumentima, i apelovati na širu javnost da političke interpretacije prava na protest kao gotovo apsolutnog prava, bilo da dolaze od predstavnika vlasti bilo opozicije ili trećih lica, moraju biti zamenjene doslednijom primenom solidnog pravnog okvira za zaštitu Ustavom i zakonom zajemčene (i omeđene) slobode mirnog okupljanja.

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CHALLENGES OF THE JUDICIARY IN ACHIEVING AND PROTECTING THE FREEDOM OF PEACEFUL ASSEMBLY – INTERNATIONAL, CONSTITUTIONAL AND CRIMINAL ASPECTS

SUMMARY

The paper first aims to provide a modern theoretical definition of the freedom of peaceful assembly. Then the relevant international standards were analyzed, especially those from the jurisprudence of the European Court of Human Rights and the Venice Commission, which normatively model the freedom of assembly. The domestic legislation, and partly the practice of the Constitutional Court in connection with the protection of this political right, were also analyzed. It was pointed out how in practice the right to freedom of peaceful assembly turns into the right to violent assembly and how protests or demonstrations are often carried out without an adequate legal response from competent authorities, including judicial authorities – prosecutor's offices and courts. All these issues are placed in the broader framework of international legal standards and principles of the rule of law.

Keywords: freedom of peaceful assembly, unannounced assemblies, spontaneous assemblies, restrictions on freedom of assembly, protests.

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THE OBLIGATION TO CONDUCT AN EFFECTIVE INVESTIGATION – INTERNATIONAL STANDARDS AND PRACTICE**

Abstract: International and regional documents for the protection of human rights do not explicitly prescribe the duty to investigate human rights violations, this positive obligation is derived from accepted obligations. However, the investigation must satisfy certain general criteria. International and regional human rights practice reveals numerous terms used to describe the necessary qualities of investigation. The European Court of Human Rights' practice introduced the concept of "effective investigation", which underscored the necessity of conducting investigations of a particular quality. The concept is primarily associated with criminal investigation. The European Court of Human Rights' practice illustrates the most advanced and gradual evolution of the concept's scope. Initially, obligation was associated with the investigation of the actions of state actors and the right to life. The obligation to effectively investigate is currently linked to a variety of human rights, private actor actions, the investigation of non-violent acts of limited gravity, and discriminatory motives. The European Court of Human Rights established broad and interrelated criteria for the evaluation of the effectiveness of investigations. The precise interpretation of this obligation is contingent upon the specific circumstances, the alleged perpetrators, the offense, and the human rights at issue.

Keywords: effective investigation, criminal investigation, human rights, European Court of Human Rights, impunity.

1. INTRODUCTION

International basic documents for the protection of human rights do not explicitly prescribe the duty to investigate human rights violations. However, this

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positive obligation is derived from accepted obligations. The “effective investigation” emerged as a concept in the practice of the European Court of Human Rights (hereinafter: ECtHR). This obligation is part of a broader trend before the ECtHR. Besides the rights that are clearly procedural in nature, for example, Articles 5, 6, and 13 of the European Convention on Human Rights (hereinafter: ECHR), the ECtHR developed a procedural layer to the scope of the most substantive ECHR rights.¹ The concept is primarily associated with criminal investigation, although other forms of proceedings may be sufficient to fulfill the obligation. The traditional perception of the necessity for a specific quality of investigation in the criminal procedure context is based on the investigation’s purpose, which is to primarily collect evidence and data that is essential for the decision to file an indictment or discontinue proceedings, as well as in preparing for the main hearing if it occurs.²

The absence of effective investigation may lead to impunity and offer opportunities for those responsible for violations to evade consequences and endorse further human rights violations. The common objective of effective investigation by domestic authorities is to reinforce the practical respect and implementation of guaranteed substantive rights.³ From a criminal law perspective, enforcing the deterrent effect of criminalization necessitates the implementation of criminal law provisions through effective investigation and prosecution. The effectiveness of an investigation can be a relative issue, contingent upon various circumstances, and the meaning of the term effective in this context is not precise. However, certain overarching concepts derived from international human rights instruments and practices can be identified.

The precise meaning of this obligation is contingent upon the human rights in question, the nature of the offense, specific circumstances, and the alleged perpetrators in question. The assessment of effectiveness is an investigation into the appropriateness of the discharge of procedural obligations triggered by the occurrence of a human rights violation.⁴ The requirement for effective investigation is more stringent concerning the actions of state actors. An effective criminal investigation is delineated in some of the documents that govern more specific state obligations, regarding the prohibition of torture, children’s rights, violence against women, human trafficking, cybercrime, corruption, enforced disappearances, counterfeiting of medical products, and offenses related to cultural property, as these areas are particularly significant or complex in this context.

- 1 E. Brems /2013/, Procedural protection: An examination of procedural safeguards read into substantive Convention rights, in: *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights*, Cambridge, p. 138.
- 2 T. Vasiljević /1981/, *Sistem krivičnog procesnog prava SFRJ*, Beograd, p. 480.
- 3 A. Mowbray /2002/, Duties of Investigation Under the European Convention on Human Rights, *International and Comparative Law Quarterly*, Vol. 51, No. 2, p. 447.
- 4 K. Kamber /2017/, *Prosecuting Human Rights Offences: Rethinking the Sword Function of Human Rights Law*, Leiden, p. 217.

2. DEFINITIONS

The obligation to investigate implies merely the execution of the investigation, regardless of its quality. The multitude of interrelated terms arising from the obligation to investigate illustrates the necessity of a particular quality of investigation.

When it comes to the term “effective”, it can be broadly understood as an investigation capable of producing the desired effect. A criminal investigation can be broadly defined as a systematic inquiry into a criminal act.⁵ The purpose of criminal investigation is to determine, to the extent possible, the truth about how the crime occurred.⁶

The ECtHR developed a broad definition of effective investigation due to the different relevant proceedings and concepts in national laws regarding investigation phases and authorized bodies in procedural law.⁷ As the ECtHR stated, the effective investigation “should in principle be capable of leading to the establishment of the facts of the case and, if the allegations prove to be true, to the identification and punishment of those responsible”. Nevertheless, the absence of conclusions from a particular investigation does not necessarily imply that it was ineffective, since the obligation to investigate “is not an obligation of results, but of means”.⁸ The ECtHR also developed additional criteria for assessing the effectiveness of national proceedings.

Regarding the practice of the UN Human Rights Committee (hereinafter: HRC), the term effective is not used as the general concept, but interchangeably along with the terms thorough, credible, independent, impartial, systematic, prompt, proper, and transparent investigation.⁹ On the other hand, the ECtHR considers some of these as elements of effective investigation, as a broader term, although it is recognized that these elements are interrelated and considered jointly, and investigation doesn’t need to meet all requirements.

The Inter-American Human Rights Court (hereinafter: IACtHR), similarly to HRC, does not acknowledge a general concept of effective investigation. As a part of the obligation to legally guarantee the free and full exercise of human rights, the

5 R. P. Gibbons /1942/, *Criminal Investigations*, *J. Crim. L. & Criminology*, Vol. 33, No. 1, p. 84.

6 M. F. Brown /2001/, *Criminal Investigation: Law and Practice*, Butterworth-Heinemann, p. 3.

7 For example, for different investigation concepts in criminal procedure, see: M. Škulić /2010/, *Koncepcija istrage u krivičnom postupku*, *Revija za kriminologiju i krivično pravo* 1, pp. 65–68.

8 *Milić and Nikezić v. Montenegro*, Apps. Nos. 54999/10 and 10609/11, (ECtHR, 18 April 2015), par. 94.

9 HRC, Consideration of reports submitted by States parties under article 40 of the Covenant: Concluding observations of the Human Rights Committee: Cameroon, CCPR/C/CMR/CO/4, 4 August 2010; *Marija and Dragana Novaković v. Serbia*, Communication No. 1556/2007, U.N. Doc. CCPR/C/100/D/1556/2007 (2010), par. 7.3; HRC, Concluding observations of the Human Rights Committee: Russian Federation, CCPR/C/RUS/CO/6, 24 November 2009, par 13; HRC, Concluding observations on the initial report of Mauritania: Human Rights Committee, CCPR/C/MRT/CO/1, 21 November 2013, par. 13; HRC, Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland, CCPR/C/GBR/CO/7, 17 August 2015, par. 8; HRC, Concluding observations of the Human Rights Committee, Israel, U.N. Doc. CCPR/C/ISR/CO/3, July 2010, par. 9.

State has the legal duty “to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.”¹⁰ For example, regardless of the filing of a complaint, “in cases of forced disappearance international law and the general duty to guarantee, impose the obligation to investigate the case *ex officio*, without delay, and in a serious, impartial, and effective manner”.¹¹ Additionally, the phrase that can be used is whether the criminal investigations are conducted with “due diligence”.¹² Like the ECtHR, the IACtHR has also established that the duty to perform a serious, complete and effective investigation is one of means and not results, therefore an obligation to use best efforts, rather than an obligation to ensure results.¹³

The term “effective” can encompass a variety of essential features of investigation. However, this term is misleading in that it might suggest that the desired outcome must be attained (identification and punishment of those responsible), which is why the limitation “is not an obligation of results, but of means” is significant. The thoroughness is a criterion also employed to assess the effectiveness of an investigation in the context of the ECtHR, and it can generally be considered to be an investigation that is comprehensive in scope and addresses all of the relevant background circumstances, as well as the investigation’s conclusions. This term is closely related to the term “effective”. Adequacy is also used in ECtHR practice, but possibly to refer to effective investigation without other criteria for effective investigation (promptness, independence, public scrutiny, and engagement of the victim or next of kin). Adequacy is more closely associated with a satisfactory response in a specific situation. Due diligence in investigation is also employed, and it could refer to the typical practice of care or inquiry, suggesting a degree of discretion toward the outcomes of the investigation. The ECtHR aligned the term of effective investigation with due diligence by incorporating a reasonableness standard, indicating that states are required to adopt procedures deemed reasonable in particular circumstances.

3. EFFECTIVE CRIMINAL INVESTIGATION AND INTERNATIONAL DOCUMENTS

3.1. *United Nations*

The obligation to conduct an investigation is not explicitly mentioned in the legally binding basic human rights documents; however, it is considered to be a necessary condition for the fulfillment of the accepted obligations. At the UN level, Human Rights Committee General Comment No. 31 on the nature of the general legal

10 *Velásquez Rodríguez v. Honduras*, IACtHR, Judgment of 29 July 1988, Series C No. 4, par. 174; *Anzualdo Castro v. Peru*, IACtHR, Judgment of September 22, 2009, Series C No. 202, par. 62.

11 *Radilla Pacheco v. Mexico*, IACtHR, Judgment of 23 November 2009, Series C No. 209, par. 143.

12 *Ibid.*, par. 193; *Employees of the Fireworks Factory of Santo Antônio de Jesus and their Families v. Brazil*, IACtHR, Judgment of 15 July 2020, Series C No. 407, par. 220.

13 *Kawas Fernández v. Honduras*, IACtHR, Judgment of April 3, 2009, Series C No. 196, par. 101; *Heliodoro-Portugal V. Panamá*, IACtHR, Judgment of August 12, 2008, Series C. No. 186, par. 144.

obligation imposed on States Parties to the International Covenant on Civil and Political Rights (hereinafter: ICCPR), emphasizes that the obligation to investigate is an integral part of Article 2 of the ICCPR. The positive obligations of States Parties to guarantee Covenant rights will be fulfilled only if the State safeguards individuals from not only violations of Covenant rights by its agents but also from actions taken by private individuals or entities that would impede the enjoyment of ICCPR rights.¹⁴ Article 2, paragraph 3 of the ICCPR ensures that individuals must also have accessible and effective remedies to vindicate protected rights, and a failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the ICCPR. Independent and impartial bodies (judicial and administrative) must promptly, thoroughly, and effectively investigate allegations.¹⁵ The Special Rapporteur on the situation of human rights defenders delineated necessary principles for “due diligence” in the criminal investigation of human rights: state initiative upon becoming aware of a human rights violation, timeliness, and expeditiousness, competence of professionals conducting investigation, independence, and impartiality, exhaustiveness (meaning that all available means are used to establish the truth and identify all those responsible), participation of victims and transparency.¹⁶

In the HRC General Comment No. 36 on the right to life, it is emphasized that the obligation to investigate and prosecute allegations of deprivation of life by State authorities or by private individuals and entities is a critical component of the protection of the right to life.¹⁷ Regarding the prohibition of torture, or other cruel, inhuman or degrading treatment or punishment, complaints must be investigated promptly and impartially by competent authorities to make the remedy effective.¹⁸ States must conduct an effective, impartial, and timely investigation of any allegation or reasonable suspicion of unlawful use of force or other violations by law enforcement officials in the context of the right to peaceful assembly.¹⁹

Some elements of the obligation to effectively investigate could be explicitly found in UN documents dealing with more specific aspects of protection. For example, in the Convention against torture and other cruel, inhuman or degrading treatment or punishment, Article 12 declares that “the State parties must also ensure that their competent authorities proceed to a prompt and impartial investigation when there is ground to believe that an act of torture has been committed in any territory under their jurisdiction”.²⁰ The UN Committee against Torture and Inhu-

14 HRC, General Comment No. 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 29 March 2004, CCPR/C/21/Rev.1/Add. 1326 May 2004, par. 8.

15 *Ibid.*, par 15.

16 UN General Assembly, Situation of human rights defenders, Note by the Secretary-General, A/74/159, 15 July 2019, par. 41.

17 HRC, General comment No. 36, Article 6 (Right to Life), CCPR/C/GC/35, 3 September 2019, paras. 19, 21, 27–29, 58.

18 HRC, CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), 10 March 1992, par. 14.

19 HRC, General comment No. 37 (2020) on the right of peaceful assembly (article 21), CCPR/C/GC/37, 17 September 2020, par. 90.

20 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, United Nations, UN General Assembly, *Treaty Series*, vol. 1465, p. 85, 10 December 1984, Article 12.

man and Degrading Treatment also urges that States conduct an impartial, effective, thorough, and prompt investigation.²¹

The United Nations General Assembly Declaration on the Elimination of Violence against Women, in its Article 4(c), urges States to “exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or private persons”.²² The significance of effective investigation procedures is also emphasized in Article 19(2) of the United Nations Convention on the Rights of the Child.²³ The Palermo Protocol, for example, applies to the investigation and prosecution of the trafficking in persons.²⁴ Article 12 of the International Convention for the Protection of All Persons from Enforced Disappearances emphasizes the obligation of competent authorities to thoroughly, promptly, and impartially examine the alleged or suspected case of enforced disappearance.²⁵

The UN Office of the High Commissioner for Human Rights has issued two manuals that are significant to the issue of effective criminal investigation of potentially unlawful death and regarding torture and other cruel, inhuman or degrading treatment or punishment.²⁶

3.2. Europe

The ECtHR stated that the obligation to protect the right to life necessitates “some form of effective official investigation when individuals have been killed as a result of the use of force by, inter alia, agents of the State”, when read in conjunction with the State’s general duty under Article 1 of the ECHR to secure to everyone within their jurisdiction the rights and freedoms defined in ECHR.²⁷ Also, ECtHR stated that “general legal prohibition of arbitrary killing and torture and inhuman or degrading treatment or punishment by agents of the State would be ineffective in practice if there existed no procedure either for reviewing the lawfulness of the use of lethal force by State authorities or for investigating arbitrary killings and allega-

21 Committee Against Torture (CAT), Concluding observations on the 3rd periodic report of Belgium, CAT/C/BEL/CO/3, 28 October–22 November 2013, par. 13.

22 Declaration on the Elimination of Violence against Women, A/RES/48/104, UN General Assembly, 20 December 1993, Article 4(c).

23 Convention on the Rights of the Child, United Nations, UN General Assembly, *Treaty Series*, vol. 1577, p. 3, 20 November 1989, Article 19.

24 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, UN General Assembly, 15 November 2000.

25 International Convention for the Protection of All Persons from Enforced Disappearance, UN General Assembly, 20 December 2006, Article 12.

26 The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016), UN Office of the High Commissioner for Human Rights (OHCHR), New York/Geneva, 2017; Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Istanbul Protocol”), UN Office of the High Commissioner for Human Rights (OHCHR), HR/P/PT/8/Rev.1, 2004.

27 *Al-Skeini and Others v. the United Kingdom* (GC), App. No. 55721/07, (ECtHR, 7 July 2011), par. 163.

tions of ill-treatment of persons held by them”.²⁸ Obligation does not solely concern deaths resulting from the use of force by agents of the State, but also a positive obligation on States to take appropriate steps to safeguard the lives of those within their jurisdiction.²⁹ Equally, “Article 3 requires that the authorities conduct an effective official investigation into the alleged ill-treatment even if such treatment has been inflicted by private individuals”.³⁰ Similar to Articles 2 and 3, Article 4 also entails a procedural obligation to effectively investigate potential trafficking violations.³¹ Although the practice on this issue is not elaborated as in the case of articles 2 and 3 of the ECHR, the ECtHR does not exclude the possibility of extending to the effectiveness of an investigation regarding several other human rights, although mostly not as an autonomous procedural obligation.

Numerous conventions adopted within the Council of Europe stress the need for effective investigation, the obligation content varies depending on the regulated subject matter, and it is mostly related to a criminal investigation.³² All of the documents also impose the obligation of international cooperation in criminal matters. Conventions mostly refer to states’ obligation to ensure effective criminal investigation in relevant subject matter, or to the obligation to take all necessary measures to enable evidence gathering. Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse refers to the obligation to treat investigations and criminal proceedings as a priority and to carry them out without any unjustified delay.³³ Conventions do not specify what constitutes an effective investigation, although they indicate the need for special investigative techniques or specialized personnel in some subjects.³⁴ In addition, The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) as the body set up to monitor the implementation of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, if

28 *Mocanu and Others v Romania* (GC), Apps. nos 10865/09, 45886/07 and 32431/08, (ECtHR, 17 September 2014), par. 316.

29 *Öneryildiz v. Turkey*, App. No. 48939/99, (ECtHR, 30 November 2004), par. 71.

30 *C.A.S. and C.S. v Romania*, App. No. 26692/05, (ECtHR, 20 March 2012), par. 69.

31 *Rantsev v. Cyprus and Russia*, App. No. 25965/04, (ECtHR, 7 January 2010), par. 288;

32 Council of Europe Convention against Trafficking in Human Organs, Santiago de Compostela, 25.III.2015, *CETS* 216, Articles 15–16; Council of Europe Convention on the Prevention of Terrorism, Warsaw, 16.V.2005, *CETS* 196, Article 15; Convention on Cybercrime, Budapest, 23.XI.2001, *CETS* 185, preamble; Council of Europe Convention on Offences relating to Cultural Property, Nicosia, 19.V.2017, *CETS* 221, Articles 2, 17–18; Council of Europe Convention on the counterfeiting of medical products and similar crimes involving threats to public health, Moscow, 28.X.2011, *CETS* 211, Articles 15–16; Council of Europe Convention on preventing and combating violence against women and domestic violence Istanbul, 11.V.2011, *CETS* 210, Articles 5, 49; Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse Lanzarote, 25.X.2007, *CETS* 201, Articles 30, 32, 34; Council of Europe Convention on Action against Trafficking in Human Beings, Warsaw, 16.V.2005, *CETS* 197, Articles 1, 27; Criminal Law Convention on Corruption, Strasbourg, 27.I.1999, *CETS* 173, Article 23.

33 Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, Article 30 (3).

34 Criminal Law Convention on Corruption, Article 23; Council of Europe Convention on Offences relating to Cultural Property, Article 18.

necessary, can recommend that any information regarding alleged ill-treatment to be properly investigated.³⁵

The Council of Europe issued Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations, which list adequacy, thoroughness, impartiality and independence, promptness, and public scrutiny as necessary elements of effective investigation.³⁶

Within the EU, like the ECHR, the European Charter of Human Rights does not explicitly mention the obligation to investigate, but the Charter contains rights that correspond to rights guaranteed by the ECHR, and the meaning and scope of those rights shall be the same as those laid down by the ECHR (Article 52 (3)). However, EU secondary legislation explicitly regulates some of the areas that are important or challenging concerning the issue of effective criminal investigation.³⁷

3.3. *The Inter-American Human Rights System*

The duty to investigate human rights violations is not explicitly provided in the American Convention on Human Rights (ACHR). However, it has been developed as a component of the obligation of states to guarantee rights, as outlined in Article 1(1) of the ACHR, in conjunction with the substantive right that must be safeguarded or guaranteed, and as a component of the right to access justice, as outlined in Articles 8 and 25 of the ACHR.³⁸ The Court has recognized that the duty to inves-

35 For example: Report to the Government of “the former Yugoslav Republic of Macedonia” on the visit to “the former Yugoslav Republic of Macedonia” carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 14 to 18 October 2007, CPT/Inf (2008) 22, par. 16

36 Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations, Adopted by the Committee of Ministers on 30 March 2011 at the 1110th meeting of the Ministers’ Deputies.

37 Directive (EU) 2024/1712 of the European Parliament and of the Council of 13 June 2024 amending Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, *OJ L*, 2024/1712, 24.6.2024, Articles 9, 19b; Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, *OJ L* 88, 31.3.2017, recital (21), Article 20; Directive (EU) 2024/1385 of the European Parliament and of the Council of 14 May 2024 on combating violence against women and domestic violence, Article 15; Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, *OJ L*, 2024/1385, 24.5.2024, Article 15; Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law, *OJ L* 284, 12.11.2018, Article 11; Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), *OJ L* 119, 4.5.2016, Article 2.; Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, Official Journal of the European Union, *L* 130, 1.5.2014, p. 1–36.

38 G. M. Frisso /2018/, The Duty to Investigate Violations of the Right to Life in Armed Conflicts in the Jurisprudence of the Inter-American Court of Human Rights, *Israel Law Review*, Vol. 51, No. 2, p. 173.

tigate instances of substantive law violations that must be safeguarded, protected, or guaranteed is derived from the general obligation to uphold the human rights enshrined in Article 1(1) of the Convention. Therefore, “in cases of extra-legal executions, forced disappearances and other egregious human rights violations, the IACtHR has held that the conduct of a prompt, serious, impartial and effective ex officio investigation is a fundamental and conditioning element for the protection of certain rights that are otherwise affected or annulled by those situations, such as the right to life, personal liberty and personal integrity”.³⁹

3.4. African Human Rights System

Similarly, the duty to investigate human rights violations is not explicitly provided in the African Charter on Human and Peoples’ Rights (ACHPR), it is derived from accepted obligations (Article 1) and rights regarding remedies in Article 7 (there is no explicit provision on effective remedies).⁴⁰ For example African Court on Human and Peoples’ Rights found a violation regarding article 7 of the Charter as well as article 1 of the Charter, concerning the obligation to adopt measures, other than legislative measures, regarding lack of due diligence in the investigation of murder.⁴¹ The African Court on Human and Peoples’ Rights can order the Respondent State to reopen investigations to apprehend, prosecute, and bring the perpetrators to justice.⁴²

4. EUROPEAN COURT OF HUMAN RIGHTS PRACTICE

4.1. Relevant human rights and basic principles

In the jurisprudence of the European Court of Human Rights, the general positive obligation to undertake an effective investigation is considered to be a procedural element of the right to life (Article 2 of the ECHR), the prohibition of torture and inhuman or degrading treatment and punishment (Article 3 of the ECHR), and the prohibition of slavery and forced labor (Article 4 of the ECHR).⁴³

Right to liberty and security (Article 5 of the ECHR) can also entail an obligation to conduct a prompt, effective investigation, such as into an arguable claim that a person has been taken into custody and has not been seen since.⁴⁴

Regarding the right to private life (Article 8 of the ECHR), the ECtHR has not excluded the possibility that the State’s positive obligation to safeguard an individual’s integrity may extend to the effectiveness of an investigation and that an obligation to investigate should even less be excluded in the context of Article 8 con-

39 *La Cantuta v. Peru*, IACtHR, Judgment of November 29, 2006, Series C No. 162, par. 110.

40 *Application 013/2011 - The beneficiaries of the late Norbert - Zongo Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo vs Burkina Faso*, Judgments (Merits), 28.03 2014.

41 par. 156.

42 *Ibid.*, Judgments (Reparations), par. 111.

43 *Rantsev v. Cyprus and Russia*, par. 305.

44 *Kurt v. Turkey*, App. No. 15/1997/799/1002, (ECtHR 25 May 1998), paras 124, 128.

cerning acts of State agents.⁴⁵ The cases primarily pertain to individual integrity, although they may also involve matters related to private life.⁴⁶

In cases involving violent incidents against newspapers and individuals associated with them, the issue of effective investigation may be examined under the freedom of expression (Article 10 of the ECHR).⁴⁷ The ECtHR also determined that in cases of interference with freedom of association by acts of individuals (Article 11 of the ECHR), the competent authorities have an additional obligation to take effective investigative measures.⁴⁸

In the context of the investigation of discriminatory motives, Articles 2, 3, or 8 may be violated in conjunction with Article 14 of the ECHR.⁴⁹ In one case related to shortcomings in the investigation of religiously biased violent acts, the ECtHR concluded that there has been a breach of the respondent State's positive obligations under Articles 8 and 9 of the Convention taken in conjunction with Article 14.⁵⁰

Concerning the right to free elections (Article 3 of Protocol No. 1 to the ECHR), the ECtHR determined that domestic courts, when faced with an arguable claim regarding electoral irregularities, were obligated to undertake reasonable steps to investigate the alleged irregularities.⁵¹

Also, recently, in one case, the ECtHR held that the respondent State was under a positive duty regarding right to property (Article 1 of Protocol No. 1 of the ECHR) to conduct an effective criminal investigation.⁵² This case concerned the positive obligation to protect intellectual property, and an investigation did not include the identification of the holder of the bank card allegedly used to collect payment for illegal downloads. The ECtHR also concluded that “there is no indication that taking those steps would have imposed a disproportionate burden on the authorities, even taking into account the relatively limited gravity of the alleged offence against the applicant's intellectual property”.⁵³ This case illustrates the ECtHR's increasing engagement in intellectual property disputes, as well as the requirement for effective investigation, which was previously associated with fundamental values and essential components of human rights protection.⁵⁴

The ECtHR's practice of the duty to effectively investigate has undergone a gradual evolution, not only regarding the rights that might entail the obligation. Ini-

45 *Basu v. Germany*, App. No. 215/19, (ECtHR 18 October 2022), par. 32.

46 *Craxi (no. 2) v. Italy*, App. No. 25337/94, (ECtHR 17 July 2003), paras 74–75.

47 *Özgür Gündem v. Turkey*, App. No. 23144/93, (ECtHR 16 March 2000), par. 45.

48 *Ouranio Toxo and Others v. Greece*, App. No. 74989/01, (ECtHR 20 October 2005), par. 43.

49 *Mikeladze and Others v. Georgia*, App. No. 54217/16, 16. November 2021; *Nachova and Others v. Bulgaria* (GC), App. no. 43577/98 and 43579/98, (ECtHR 06. July 2005); *Association Accept and others v. Romania*, (ECtHR, App. No. 19237/16), 1 June 2021.

50 *Georgian Muslim Relations and Others v. Georgia*, (ECtHR App. No. 24225/19), 30 November 2023, par. 100.

51 *Namat Aliyev v. Azerbaijan*, (ECtHR App. No. 18705/06), 8 April 2010, par. 88.

52 *Korotiyuk v. Ukraine*, App. No. 74663/17, (ECtHR 19 January 2023), par. 45.

53 *Ibid.*, par. 55.

54 *E. Izyumenko /2023/, Ineffective Investigation into Making a Book Available for Illegal Download Breaches Copyright Holder's Right to Property*, Rules the European Court of Human Rights, *Journal of Intellectual Property Law & Practice*, Vol. 18, No. 4. p. 271.

tially, the obligation was present only in cases where the harm was caused by state agents and subsequently expanded to include cases in which harm was caused by non-state actors.⁵⁵ From the initial case of *McCann*, in which the ECtHR cautiously referred to the necessity of some form of effective official investigation when individuals have been killed as a result of the use of force by State agents, to the effective criminal investigation of private actors' actions.⁵⁶ The obligation has evolved as well concerning the essential elements or objectives of an effective investigation, such as the necessity to examine the discriminatory motives of the perpetrator, which can pose a particularly challenging element of the investigation.⁵⁷

The ECtHR has evaluated the issue of procedural obligations regarding Articles 2, 3, and 4 separately from the question of substantive obligation compliance and has, when necessary, identified a distinct violation on that basis, allowing for review by the ECtHR without addressing the substantive aspect of the provision. This implies that the duty to effectively investigate other rights is tied to substantive rights. The procedural obligation under Article 8, for example, has not been consistently characterized as autonomous.⁵⁸

The positive obligation to conduct a specific type of investigation, more precisely, an official criminal investigation, is primarily associated with the severity of the offense and the intention behind it. In the majority of cases, it is associated with the prohibition of torture and the right to life. Concerning the broad right to respect for private and family life, official criminal investigations may be requisite in certain instances, contingent upon the specific part of the right involved and the case's circumstances, particularly where fundamental values and essential aspects of private life are at stake.⁵⁹ In certain instances, cases of arguable omissions do not require criminal investigation, as other forms of proceedings, like civil, administrative, or disciplinary proceedings, may be sufficient to satisfy the more general obligation to have an effective judicial system.⁶⁰ However, where, for example, the healthcare providers' fault exceeded mere error or medical negligence, the ECtHR has determined that compliance with the procedural obligation necessitates the resort to criminal law. In other instances where the infringement of the right to life or personal integrity is not intentional, the general obligation to establish an effective and independent judicial system does not necessarily necessitate the provision of a criminal law remedy.⁶¹ For instance, the ECtHR maintained that Article 2 did not necessarily re-

55 J. Chevalier-Watts /2010/, *Effective Investigations under Article 2 of the European Convention on Human Rights: Securing the Right to Life or an Onerous Burden on a State?*, *The European Journal of International Law*, Vol. 21, No. 3, p. 707.

56 *McCann and Others v. UK*, (ECtHR App. No. 18984/91), 27 September 1995, par. 161.

57 *Nachova and Others v. Bulgaria*.

58 V. Stoyanova /2023/, *Positive Obligations under the European Convention on Human Rights*, Oxford, pp. 126–127. For example, the ECtHR found a separate violation of Article 8 in its procedural aspect in *Ulusoy and others v. Turkey*, App. No. 54969/09, (ECtHR 3 May 2019); *M.S. v. Ukraine*, App. No. 2091/13, (ECtHR 11 July 2017).

59 *M.C. v. Bulgaria*, App. No. 39272/98, (ECtHR 4 December 2003), par. 152; *Hadija Ismayilova v. Azerbaijan*, Apps. nos. 65286/13 and 57270/14, (ECtHR 10 January 2019), par. 115.

60 V. Stoyanova, *op. cit.*, pp. 141–148.

61 *Lopes de Sousa Fernandes v. Portugal* (GC), App. No. 56080/13, 19 December 2017, par. 215.

quire a criminal-law remedy in the case of the applicant's husband's death following a routine operation, as there was no evidence that the death was intentional. However, to fulfill the procedural obligation of Article 2, other proceedings must be effective.⁶² In a situation where a criminal investigation is required, the authorities must act on their motion once the matter has come to their attention.⁶³

The ECtHR emphasizes that the authorities must take actions that are considered reasonable in the context of the case when evaluating the effectiveness of an investigation.⁶⁴ The ECtHR also pointed out that it “is not concerned with allegations of errors or isolated omissions in the investigation; it cannot replace the domestic authorities in the assessment of the facts of the case; nor can it decide on the alleged perpetrators’ criminal responsibility.”⁶⁵

The ECtHR also usually points out all international documents accepted by the respondent State relevant to an effective criminal investigation, contingent upon the subject matter.⁶⁶

When it comes to the admissibility of a complaint, the passage of time adversely impacts both the State's obligation to investigate and the ECtHR's ability to conduct a meaningful and effective review of the case. In the cases where there is an explicit autonomous procedural obligation, the ECtHR established that an applicant must take action when it is evident that no adequate investigation will be conducted, that is, when it becomes clear that the respondent State will not meet its obligations under the Convention.⁶⁷ The challenge of pinpointing the precise moment when the applicant recognized, or should have recognized, the ineffectiveness of the investigation can be complex. For instance, in some cases, evidence allegedly illuminating the circumstances of a homicide may emerge in the public domain at a subsequent stage. If there is an “important new development in the investigation” that has not been effectively investigated, then a four-month time limit for logging complaints to the ECtHR will have a new starting point.⁶⁸

Although it may seem to be a plausible option in rare instances to prompt an effective investigation to prevent evidence deterioration as an interim measure, the ECtHR appears to have concluded that this request does not meet the criteria established by Rule 39 of the Rules of Court.⁶⁹

62 *Ibid.*, paras. 231–234; *Ribcheva and Others v. Bulgaria*, Apps. nos. 37801/16, 39549/16 and 40658/16, (ECtHR 30 March 2021), paras. 128–129.

63 *Nicolae Virgiliu Tănase v. Romania* (GC), App. No. 41720/13, (ECtHR 25 June 2019), par. 164.

64 *Bouyid v. Belgium* (GC), App. No. 23380/09, (ECtHR 28 September 2015), par. 123; *Butolen v. Slovenia*, App. No. 41356/08, (ECtHR 26 April 2012), par. 74.

65 *M.C. v. Bulgaria*, paras. 167–168.

66 *S.M. v. Croatia*, App. No. 60561/14, (ECtHR 25 June 2020), paras. 107–209.

67 *Mocanu and Others v. Romania*, par. 262.

68 *Khadzhimuradov and Others v. Russia*, Apps. nos. 21194/09 and 16 others, (ECtHR 10 October 2017), par. 76.

69 Interim measure issued in sonic-weapon case, Press Release issued by the Registrar of the Court ECHR 110 (2025) 30.04.2025. The Rules of Court have been recently revised, with Rule 39 now incorporating the term “exceptional circumstances” and establishing a criterion of “imminent risk of irreparable harm to a Convention right,” as derived from ECtHR jurisprudence. Rules of Court, 28 April 2025, Registry of the Court, Strasbourg.

The ECtHR typically evaluates whether the harm impacts interests that are within the definitional scope of the relevant right. However, this assessment may be challenging due to the inefficiency of investigation or the absence of any investigation, which is why the ECtHR has, in some instances, opted to avoid the definitional stage.⁷⁰ This can be difficult, as the ECtHR, as previously mentioned, is unable to substitute the domestic authorities in the evaluation of the facts of the case, particularly in cases where there is a lack of physical evidence.

4.2. Criteria for assessing investigation effectiveness

In the practice of the ECtHR, several essential requirements for an effective investigation can be identified: adequacy, independence, promptness, public scrutiny, and the involvement of the victim or the next of kin.⁷¹ However, as the ECtHR pointed out, “these elements are interrelated and each of them, taken separately, does not amount to an end in itself, as is the case in respect of the independence requirement of Article 6. They are criteria which, taken jointly, enable the degree of effectiveness of the investigation to be assessed”.⁷² Also, it cannot be claimed that a single unified procedure should meet all requirements.⁷³ Therefore, the effectiveness of the investigation may vary based on the circumstances involved. These criteria are not uniform, as the thoroughness of investigations is sometimes acknowledged as a distinct criterion from the adequacy of investigation.⁷⁴ The elements are interconnected. For instance, a deficiency in promptness may stem from a lack of independence. In addition, serious deficiencies in a single criterion may suffice for the ECtHR to determine an absence of effective investigation.⁷⁵ The ECtHR also stressed that when state agents are involved, “particularly stringent scrutiny must be applied” to the ensuing investigation.⁷⁶

The investigation must first be adequate. According to the ECtHR, adequate investigation must be capable of leading to the establishment of the facts and, where appropriate, the identification and punishment of those responsible.⁷⁷ However, this definition is also used for effective investigation in the ECtHR practice.⁷⁸ It may be argued that adequacy represents a narrow sense of efficacy without other further relevant criteria. Regarding the right to life, for example, the ECtHR elaborated fur-

70 V. Stoyanova, *op. cit.*, pp. 124–125.

71 *R.R. and R.D. v. Slovakia*, App. No. 20649/18, (ECtHR 1 September 2020), par. 178; *Mocanu and Others v. Romania*, paras. 332–351.

72 *Mustafa Tunç and Fecire Tunç v. Turkey* (GC), App. No. 24014/05, (ECtHR 14 April 2015), par. 225.

73 *Ribcheva and Others v. Bulgaria*, par. 139.

74 “The characteristics which such an investigation must display to be seen as effective – independence, promptness, reasonable expedition, adequacy, thoroughness, objectivity, and sufficient involvement of the next of kin”, *Ibid.*

75 *Collette and Michael Hemsworth v. The United Kingdom*, App. No. 58559/09, (ECtHR 16 July 2013), par. 74.

76 *Enukidze and Girgylani v. Georgia*, App. No. 25091/07, (ECtHR 26 April 2011), par. 277.

77 *Ramsahai and Others v. Netherlands* (GC), App. No. 52391/99, (ECtHR 15 May 2007), par. 324; *Jeronovič v. Latvia* (GC), App. No. 44898/10, (ECtHR 5 July 2016), par. 103.

78 *Koky and Others v. Slovakia*, App. No. 13624/03, (ECtHR 12 June 2012), par. 215.

ther meaning of the adequacy of the investigation. Authorities must take all reasonable measures to obtain evidence about the incident, such as eyewitness testimony, forensic evidence, and, if necessary, an autopsy that provides a comprehensive and accurate record of injury and an objective analysis of the clinical findings, including the cause of death. Additionally, if the harm is caused by State agents, the investigation must be effective in the sense that it can determine whether the force used by State agents was or was not justified in the circumstances.⁷⁹ Regarding the prohibition of torture, the determination of whether the force used by State agents was or was not justified in the circumstances is also especially significant.⁸⁰

The ECtHR also acknowledged that the investigation must encompass the evaluation of potential perpetrators' discriminatory motives, and there is substantial case law on this subject. Here, the deficiencies in the investigation are not associated with the base offense, but rather with the investigation of the perpetrator's motives. The ECtHR emphasized that demonstrating racial motivation can often be difficult in practice, and this requirement is not absolute. Nonetheless, „authorities must do what is reasonable in the circumstances to collect and secure the evidence, explore all practical means of discovering the truth and deliver fully reasoned, impartial and objective decisions, without omitting suspicious facts that may be indicative of racially induced violence.”⁸¹ Furthermore, there must be some indication of the presence of discriminating motives.⁸²

In certain instances, the ECtHR delineated the thoroughness of investigation as a relevant criterion. A thorough investigation implies that the authorities must consistently make a serious effort to determine the exact events that occurred and should not rely on hasty or ill-founded conclusions when closing their investigation. They are required to take all reasonable measures at their disposal to secure the evidence concerning the incident, such as forensic evidence, eyewitness testimony, and so forth.⁸³ It seems that the term thorough is more directed at the basis for investigation conclusions, since “the investigation's conclusions must be based on a thorough, objective and impartial analysis of all relevant elements.”⁸⁴ The thorough criteria appear to overlap with adequacy mostly. It can be concluded that adequate investigation is an investigation capable of leading to the identification and punishment of those responsible, while a thorough investigation refers more to an investigation that is comprehensive in scope and addresses all of the relevant background circumstances, as well as investigation conclusions.

Independent investigation criteria is particularly important regarding the investigation of state actors' actions. For an investigation to be effective, it is typically essential that the individuals conducting the investigation be independent of those involved in the events. The ECtHR underlined that the individuals and enti-

79 *Armani da Silva v. The United Kingdom* (GC), App. No. 5878/08, (ECtHR 30 March 2016), par. 233.

80 *Mustafa Tunç and Fecire Tunç v. Turkey*, par. 103.

81 *Nachova and Others v. Bulgaria*, par. 160.

82 *Mižigárová v. Slovakia*, App. No. 74832, (ECtHR December 2010), par. 122.

83 *Bouyid v. Belgium*, par. 123; *Butolen v. Slovenia*, par. 74.

84 *Armani da Silva v. The United Kingdom*, par. 234; *Mustafa Tunç and Fecire Tunç v. Turkey*, par. 175.

ties responsible for the investigation don't need to possess absolute independence; rather, they should be sufficiently independent of the individuals and structures whose responsibility is likely to be involved. In addition, the sufficiency of the level of independence is evaluated considering all relevant circumstances.⁸⁵ Also, "for an investigation to be effective, the institutions and persons responsible for carrying it out must be independent of those targeted by it. This means not only a lack of any hierarchical or institutional connection but also practical independence".⁸⁶ The assessment of hierarchical or institutional relationships should not be overly complex; however, practical independence is a vague term that encompasses various forms of personal connections, making it challenging to ascertain the extent of practical dependence that would breach the requirement of independent investigation.⁸⁷ The adequacy of the degree of independence is assessed in the light of all the circumstances, which are necessarily specific to each case.⁸⁸

Regarding the promptness criteria, the ECtHR noted that the passage of time might not only weaken an investigation but also irrevocably diminish its likelihood of completion.⁸⁹ The investigation cannot be deemed excessively lengthy if the investigation duration can be attributed to the scope of the inquiries conducted, such as the inclusion of numerous hearings and expert assessments.⁹⁰ If there are any unjust delays, such as the State prosecutor failing to interview any of the officers involved in the incident, other witnesses, or potential witnesses in the months following the incident, the investigation's promptness is not met.⁹¹ For instance, the investigation's promptness is not fulfilled due to the lengthy delays in obtaining evidence from applicants, who were ultimately heard by the investigator more than a year after the incident, and no explanation was provided for this delay.⁹² However, in some cases where the investigation could be considered lengthy, the ECtHR justified the delays due to the complex circumstances following the war.⁹³ Implementing a strict time limit for investigation length within national laws would pose significant practical challenges, as it is generally acknowledged that the intricacy of an investigation does not correlate directly with the gravity of the offense, for example, but rather with a complex set of circumstances.⁹⁴ However, certain procedures can be adopted to prevent excessively prolonged investigations.⁹⁵

85 *Mustafa Tunç and Fecire Tunç v. Turkey*, par. 223.

86 *Basu v. Germany*, par. 33.

87 V. Čorić, R. Radević /2016/, Independent investigation of violations of the European Convention on Human Rights attributable to police activities, *Strani pravni život*, Vol. 60, No. 4, p. 159.

88 *M.B. and Others v. Slovakia*, App. No. 45322/17, (ECtHR 1 April 2021), par. 91.

89 *Mocanu and Others v. Romania*, par. 337.

90 *Ghedir and Others v. France*, App. No. 20579/12, (ECtHR 16 July 2015), par. 133.

91 *Baranin and Vukčević v. Montenegro*, Apps. nos. 24655/18 and 24656/18, (ECtHR 11 March 2021), par. 142.

92 *M.B. and Others v. Slovakia*, paras. 80–83.

93 *Palić v. Bosnia and Herzegovina*, App. No. 4704/04, (ECtHR 15 February 2011), par. 70.

94 See: T. Vasiljević, *op. cit.*, p. 504.

95 Article 310 of the Criminal Procedure Code, "Official Gazette of RS", no. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013, 55/2014, 35/2019, 27/2021 - decision of the Constitutional Court and 62/2021 - decision of the Constitutional Court – CPC

In terms of public scrutiny and engagement of the victim or next of kin, the ECtHR highlighted the importance of ensuring sufficient public scrutiny of the investigation or its results to secure accountability in practice and theory. The degree of public scrutiny required may well vary from case to case. Regarding the right to life, for example, the ECtHR noted that in all situations, the victim's next of kin must participate in the procedure to the degree necessary to protect their legitimate interests.⁹⁶

5. CONCLUSION

The obligation to investigate human rights abuses is considered an essential component of the human rights protection outlined in fundamental international human rights instruments, albeit implicitly, as a necessary condition for fulfilling the accepted obligations. However, it is not restricted to the duty to conduct an investigation, rather, the investigation must satisfy certain general criteria. In addition, various international documents regulating certain domains, especially those that are complex or pivotal for effective criminal investigation, contain provisions relevant to or explicitly mentioning effective criminal investigation.

The IACtHR and HRC do not uniformly acknowledge the general concept of effective investigation; rather, they evaluate this element alongside other necessary qualities of investigation. However, the obligation is more tied to the right to effective judicial remedies for victims of human rights violations.

A more detailed and general concept of effective investigation was established by the ECtHR, emphasizing the significance of conducting investigations of a specific quality. When assessing the effectiveness of the investigation, the reasonableness standard is relevant, as a starting point, since the ECtHR regularly asserts that states must implement measures considered reasonable under specific circumstances. The ECtHR also established specific criteria for the effectiveness assessment. Some criteria overlap or are not used uniformly, however, they are intended to be used jointly as a means of assessing the investigation's effectiveness. The assessment should be tailored to the specific circumstances, the nature of the offense, the potential perpetrators, various human rights in question, and this assessment can be based on these broad criteria. On the other hand, excessively broad criteria may result in a lack of uniformity in practice. The concept is largely linked to a criminal investigation, however, alternative proceedings in some cases may adequately satisfy the requirement.

The ECtHR's practice regarding effective investigation has progressively evolved from its initial obligation, which was associated with the investigation of the actions of state actors and the right to life. The obligation is currently associated with numerous human rights, and there are still some uncertainties, mostly regarding the potential of Article 8 to be considered as including an autonomous procedural obligation to conduct an effective investigation.

⁹⁶ *Paul and Audrey Edwards v. the United Kingdom*, App. No. 46477/99, (ECtHR 14 March 2002), par. 73

The ECtHR has recently established a positive duty to conduct an effective criminal investigation concerning the right to property, even when the alleged offense against the applicant's intellectual property is of limited gravity and the violation was strictly linked to an ineffective criminal investigation. The obligation to effectively investigate was previously mostly tied to serious human rights violations, which include violent acts. However, currently, it seems that obligation can encompass (although not in a substantial number of cases) the above-mentioned investigation of offenses against the applicant's intellectual property, disclosure of personal data, and election irregularities. Even in the case of nonviolent acts, the absence of an effective investigation procedure could leave substantive rights provisions meaningless, potentially resulting in impunity and additional human rights violations. Nevertheless, in all cases, the ECtHR must bear in mind its restriction to replace the domestic authorities in the assessment of the facts of the case, which can be difficult in terms of the obligation to conduct an effective investigation.

A significant body of case law has emerged concerning the investigation of the perpetrator's discriminatory motives. These motives are mostly associated with the application of criminal law provisions for hate crimes, often incorporated as aggravating circumstances in domestic laws, and imply increased criminal penalties. In this case, the deficiencies in the criminal investigation are not associated with the base offense but rather with the investigation of the perpetrator's motives, which correlate with an increase in the penalty. The ECtHR recognized that investigating the motives of perpetrators can be difficult, as even the perpetrator may be unaware of or misinterpret their motives. The reasonableness standard and the necessity of some form of indication of the existence of discriminatory motives were emphasized by the ECtHR in these cases.

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OBAVEZA SPROVOĐENJA DELOTVORNE ISTRAGE – MEĐUNARODNI STANDARDI I PRAKSA

REZIME

Međunarodni i regionalni dokumenti za zaštitu ljudskih prava ne propisuju eksplicitno dužnost istrage povreda ljudskih prava, ova pozitivna obaveza proizilazi iz prihvaćenih obaveza. Međutim, sprovedena istraga mora da zadovolji određene opšte kriterijume. Međunarodna i regionalna praksa u oblasti ljudskih prava otkriva mnoštvo termina koji se koriste za opisivanje neophodnih kvaliteta istrage. Pojam „delotvorne istrage“ se razvio u praksi Evropskog suda za ljudska prava, naglašavajući obavezu sprovođenja istrage određenog kvaliteta. Koncept se prvenstveno povezuje sa krivičnom istragom. Praksa Evropskog suda za ljudska prava pokazuje postepenu evoluciju i najrazvijeniji koncept u vezi sa pitanjem neophodnih standarda istrage. U početku, obaveza je bila povezana sa istragom postupaka državnih aktera i pravom na život. Obaveza efikasne istrage trenutno je povezana sa nizom ljudskih prava, postupcima privatnih aktera, istragom nenasilnih dela ograničene težine i diskriminatornim motivima. Evropski sud za ljudska prava utvrdio je široke i međusobno povezane kriterijume za procenu efikasnosti sprovedene istrage. Precizno tumačenje ove obaveze zavisi od konkretnih okolnosti, osumnjičenog, krivičnog dela i relevantnih ljudskih prava.

Ključne reči: delotvorna istraga, krivična istraga, ljudska prava, Evropski sud za ljudska prava, nekažnjivost.

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CIVIL LAW VS. CRIMINAL LAW: THE LEGAL CROSSROADS OF ASSET CONFISCATION AND PROPERTY CLAIMS

Abstract: This paper examines the intersection of civil and criminal law institutes in the context of property claims and the confiscation of property benefits acquired through criminal offences. It compares the procedural and substantive nature of property claims – most commonly submitted within criminal proceedings through the adhesion procedure or separately via civil lawsuits – with the criminal law measure of confiscation. Special attention is given to the legal differences, purposes, and practical challenges of these two institutes. Although both aim to address the financial consequences of criminal conduct, a property claim focuses on compensating the injured party, while confiscation primarily seeks to deprive perpetrator of illicit gain. Through the analysis of Croatian legislation, court practice, and a detailed case study involving conflicting outcomes between criminal and civil proceedings, the paper reveals misinterpretations of legal principles such as *ne bis in idem*, *res judicata*, and double recovery. The analysis highlights that, following the repeal of the Act on the Procedure for the Confiscation of Property Benefits in 2017, there is currently no legal framework enabling compensation of injured parties from confiscated assets. Consequently, both the state and the injured party may seek recovery from the same asset pool, potentially leading to unjust enrichment, legal uncertainty and double recovery problem.

Keywords: property claim, confiscation of property benefits, compensation for damages, criminal procedure, civil procedure.

1. INTRODUCTION

It is well known that the same event can simultaneously constitute both a civil law matter and a criminal law matter. In criminal (adhesion) proceedings, criminal courts have jurisdiction to resolve and determine matters arising from relationships

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governed by substantive civil law, especially civil law matters concerning damages arising from the criminal offence. Property claims in criminal proceedings address and resolve relationships governed by the rules of substantive civil law. Given the broad scope of civil law, this paper will focus on a property claim for damages, submitted within criminal proceedings in comparison to civil procedure initiated by a lawsuit for compensation of damages. This paper will place particular emphasis on the differences between these institutes of a civil law nature and the criminal law institute of confiscation of property benefit.

The adhesion procedure is essentially a civil procedure attached to a criminal proceeding, within which the criminal court resolves property related disputes arising from the committed criminal offence. “Therefore, the property claim is defined as an ancillary matter of a civil-law nature within criminal proceedings, known as adhesion proceedings...”¹ This means that the criminal court, which determines guilt, also resolves the civil dispute within the criminal procedure, deciding upon compensation for damages or another civil law related issue linked to the criminal offence. This adhesion procedural arrangement arises from the principle of efficiency, but at the same time it serves the purpose of avoiding double victimization and disables unnecessary re-engagement of the judicial system.²

2. ADHESION AND CIVIL PROCEEDINGS

In civil proceedings, the court discusses and establishes facts within the framework defined by the lawsuit, which depends exclusively on the plaintiff’s discretion. In contrast, criminal proceedings for most criminal offences are conducted *ex officio*, meaning independently of the victim’s or injured party’s initiative,³ upon initiative of the prosecuting body – State Attorney’s request. Furthermore, criminal courts and prosecuting authorities have broader powers to establish facts relevant to determining criminal liability than civil courts do when ruling on a lawsuit, which is entirely determined by the plaintiff (the basis and the quantified value of the civil claim), who thereby independently and fully defines the subject matter of the civil proceedings in accordance with the principle of party autonomy.

1 M. Galiot, V. Brzić Bahun /2022/, *Osiguranje imovinskopravnog zahtjeva*, in: *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, Rijeka, p. 791.

2 D. Tripalo, T. Brđanović /2023/, *Imovinskopravni zahtjev, odluka o imovinskopravnom zahtjevu, oduzimanje imovinske koristi i privremene mjere osiguranja – teorijski i praktični aspekti za suce i državne odvjetnike – Priručnik za polaznike*, Zagreb, p. 6 stated: “The principles related to the decision-making on a property claim include the principle of efficiency, the principle of avoiding double victimization, as well as the issue of procedural costs.”

3 The Criminal Procedure Act currently in force recognizes three categories of authorized prosecutors at whose request criminal proceedings are initiated, see Article 2, paragraph 2 of the Criminal Procedure Act. The current Criminal Procedure Act was published in the Official Gazette of the Republic of Croatia, “Narodne novine”, No. 152/08, 76/09, 80/11, 121/11 (consolidated text), 91/12 (Decision of the Constitutional Court of the Republic of Croatia), 143/12, 56/13, 145/13, 152/14, 70/17, 126/19, 80/22, and 36/24.

Both of these procedures, adhesion and civil procedure share the same goal, to grant protection of subjective right that was infringed.⁴ It is highly beneficial for the same court that rules on guilt in a criminal case to also address the related civil claim resulting from the criminal offence.

Primarily, the main task of the criminal court is to determine whether a person has committed a criminal offence and, if found guilty, to impose a criminal sanction, whereas the main task of the civil court is to rule on the lawsuit.⁵ Despite the primary role of the criminal court, the rights of the injured party in criminal proceedings are thoroughly regulated and guaranteed by both substantive and procedural criminal legal provisions, and "...compensation for damage caused by a criminal offence indeed emerges as one of the fundamental imperatives for achieving the purpose of punishment and conducting criminal proceedings."⁶

"This avoids the need for courts to judge, due to the same life event, in two different proceedings, which also leads to a reduction in the number of cases that are primarily resolved in civil proceedings, and at the same time avoids the possibility of rendering contradictory decisions."⁷ It is important to emphasize that since the parties in those proceedings have different roles, they have also different rights and guarantees depending on the initiated procedure, due to the differences between those proceedings.

Some authors argue that "...the position of the parties in the adhesion procedure is not equal to the position of parties in a regular civil procedure, which constitutes a violation of the right to equal legal protection..."⁸

Despite the general precedence of the property claim over the confiscation of illicit property benefit, it may occur that the unlawfully obtained benefit is confiscated from the defendant, who is simultaneously the liable party, in favour of the state budget, either through enforcement proceedings in which the Republic of Croatia is the holder of that right, or through the defendant's voluntary payment of the amount determined as property benefit into the state budget. Meanwhile, the injured party may obtain compensation for damages directly from the defendant in an enforcement proceedings (if he succeeded with the claim for compensation or property claim and has the final judgment in his favour). In such a scenario, a double recovery from the defendant's asset pool may occur, which is contrary to the intended purpose of the confiscation of property benefits.

4 M. Vedriš, P. Klarić /2003/, *Građansko pravo: opći dio, stvarno pravo, obvezno i nasljedno pravo*, Zagreb, p. 65 – Subjective right is defined as a set of entitlements granted to a legal subject within a specific civil law relationship, as recognized by the norms of objective civil law.

5 A detailed overview of the similarities and differences between civil and criminal proceedings can be found in M. Galiot, V. Brizić Bahun /2021/, *Položaj oštećenika u adhezijskom postupku*, in: *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, Rijeka.

6 I. Grubišić /2014/, *Imovinskopravni zahtjev prema okrivljeniku odgovornoj osobi kada je kaznenim djelom pribavio imovinsku korist za pravnu osobu*, in: *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, Rijeka, p. 745.

7 M. Galiot, V. Brizić Bahun /2021/, *op. cit.*, p. 467.

8 D. Šago, M. Pleić /2012/, *Adhezijsko rješavanje imovinskopravnog zahtjeva u kaznenom postupku*, in: *Zbornik Pravnog fakulteta sveučilišta u Rijeci*, Rijeka, pp. 967–999.

Conversely, it may also happen that neither the unlawful property benefit is successfully confiscated from the defendant into the State budget, nor is the injured party able to recover compensation from him.

3. RELATIONSHIP BETWEEN PROPERTY CLAIMS AND CONFISCATION OF PROPERTY BENEFITS

3.1. *Property claim*

“The property claim enables the injured party to pursue their civil law claim, arising from the fact that a criminal offence caused a damage for the injured party, within the framework of the criminal proceedings against the defendant.”⁹

The subject and content of the property claim made within the criminal procedure and the claim made in the civil procedure are *ratione materiae* identical.

Previously, the Criminal Procedure Act¹⁰ explicitly defined the subject matter of a property claim, restricting it to compensation for damages, restitution of property, and annulment of legal transactions.¹¹ Currently, the Criminal Procedure Act explicitly¹² stipulates that the subject of a property claim may be anything that can be the subject of a claim in civil litigation, although in practice, it will most commonly pertain to compensation for damages. Therefore, this paper will use a practical example to clarify the relationship between these two institutes and their connection and relation to the institute of confiscation of property benefit.

Property claim has primacy in relationship to the confiscation of property benefit, but only if injured party has the basis in form of final civil court’s judgement brought upon a claim for damages, or final criminal court’s judgement brought upon a property claim, and which judgements determine a substance and the amount regarding those claims.

A property claim that arose due to the commission of a criminal offence shall be discussed upon the motion of the injured party if this would not significantly prolong the criminal proceedings.¹³ In criminal theory legal standard *would not significantly prolong* was criticized because “such an imprecise term allows for its varying interpretation, including the possibility that the court, even without justified reasons, refers the injured party to civil litigation.”¹⁴

Additionally, in cases where the information available in the criminal procedure, despite establishing the perpetrator’s guilt, does not provide a reliable basis for

9 I. Grubišić /2014/, *op. cit.*, p. 741.

10 Former Criminal Procedure Act from 1997, was published in the Official Gazette of the Republic of Croatia “Narodne novine” No. 110/97, 27/98, 58/99, 112/99, 58/02, 143/02, 62/03, 178/04, 115/06, 152/08, 76/09, 80/11, and 143/12.

11 The Criminal Procedure Act from 2008 expanded the scope of the property claim to the form in which it is regulated today. Previous Art. 127. Pr. 2. Criminal Procedure from 1997.

12 Art. 153. Pr. 2 of Criminal Procedure Act currently in force.

13 Art. 153. Pr. 1 Criminal Proceeding Act currently in force.

14 M. Galot, V. Brizić Bahun /2021/, *op. cit.*, p. 463.

either a full or partial ruling on the property claim, the criminal court must refer the injured party to pursue the claim in a civil lawsuit.¹⁵

Criminal court deciding on the property claim within the adhesion procedure cannot reject it due to procedural deficiencies; it can either accept it or refer the injured party to pursue the claim in a separate civil lawsuit.

In some cases, Croatian criminal courts, referring to the mentioned provision, direct the injured parties to pursue their compensation claims in civil proceedings, even though there was a factual basis and sufficient evidentiary support for ruling (full or partial) on the property claim within the criminal proceedings.¹⁶ This is especially problematic for the victims of offences against a sexual freedom and other criminal offences with violence and detrimental psychological, emotional and physical consequences for the victims because it generates problems of secondary victimization and repeated traumatization, especially considering that civil proceedings do not provide the same level of guarantees for the victims regarding protection of their dignity, as criminal proceedings do or should.¹⁷

3.2. Confiscation of property benefits

In the Croatian Penal Code,¹⁸ the confiscation of property benefits (both ordinary and extended¹⁹) is a special criminal law measure,²⁰ placed in Chapter VI,

- 15 Art. 158. Pr. 2. of the Criminal Procedure Act currently in force: “In a judgment by which the defendant is found guilty, the court may award the injured party’s property claim in full, or it may partially uphold the claim and refer the injured party to civil litigation for the remainder. If the data from the criminal proceedings do not provide a reliable basis for either a full or partial decision, the court shall refer the injured party to pursue the property claim through a civil lawsuit.”
- 16 Where the amount of the property claim is unequivocally established, the court is obliged to adjudicate on the claim and may not refer the injured party to pursue civil litigation. In this regard, the Croatian Supreme Court in case Kzz 42/2010-2 from October 6th, 2010, identified an error on the part of the first-instance court, which referred the injured party to civil proceedings despite the fulfilment of all legal prerequisites for adjudicating the claim.
- 17 In its recent judgment No. U-III-641/2021 from November 12th, 2024, the Constitutional Court of the Republic of Croatia addressed a criminal case in which the accused was convicted of rape. The Court held that the criminal court, by referring the injured party to pursue a compensation claim through civil proceedings, thereby obliging the victim to recount the traumatic events for a third time, engaged in conduct amounting to institutional victimization. This conclusion was particularly underscored by the fact that the criminal courts failed to provide any reasoning for their decision to deny the adjudication of the compensation claim within the criminal proceedings.
- 18 The current Croatian Penal Code was published in the Official Gazette of the Republic of Croatia, “Narodne novine”, No. 125/11, 144/12, 56/15, 61/15 (correction), 101/17, 118/18, 126/19, 84/21, 114/22, 114/23, and 36/24.
- 19 V. Marušić, M. Vučko, M. Kuštan /2020/, Oduzimanje imovinske koristi i privremene mjere osiguranja s posebnim osvrtnom na trajanje mjera i poteškoće u praksi, *Hrvatski ljetopis za kaznene znanosti i praksu*, № 2, vol. 27, pp. 471–496 – “In Croatian legislation, the asset confiscation can be distinguished by the scope of intervention in the perpetrator’s property: („ordinary“ and „extended“), [...]”
- 20 County Court in Zagreb in the case Kž 432/2015-4 from June 2nd, 2015, stated as following: “Namely, the confiscation of property benefit obtained through a criminal offence primarily serves a restorative function. For that reason, it does not constitute a form of sanction, but rather represents a specific so-called in rem measure, which follows the object or the form of benefit that was acquired.”

which also regulates the confiscation of objects and public disclosure of judgments. Regarding their position in Croatian Penal Code, this *sui generis* measure is distinct from the system of criminal law sanctions, at least nominally. Nevertheless, in author's opinion, both of these *sui generis* measures are criminal law sanctions in the broader sense, simply because they represent state response to the criminal behaviour given in criminal proceedings and can be imposed only in relation to the criminal offence (direct one in scope of ordinary confiscation, and indirect one in scope of extended confiscation).

The measure of confiscation of property benefits is based on the criminal law principle that no one may retain property benefits acquired through an unlawful act,²¹ which, according to some Croatian authors, is derived from a higher principle of justice.²²

The function of this measure, in the case of ordinary confiscation,²³ is primarily restorative,²⁴ as its goal is to restore a person's financial status to what it was before they benefited from the unlawful act, thereby preventing the profitability of committing a criminal offence. Traditionally, authorities could under ordinary confiscation only seize property benefit directly linked to proven criminal activities, in other terms, property benefit that is causally linked to the proven criminal offence or unlawful act.

It is important to emphasize that the purpose of this measure isn't for the state to gain wealth²⁵, that's just the consequence of a confiscation.

On the other hand, due to the scope of property confiscation and the shifting of the burden of proof, in extended confiscation²⁶ of property benefits, its punitive function prevails, making it impossible to insist on its restorative nature.^{27, 28}

21 Art. 5 of Penal Code currently in force.

22 E. Ivičević Karas /2007/, *Kaznenopravno oduzimanje nezakonito stečene imovinske koristi*, in: *Hrvatski ljetopis za kazneno pravo i praksu*, № 2, vol. 14, p. 674.

23 Art. 77 Pr. 1 of Penal Code currently in force: "Property benefit shall be confiscated by a court decision establishing that an unlawful act has been committed. Property benefit shall also be confiscated from the person to whom it was transferred, if it was not acquired in good faith."

24 D. Tripalo, T. Brđanović /2023/, *op. cit.*, p. 30 – "Its function is primarily restorative, meaning its goal is to restore the financial status of the perpetrator of the criminal offence – as well as other persons – to the state that existed before they benefited from the offence."

25 F. Bačić, Š. Pavlović /2004/, *Komentar Kaznenog zakona*, Zagreb, p. 396 – "When the criminal law provides for the measure of confiscation of property benefit, it is certainly not for the purpose of the state obtaining some material benefit, to become enriched through the commission of a criminal offence, or in any way to participate in criminal profit, but rather to ensure that the property benefit does not remain in the hands of those who participated in the commission of the criminal offence."

26 Art. 78. Pr. 2. of Penal Code currently in force: "If the perpetrator of the criminal offence referred to in Paragraph 1 of this Article has or had assets that are disproportionate to their lawful income, it shall be presumed that such assets represent property gain derived from a criminal offence, unless the perpetrator makes it probable that their origin is lawful."

27 D. Tripalo, T. Brđanović /2023/, *op. cit.*, p. 30 – "Given the scope of asset confiscation, it also contains certain punitive elements, as the subject of confiscation can be the perpetrator's entire property, making it resemble a measure of asset confiscation." – by which is meant when confiscation was in previous times regulated as a criminal sanction.

28 E. Ivičević Karas /2010/, *Utvrdjivanje imovinske koristi stečene kaznenim djelom primjenom bruto ili neto načela s obzirom na pravnu prirodu mjere (proširenog) oduzimanja imovinske koristi*,

Additionally, extended confiscation allows authorities to seize assets that aren't directly linked to a single crime. Namely, it is presumed that property benefit has been obtained through unspecific criminal conduct, and the specificity of that conduct through which the benefit was acquired is not subject to proof at all.

That is the reason why the subject of extended confiscation and the subject of property claim cannot have the same basis. In other words, subject of the property claim can be closely linked to the subject of an ordinary confiscation, but significantly differs from the subject of extended confiscation.

For this reason, this paper will not delve into the relationship between these two measures in detail but will instead primarily focus on the relationship between the measure of ordinary confiscation of property benefit and the property claim.

3.3. *Notion and purpose of property claim and confiscation*

The concept and the notion of property is important both in civil law as it is in criminal law.

Accordingly, in order to properly examine institutes discussed in this paper it is important to understand the term of a property. The legal definition of property is provided by the Penal Code, while the Civil Obligations Act nor Ownership right Act do not provide definition of a property.²⁹ However, Croatian civil law theory recognizes the concept of property in several different meanings, as an economic category, as a legal category, and as an accounting category.³⁰

Property in the economic sense consists of assets; in the legal sense, it is a set of subjective proprietary rights belonging to a single holder (subject); and in the accounting sense, it represents the ratio of assets and liabilities.³¹ Penal Code also defines a property benefit resulting from a criminal offence, as the direct property benefit obtained through the commission of the offence; the property into which such gain has been converted or transformed; and any other benefit derived from the direct property benefit or from the property into which it has been converted or transformed, irrespective of whether such property is located within the Republic of Croatia or abroad.³²

Hrvatski ljetopis za kazneno pravo i praksu, № 1, vol. 17, p. 193 – “Re-examining the legal nature of the measure of confiscation of property benefit is essential, particularly in light of the newly introduced measure of extended confiscation. It is certainly untenable to maintain that this form of the measure possesses a purely restorative legal character, since extended confiscation, given its fundamental characteristics, which will also be examined in this paper, undoubtedly assumes a punitive nature with respect to the perpetrator.”

29 However, Civil Obligation Act Obligations Act (“Narodne novine”, No. 35/05, 41/08, 125/11, 78/15, 29/18, 126/21, 114/22, 156/22, 145/23, and 155/23) defines damage in Article 1046 as a reduction of someone's property (actual damage), prevention of its increase (loss of profit), and violation of personal rights (non-material damage).

30 See more about notion, functions and different categories of the term property in the civil law theory in: S. Nikšić /2012/, *Imovina u građanskom pravu*, in: *Zbornik Pravnog fakulteta Sveučilišta u Zagrebu*, Zagreb, pp. 1599–1633.

31 P. Klarić, M. Vedriš /2008/, *Gradansko pravo*, Zagreb, pp. 97–98.

32 Art. 87, Pr. 22 of the Croatian Penal Code currently in force.

Although the institutes of property benefit and property claims may overlap, this is not necessarily always the case. Some Croatian criminal law experts argue that the property claim and the measure of confiscation of property benefits share a common goal, and that is a compensation for the injured party.³³ However, differences in their purpose exist because the measure of confiscation of property benefits is based on the aforementioned principle that no one may retain property benefits acquired through an unlawful act, and the confiscation of such benefits does not aim to compensate the injured party but rather to prevent the perpetrator of a proven criminal offence or unlawful act³⁴ from gaining and retaining benefits through criminal conduct. Nevertheless, both of these institutes have a common goal, they serve to restore the pre-offence state that was disrupted by the commission of a criminal act.

Namely, it would be illogical for a perpetrator of a criminal offence or an unlawful act to be sentenced to a penalty (imprisonment or a fine) while simultaneously being allowed to retain the property benefits gained through that criminal offence/unlawful act.

Furthermore, considering that the confiscation of property benefits is ordered in favour of the State budget (meaning that the state is the authorized recipient), rather than in favour of the injured party, the author considers it incorrect to claim that the goal of both institutes is to compensate the injured party. Only in cases where the state is the injured party and has the right to file a property claim, when such a claim in its nature and content corresponds to the property benefits, could the confiscation of property benefits be equalized with compensation.

In this regard, the conclusion follows that in cases of compensation realized through a property claim (or claim for damages), the emphasis is placed on the position of the injured party, on their financial situation. In contrast, in cases of confiscation of property benefits, the focus is placed on the financial situation of the perpetrator, and potentially other persons on whom the benefit is transferred to, or in whose favour the benefit was acquired.

3.4. Primacy of property claim decision over the decision on the confiscation of property benefit

The possibility of simultaneously awarding a property claim and ordering the confiscation of property benefit from substantive perspective primarily depends on whether the property claim, by its nature and content, corresponds to the acquired property benefit. In order for a property claim to take precedence over the confiscation of property benefit, it must, by its nature and content, correspond to the acquired property benefit.³⁵

33 M. Petranović /2000/, *op. cit.*, p. 1 – “It is particularly important to emphasize that the property claim and the measure of confiscation of unlawful material gain share a common goal – compensating the injured party – while all other aspects differ significantly.”

34 Art. 77 Pr. 1. of Penal Code states: “Unlawfully obtained property benefit shall be confiscated by a court decision establishing that an unlawful act has been committed. Such material gain shall also be confiscated from any person to whom it has been transferred, provided it was not acquired in good faith.”

35 If the injured party has been awarded a property claim that, by its nature and content, corresponds to the acquired property benefit, only the portion of the property benefit exceeding the awarded property claim shall be confiscated. Art.77 Pr.2 of the Penal Code currently in force.

For example, if the perpetrator organizes the offering of sexual services by another person and thereby earns a certain profit, that profit constitutes the property benefit derived from the committed criminal offence, criminal offence of prostitution.³⁶ If the victim of that offence files a property claim for non-material damage (due to the violation of personal rights), given that such a claim, by its nature and content, does not correspond to the property benefit in the form of profit, the awarding of that claim will not preclude the confiscation of the property benefit acquired through the criminal offence. In that sense, court should order confiscation of that property benefit, and also, award injured party non-material damage.

4. DIFFERENCES BETWEEN A PROPERTY CLAIM AND A DECISION ON THE CONFISCATION OF PROPERTY BENEFITS

Although both institutes may arise from the same factual and legal context, a decision on the property claim and a decision on the confiscation of property benefits serve fundamentally different purposes within the legal system. The following section outlines the key distinctions between these two institutes.

4.1. *Ex officio decision of the court*

The court cannot decide *ex officio* on a property claim but only at the request of the entitled party.³⁷ On the other hand, even if the authorized prosecutor in a criminal proceeding does not propose the confiscation of property benefits, the court must order its confiscation if that benefit was acquired through criminal offence.³⁸

4.2. *Existence of a property benefit does not imply existence of a damage and vice versa*

The possibility of filing a property claim exists even in situations where the criminal offence has not resulted in gaining of property benefits (but the damage has been caused). For example, the perpetrator of the criminal offence of damaging another person's property³⁹ does not, by that act, acquire any property benefit for themselves, but causes material damage to the injured party. In addition, almost all

36 See Art. 157 of the Penal Code currently in force.

37 A property claim arising from the commission of a criminal offence shall be considered in the criminal proceedings at the request of the injured party, provided that such consideration would not significantly prolong the proceedings. Art. 153 Pr. 1 of the Criminal Procedure Act currently in force.

38 Property benefit shall be confiscated by a court decision establishing that an unlawful act has been committed. Art. 77 Pr. 1. Relevant is also Art. 557 Pr. 2 of the Criminal Procedure Act which states: "The court shall, even without a motion from the authorized prosecutor, confiscate from the defendant any property benefit obtained through the unlawful act described in the indictment."

39 Art. 235 of the Penal Code currently in force.

criminal offences which cause non-material damage do not lead to the acquisition of a property benefit corresponding to that damage (for example, criminal offences against life and bodily integrity⁴⁰).

On the other hand, property benefits may (and must) be confiscated only if they were acquired through a criminal offence, and they must be confiscated even if no damage has been caused to anyone. For example, the perpetrator of the criminal offence of accepting a bribe (who demanded and received a bribe to perform an official act which they were obliged to perform⁴¹) acquires a property benefit but does not thereby cause damage to anyone.

In addition, in some cases the acquired property benefit may be greater than the damage caused. For example, when the perpetrator of a criminal offence of theft⁴² sells a stolen item for a price higher than its actual value, they obtain a property benefit greater than the damage suffered by the owner of the stolen item.

Finally, the caused damage may be greater than the obtained property benefit, as for example in the case of the theft⁴³ of an item through which its owner would have earned some income: the property benefit corresponds to the value of the item, and the damage, in addition to that value, includes lost profit.

4.3. *Entitled person of confiscation and property claim*

Property benefits are confiscated in favour of the State budget,⁴⁴ whereas a property claim is awarded in favour of the injured party.

4.4. *Subsidiarity*

Compensation to the injured party has priority over asset confiscation, given that the purpose of confiscation of property benefits is not to enrich the state (fill the state budget)⁴⁵ but ensure the aforementioned principle – crime does not pay. However, the criminal court must confiscate property benefits even in cases where it has referred the injured party to pursue the property claim through a civil lawsuit.⁴⁶ This is because the confiscation of property benefits cannot depend on whether the injured party (successfully) seeks protection of their subjective rights through a civil court or not.⁴⁷

40 Chapter X of the Penal Code currently in force.

41 Art. 293 Pr. 2 of the Penal Code currently in force.

42 Art. 228 Pr. 1 of the Penal Code currently in force.

43 Art. 228 Pr. 1 of the Penal Code currently in force.

44 According to the Art. 560 Pr. 2 of the Criminal procedure Act, confiscated property benefit becomes the ownership of the Republic of Croatia.

45 F. Bačić, Š. Pavlović /2004/, *op. cit.*, p. 396 – “When the Penal Code prescribes the measure of confiscating illicit gains, it is certainly not for the state to obtain material benefits or to profit from the commission of a criminal offence...”

46 Art. 77, Pr. 3 of the Penal Code currently in force.

47 K. Turković et. al. /2013/, *Komentar Kaznenog zakona*, Zagreb, p. 114 – “This avoids the possibility that it will not be confiscated if the injured party does not initiate civil proceedings.”

4.5. *Individual or joint and several obligations*

Given the purpose and basis of the measure of confiscation of property benefits, “the court cannot order its confiscation *in solidum* from multiple perpetrators of a criminal offence”.^{48, 49} Instead, it must individually order the confiscation from those perpetrators who acquired it, and only in the amount each of them individually obtained. However, the court may order confiscation in equal shares if it cannot determine who gained more or less benefit, usually based on free judicial assessment. Conversely, if a criminal offence was committed by multiple persons, the court may order all of them to provide joint and several compensations for damages to the injured party.

4.6. *Personal liability of the defendant or other persons*

A property claim in a criminal proceeding can only be filed against the defendant, the perpetrator of the criminal offence as the liable party.

Conversely, under certain conditions, the confiscation of property benefit may also be enforced against third parties who have received or to whom the illicit gain has been transferred.

4.7. *Rejection of the claim*

The criminal court has no authority to deny a property claim, whereas the court may either accept or dismiss a motion for the confiscation of property benefits.

4.8. *Relation to violation of subjective rights*

Through a property claim, the injured party seeks protection of their subjective right, which they believe has been violated. In contrast, the confiscation of property benefits acquired through a criminal offence must be ordered regardless of whether the injured party's subjective rights have been violated, even when they have not been violated.

4.9. *Nature of property claim and asset confiscation*

Both institutes belong to criminal law, but a property claim is a criminal law institute of a civil law nature,⁵⁰ aimed at realizing the subjective civil right of the

48 P. Novoselec, I. Martinović /2019/, *Komentar Kaznenog zakona, Knjiga 1: Opći dio*, Zagreb, p. 471.

49 Supreme Court of Republic of Croatia in a case I Kž-293/13 from November 6th 2013 stated: “Thus, in cases involving the confiscation of unlawfully obtained property benefit, it is not possible to order the perpetrators to make a joint and several payments, as may be the case when adjudicating a property claim (provided that the claim is formulated in such a manner).”

50 M. Petranović /2000/, *Oduzimanje imovinske koristi ostvarene kaznenim djelom, Aktualna pitanja kaznenog zakonodavstva*, Zagreb, p. 1 – “The property claim is a category of civil law, and it is only for reasons of efficiency that it is decided within criminal proceedings, according to the rules of civil law, and it is characterized by the parties’ disposition.” In the author’s opinion, the property claim is an institute of criminal law, primarily because it is regulated by substantive and procedural criminal law provisions, yet it is civil in nature.

injured party that was violated by a criminal offence, whereas the confiscation of property benefits possesses both a restorative and a punitive character.

4.10. *Right to interest*

Interest cannot be awarded in confiscation of property benefits, whereas a property claim may include, in addition to the principal amount, an ancillary claim – interest.

5. INTERPRETATION OF PROPERTY CLAIM AND CONFISCATION INSTITUTES IN JUDICIAL PRACTICE

The challenges in interpreting and applying the concepts of property claims and confiscation measures become particularly evident in judicial practice. The following case study illustrates how the misapplication of fundamental legal principles can lead to conflicting outcomes between criminal and civil proceedings with critical overview regarding the two-man problems, double recovery problem and *ne bis in idem* principle.

5.1. *Case Study: Misapplication of Criminal Law Concepts in Relation to Civil Law*

This case study highlights the conceptual confusion and practical inconsistencies in the application of criminal and civil law institutes through the analysis of a legal case involving the criminal offence of embezzlement, confiscation of property benefits, and their relation to a civil lawsuit for damages.

5.1.1. *First-instance criminal proceedings*

The Municipal Court in Zlatar convicted the perpetrator of the criminal offence of embezzlement⁵¹ sentencing the perpetrator to one year in prison and imposing a suspended sentence.⁵²

Court also determined that the perpetrator illegally obtained a total amount of 29,354.65 EUR for herself, thereby causing financial damage to General Hospital.

General Hospital as injured party did not file a property claim in the criminal proceedings but decided to realize its rights filing a claim for damages in the civil proceedings.

51 The defendant was found guilty of having retained for herself certain amounts of money received from nurses as participation and treatment fees, instead of depositing them into the hospital's cash register, failed to invoice the payment for meal vouchers purchased by hospital employees and volunteers, nor did she deposit the money received from the sale of these vouchers into the hospital's bank account and used actual beneficiary records of financial aid for cases of parental death and childbirth assistance to withdraw aid funds from the hospital's cash register for her own benefit, recording them in the cash register logs as duplicate disbursements.

52 The Municipal Court in Zlatar, case K-39/21 from June 7th, 2021.

5.1.2. *Second-instance criminal proceedings*

Since the first-instance criminal court failed to confiscate the property benefit acquired through the proven criminal offence, the County Court in Bjelovar⁵³ accepted the appeal of the State Attorney and modified the first-instance judgment by establishing that the sum of 29,354.65 EUR constituted property benefits acquired through the criminal offence of embezzlement and ordered the defendant to pay this amount into the State budget within 15 days from the finality of the judgment.

5.1.3. *First-instance civil proceedings*

Injured party almost simultaneously with initiated criminal proceedings,⁵⁴ filed a civil lawsuit for damages against the defendant claiming 29,354.65 EUR. The Municipal Court in Zlatar,⁵⁵ Permanent Service in Zabok (partially) granted the claim, only regarding interest as the ancillary claim filed in the lawsuit, while rejecting the claim regarding the main amount of 29,354.65 EUR.

The first-instance civil court had suspended the proceedings until the final completion of the criminal case, i.e., until November 11, 2021, after which the civil proceedings resumed, leading to the described judgment.

In the reasoning of the first-instance civil judgment, the following was stated: “The defendant, based on the final criminal judgment, was paying off the determined property benefit to the state budget, which she proved through payment records.” The court also established that: “The plaintiff’s right to claim damages in this civil proceeding was disputed, given that the plaintiff had the opportunity to file a property claim in the criminal proceeding but did not do so.” Additionally, the amount of damage was questioned, “considering that the defendant is making payments into the state budget as restitution for damages.”

It was recorded that an amount of 2,560.29 EUR was paid into the State budget, since the defendant was “making monthly payments of 15.00 EUR, or 100.00 HRK, in accordance with the final criminal judgment.”

Based on these findings, the first-instance civil court, concluded: “Regarding compensation for damages in this case, there is a final criminal judgment that established the defendant’s guilt and liability and ordered the confiscation of property benefits in the amount of 29,354.65 EUR, which the defendant is obligated to pay into the State budget. Since the plaintiff in this civil case is seeking the payment of the same amount as compensation for damages, granting such a claim would result in double recovery. Therefore, the plaintiff’s claim for compensation of the principal amount is unfounded, and the court has dismissed it as ungrounded.”

Furthermore, the court stated: “It should be noted that the defendant is repaying the amount ordered by the final criminal judgment into the state budget, from which the plaintiff may subsequently be reimbursed.”

53 The County Court in Bjelovar, case Kž-220/21 from November 11th, 2021.

54 First-instance proceedings lasted from June 26th, 2014.

55 The Municipal Court in Zlatar, Permanent Service in Zabok, case Pn-5/2022, from October 20th, 2023.

The first-instance court final conclusion when accepting the claim only for the interest was: “The final criminal judgment does not cover statutory interest, which the plaintiff has the right to claim from the defendant regarding the compensation for damages...”, and for this reason, the court found the claim for damages in this part to be well-founded.

5.1.4. *Second-instance civil proceeding*

Both parties filed an appeal against this judgment, which the County Court in Pula – Pola⁵⁶ dismissed as unfounded and upheld the first-instance judgment.

In the reasoning of the second-instance judgment, the court stated: “It is undisputed that the plaintiff may seek a property claim outside of the criminal proceedings in which they participated, but not for the same claim that was already finally adjudicated in that proceeding.”

5.1.5. *Third-instance civil proceeding*

After the final judgment, the plaintiff filed a request for leave to appeal (revision) before the Supreme Court of the Republic of Croatia, raising the following legal question: “Does this constitute a *res judicata* case, and is it impossible to conduct civil proceedings (*litispence*) when the injured party did not file a property claim in the criminal proceedings but instead seeks compensation in a civil lawsuit, while the court in the criminal proceedings rendered a final judgment on the confiscation of property benefits in an amount that is included in or overlaps with the claim filed in the civil lawsuit?”

The Supreme Court of the Republic of Croatia has not yet ruled upon this claim.⁵⁷

5.2. *Critical overview of civil court judgments*

Given the complexity of the relationship between civil and criminal law institutes, it is of particular importance to examine how civil courts interpret and apply key principles when confronted with property claims and prior decisions on the confiscation of property benefits. The following analysis focuses on two recent interpretative challenges in judicial practice: the (mis)application of the *ne bis in idem* principle and the problem of double recovery.

5.2.1. *Misinterpretation of the Ne bis in idem principle*

Conducting an adhesion procedure while simultaneously pursuing a separate civil lawsuit concerning the same claim on its merits would violate the rules of *litispence*. Moreover, if both proceedings reach final decisions, such parallelism would breach the principle of *res judicata* (prohibition of *ne bis in idem*). However,

56 County Court in Pula – Pola, case number Gž-56/2024 from June 3rd, 2024.

57 Supreme Court of Croatia, case Rev-387/25.

in the presented case, injured party did not file a property claim in criminal proceedings.⁵⁸

On the other hand, the confiscation of unlawfully acquired property benefit within criminal proceedings does not amount to a breach of these procedural rules regarding property claim or claim for damages. It does not preclude a separate civil action nor constitute a final adjudication (*res judicata*) regarding property claims filed in either an adhesion procedure or a civil lawsuit.

As previously outlined, the injured party retains the discretion to choose whether to seek the protection in front of the court and the legal avenue for protecting their subjective rights, which reflects the principle of party autonomy (dispositiveness). However, once they make that choice, their actions are no longer entirely free due to the prohibition of initiating a new lawsuit on the same claim during the course of the initiated proceedings (prohibition of double litispence), as well as the prohibition of re-litigation on a legal matter that has already been finally adjudicated (principle *ne bis in idem* regarding *res judicata* matter).

This means that if the injured party files a property claim within criminal proceedings and the court decides to deliberate on it under the framework of adhesion procedure, the injured party cannot file *ratione materiae* the same claim in a civil lawsuit; and if they do, the civil court should dismiss it based on the prohibition of double litispence.

Double recovery emerges when property benefit has already been confiscated from the defendant, and injured party decides to enforce civil law judgement in front of the Financial Agency (FINA),⁵⁹ without first attempting to seek compensation from the confiscated property (State budget). When both the State and the injured party attempt and succeed to recover from the same asset pool (from defendant's property), it undermines the objective and purpose of asset confiscation.

5.2.2. Misinterpretation of a double recovery problem

Civil courts' position in presented case that plaintiffs may recover from already confiscated property is questionable for two reasons. Firstly, confiscation in the State budget was only partially enforced (since perpetrator made monthly payments of 15.00 EUR into the State budget), which would disable full compensation upon damages, and secondly, current legal regulation provides no legal basis regarding requesting compensation from State budget confiscated property.

The issue of double recovery was previously addressed by the repealed Act on the Procedure for the Confiscation of Property Benefits Acquired Through Crimi-

58 In a revision ruling case: Revr-1275/2012-2 from May 22nd, 2012, the Civil Division of the Supreme Court of Croatia rejected the objection that the civil action was barred by *res judicata* due to the prior criminal judgment in which confiscation was ordered, and that awarding such claim would constitute double recovery problem. Court ruled that the injured party may pursue damages claim in civil proceedings if they had not previously filed a property claim in the criminal procedure.

59 As a designated enforcement authority, FINA (Financial Agency) is responsible for executing final court rulings through enforcement procedures.

nal Offences or Misdemeanours,⁶⁰ particularly in Chapter VIII – Rights of the Injured Party. Articles 23⁶¹ and 24⁶² stipulated that enforcement of confiscated benefit could be ordered only to the extent that it did not prevent the full satisfaction of the injured party's claim. Republic of Croatia, represented by the State Attorney, was obligated to compensate injured parties upon their claim, from the confiscated property benefit, but only up to the amount of the confiscated assets.

This Act did not require injured parties to first seek compensation from confiscated property, it rather provided a possibility for the injured parties to do so. The benefit of choosing this route is the certainty of recovery from state-held assets rather than the uncertainty of (un)successfulness of ordinary enforcement proceedings.

Since the repeal of this Act, the relevant provisions regulating the rights of injured parties were mistakenly omitted, while the majority of its other provisions were incorporated into the current criminal legislation. As a result, injured parties can no longer legally request and realize compensation for damages from confiscated property benefits, even if they possess a final civil judgment. Especially now, both the State and the injured party can pursue compensation from the same pool of perpetrator's assets, on different legal grounds (damages and confiscation).

Despite this legislative gap, the legal nature of the institutions in question has not changed since the Supreme Court's 2012 opinion. Hence, problematic civil court decisions rejecting claims solely on the grounds that the property benefit had been confiscated in criminal proceedings are legally and logically unfounded.

6. CONCLUSION

The legal intersection between civil law property claims/ claims for damages and the criminal law measure of confiscation of property benefits represents a normative and practical challenge. Although both institutes may originate from the same factual context, their legal nature, purpose, and normative frameworks differ profoundly. A property claim, with nature rooted in civil law, is a manifestation of the subjective right of the injured party to seek reparation for harm suffered, while the confiscation of property benefit is a criminal law measure that expresses the imperative that no one should profit from criminal conduct according to the principal *crime does not pay*.

The findings of this paper indicate that the current Croatian legal framework inadequately regulates the coexistence of these two mechanisms, especially following the 2017 repeal of the Act on the Procedure for the Confiscation of Property Benefits Acquired Through Criminal Offences or Misdemeanours. That Act had

60 Official Gazette "Narodne novine" 145/2010, and 70/2017 – this Act has been repealed on July 27th, 2017.

61 If, during the course of criminal proceedings, a property claim has been submitted and the court has fully or partially granted it, or if there is an enforceable decision of a civil court by which the injured party's claim related to the criminal offence has been fully or partially upheld, enforcement under this Act may be ordered only to the extent that it does not prevent full compensation of the injured party.

62 The Republic of Croatia shall satisfy the injured party's claim based on the property claim only up to the amount of the property benefit confiscated in the proceedings under this Act.

previously provided a legal foundation for the compensation of injured parties from already confiscated assets. In its absence, the legal system has been left with a normative vacuum, resulting in legal uncertainty and the problem of double payment. Two main problems exist, both of which undermine legal certainty and the principle of fairness. Firstly, the injured parties may be deprived of compensation, and secondly, the perpetrator may be subjected to double recovery, if decisions on confiscation and compensation were enforced from the same pool of assets.

Through the analysis of legal provisions, doctrinal positions, and relevant case law, particularly the presented case study, this paper has highlighted recent judicial misinterpretations of foundational principles such as *ne bis in idem*, *res judicata*, and *litispentence*. These principles, when not properly understood in the interplay between civil and criminal institutes, may lead to procedural paradoxes in which the injured party is denied effective legal remedy, or the perpetrator is penalized in a manner that exceeds what is legally justified.

It is therefore essential that future legislative reforms reintroduce a clear and functional mechanism enabling injured parties to claim compensation from confiscated assets, while balancing the rights of the perpetrators and preventing double recovery, and at the same time ensuring fair compensation for injured party.

In conclusion, only a coordinated and principled legislative and judicial approach can adequately regulate the coexistence of these two legal institutes. This approach must recognise the distinctive functions of property claims and confiscation, prevent double recovery and ensure just outcomes for all parties.

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Silvija Tripalo*

GRAĐANSKO I KRIVIČNO PRAVO NA GRANICI ODUZIMANJA IMOVINSKE KORISTI I IMOVINSKOPRAVNOG ZAHTEVA

REZIME

Ovaj rad istražuje složeni pravni odnos između građanskog i krivičnog prava u kontekstu oduzimanja imovine i imovinskopravnih zahteva u Hrvatskoj. U središtu analize nalazi se poređenje dva pravna instituta: zahteva za naknadu štete, odnosno imovinskopravnih zahteva (koji se obično podnose u parničnom postupku ili kao adhezioni zahtev u okviru krivičnog postupka) i oduzimanja imovinske koristi (mere krivičnog prava *sui generis*). Autorka ispituje njihovu pravnu prirodu, svrhu i međusobne razlike.

Rad počinje kontekstualizacijom adhezionog postupka, koji omogućava krivičnom sudu da odlučuje o zahtevima građanskopravne prirode, kao što je naknada štete. Krivični sud može odrediti oduzimanje imovinske koristi u korist države, dok oštećeni istovremeno potražuje isti iznos kao naknadu štete, što potencijalno dovodi do situacije u kojoj se od okrivljenog dva puta potražuje isti iznos. Kroz pravnu analizu i studije slučaja, posebno na primeru krivičnog dela pronevere, rad pokazuje kako sudske odluke mogu nenamerno omogućiti ili onemogućiti naknadu štete usled pogrešnog tumačenja pravne prirode imovinske koristi u odnosu na naknadu štete.

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Lutanje sudova u primeni pravnih principa, kao što je *res judicata*, pravila litispendencije i zabrane dvostruke naknade (*double recovery*) ukazuje na postojanje praznine u sudskom razumevanju. Ključna je razlika u svrsi ova dva instituta: imovinskopravni zahtev usmeren je na vraćanje oštećenog u pređašnje stanje, dok je oduzimanje imovinske koristi usmereno na sprečavanje protivpravnog bogaćenja i ima kazneno-preventivnu funkciju. Iako se materijalno mogu preklapati, njihov pravni osnov je različit.

Štaviše, hrvatski sudovi su dužni da oduzmu imovinu stečenu krivičnim delom, bez obzira na to da li je oštećeni tražio građansku naknadu. Ukidanjem Posebnog zakona o oduzimanju imovinske koristi 2017. godine, oštećenom je ukinuto pravo na naknadu iz oduzete imovine. Na kraju, rad poziva na harmonizaciju sudske prakse i jasnije zakonsko uređenje, radi sprečavanja preklapanja pravnih ishoda, zaštite prava oštećenih i obezbeđenja dosledne primene pravde.

Ključne reči: imovinskopravni zahtev, oduzimanje imovinske koristi, naknada štete, krivični postupak, parnični postupak.

Asea Gašparić*

NAVIGATING LIFELONG IMPRISONMENT, HUMAN RIGHTS, AND EVIDENCE-BASED JUSTICE IN A POST-DEATH PENALTY ERA

Abstract: The global shift away from the death penalty has elevated lifelong imprisonment as a primary alternative, prompting a critical examination of its conceptual, legal, and human rights dimensions. This exploration navigates through diverse legal definitions and cultural interpretations, emphasizing the increasing adoption of lifelong imprisonment following the decline of the death penalty. In that regard, the dichotomy between penal populism and evidence-based crime policy adds a critical perspective on the influence of public sentiment on criminal justice discourse. While penal populism often prioritizes public opinion over empirical evidence, an evidence-based approach underscores the importance of careful consideration, analysis, and reliance on scientific research in shaping legal policies. Finally, the nuanced approach to lifelong imprisonment recognizes its potential for rehabilitation and reintegration, balancing ethical considerations, evolving trends, and the imperative to protect human rights. This article emphasizes the multidimensional nature of lifelong imprisonment, encompassing ethical dilemmas, evolving paradigms, and the imperative to navigate these complexities with a commitment to justice and human rights.

Keywords: lifelong imprisonment, human rights, death penalty, evidence-based justice.

1. INTRODUCTION

The global landscape of criminal justice has witnessed a significant transformation in recent decades, marked notably by the progressive abolition of the death penalty in many countries. As societies cope with the ethical implications of taking a human life as punishment, a consequential shift has occurred, redirecting focus towards lifelong imprisonment as an alternative measure.¹ This paradigmatic tran-

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1 See more in D. Van Zyl Smit and C. Appleton /2019/, *Life imprisonment: A global human rights analysis*, Harvard University Press.

sition prompts a critical examination of the conceptual underpinnings and practical implications of lifelong imprisonment, inviting examination from legal, ethical, and human rights perspectives. This exploration begins by clarifying the conceptual aspects of lifelong imprisonment, investigating whether it stands as a just alternative or merely a delayed form of death sentence. Delving into philosophical and legal perspectives, we contemplate the essence of life, the quality of its existence, and the societal dimensions that shape our understanding of punishment. Drawing from historical roots to contemporary practices, we navigate through diverse legal definitions and cultural interpretations, acknowledging the complexity inherent in summarizing the notion of life imprisonment. The subsequent section sheds light on the evolving trends in lifelong imprisonment across various jurisdictions, emphasizing the notable progress towards its adoption as a predominant punitive measure following the decline of the death penalty.

Finally, the narrative pivots towards the dichotomy between penal populism and evidence-based crime policy. The concept of penal populism is dichotomized, revealing its influence in shaping criminal justice discourse based on public sentiment rather than empirical evidence. On the contrary, we underscore the importance of evidence-based approaches in crafting legal policies, especially in the context of lifelong imprisonment, where normative concerns intersect with the need for a just and effective criminal justice system. In navigating these intricate dimensions of lifelong imprisonment, this exploration seeks to unravel the complexities, ethical quandaries, and evolving paradigms that define contemporary approaches to punishment in the absence of capital sentences.

2. THE ABOLITION OF DEATH PENALTY AND ITS IMPACT ON LIFELONG IMPRISONMENT

2.1. Moral, legal, and human dimensions of lifelong imprisonment

With the progression of human rights, society has recognized lifelong imprisonment as the most feasible alternative measure to replace capital punishment, given that taking someone's life as a form of punishment is no longer acceptable. While this focus is understandable, it overlooks the fact that definitions of life serve not only epistemic and metaphysical purposes, but also carry significant social, political, and ethical implications.² In light of this, it is crucial to ponder the very essence of life and its various dimensions. However, can life be solely measured in terms of quantity?

Historically, life imprisonment has also served as a way to impose a punishment meant to keep an offender incarcerated for the rest of their natural life, essentially functioning as "life without the possibility of parole."³ Bearing that in mind,

2 L. Schoenmakers /2023/, Scientific progress, normative discussions, and the pragmatic account of definitions of life, *Synthese*, № 4, vol. 201, p. 13.

3 M. Mauer /2004/, *The meaning of "life": Long prison sentences in context*, Washington, DC: Sentencing Project, p. 4.

can we characterize lifelong imprisonment as a just very slow death sentence? Can a prisoner experience life in its true sense if sentenced to whole life imprisonment? Thus, apart from the quantitative aspects of life quality, it is important to underline the qualitative aspects by considering the fundamental elements that constitute a meaningful existence. The main issue when dealing with this topic is how we interpret and initially approach it from a conceptual point of view. The quality of life can be viewed as a developing goal or, more advantageously, as a method of establishing long-term conditions for oneself on Earth.⁴ Two perspectives may be used to describe the quality of life. Firstly, from a human perspective, it is the extent to which essential natural, biological, psychological, economic, and social needs are met or fulfilled.⁵ And secondly, from the point of view of the society, the quality of life is represented by the capacity of the society, i.e. its ability to meet the resources necessary to fulfill human needs.⁶ The phrase quality of life may signify many different things, from personal fulfillment to the capacity to live a normal existence. In social indicators study, it includes all aspects of daily living, such as housing, recreation, employment, the environment, income.⁷ According to some scholars,⁸ the factors considered to determine the essence of life quality and the degree to which those needs are fulfilled encompass a range of human needs, including physical, psychological, social, functional, relational, and environmental aspects. Examining the multifaceted nature of life quality becomes imperative in evaluating the ethical dimensions of lifelong imprisonment, prompting a critical exploration of its impact on the human experience. As society grapples with the ethical implications, a comprehensive understanding of the qualitative aspects of life is essential to inform discussions surrounding justice, punishment, and the preservation of human dignity.

When discussing life imprisonment, it is essential to begin by establishing a clear definition of what constitutes life imprisonment. In connection with life sentence, the question of justification is linked to the legal definition and practical implementation of life imprisonment.⁹ According to Italian philosopher, Cesare Beccaria, one can define life imprisonment as the incarceration of a prisoner subjected to severe treatment during his sentence and inevitable death in prison.¹⁰ Moreover, Beccaria strongly condemned the death penalty and proposed a life sentence as a harsher and more effective way of punishment.¹¹ On the contrary, some modern countries define life imprisonment as a form of incarceration where individuals are confined for

4 N. Karajić /1992/, *Važnost pojedinih komponenata kvalitete života, Socijalna ekologija*, № 4, vol. 1, p. 486.

5 M. M. Bubolz et al. /1980/, *A human ecological approach to quality of life, Social Indicators Research*, № 1, vol. 7, p. 107.

6 Karajić /1992/, p. 485.

7 See more in: A. Campbell, P. E. Converse, W. L. Rodgers /1976/, *The quality of American life: Perceptions, evaluations, and satisfactions*, New York: Russell Sage Foundation.

8 E.g. J. O. Hörnquist /1982/, *The concept of quality of life, Scandinavian Journal of Social Medicine*, № 2, vol. 10, A. H. Maslow /2013/, *Toward a psychology of being*, Simon and Schuster.

9 For detailed analysis see: D. van Zyl Smit, C. Appleton /2019/, *Life imprisonment: A global human rights analysis*, Harvard University Press.

10 C. Beccaria /2009/, *On crimes and punishments and other writings*, University of Toronto Press.

11 C. Beccaria /2009/, *ibid.*

the rest of their lives but are provided with chances for rehabilitation, and if they are deemed no longer a threat to society, they may be released. In countries that have chosen to incorporate life imprisonment as a punishment within their criminal justice systems, it is necessary to establish regulations concerning the possibility of parole. A prominent example regarding the issue of parole at the European level can be found in German legal practice, where the Constitutional Court, in a landmark decision from 1977,¹² ruled that mandatory life sentences without any possibility of parole under all circumstances are unconstitutional. The same was stated by the European Court of Human Rights which highlighted the importance of implementing mechanisms for reviewing life sentences in several cases.¹³ The Court has emphasized that countries should establish a justice system that allows individuals serving life imprisonment to seek a review and potential commutation of their sentence. In the case of *Vinter and Others v. United Kingdom*,¹⁴ the ECtHR acknowledged the possibility that there might come the point where the continued detention of individuals sentenced to whole life imprisonment no longer serves penological purposes. The Court held that sentences of life imprisonment without any prospect of release or opportunity for review, thereby depriving the prisoners of any hope of eventual release, are inconsistent with Article 3¹⁵ of the European Convention on Human Rights.¹⁶ In the *Vinter* case, the Court did not challenge the legitimacy of lifelong sentences, but the existence of sufficient penological justification for the continued imprisonment of a person on whom a life sentence is imposed. However, the Court explicitly stated that if a prisoner continues to pose a risk to society, he should remain in prison. However, this judgment also emphasized the importance of preserving hope for prisoners regarding their future outside of prison. Finally, without hope, it becomes questionable whether there is any realistic chance for an individual to rehabilitate and fulfill the ultimate goal of the given punishment – resocialization.

2.2. Trends in lifelong imprisonment

The advantage of imprisonment versus the death penalty is recognized in allowing the convicted person to change and improve his or her behavior while serving the sentence. This allows for considering their progress and fulfilling specific conditions that may lead to their eventual release. Furthermore, the advantage of

12 Available at: <https://openjur.de/u/60105.html>.

13 E. g. In the case *Marcello Viola No. 2. v. Italy* (77633/16) ECHR supported the amendment of Prison Administration Act which introduced the possibility for full life prisoners who had failed to cooperate with the justice system to be eligible for release on parole after serving 30 years of imprisonment. Another case is *Matiošaitis and Others v. Lithuania* (226622/13) in which the Court highlighted the importance on establishing an opportunity for life prisoners to ask the domestic court that their sentence be replaced by fixed-term custodial sentence if they have served not less than 20 years. The same was repeated in *Petukhov No. 2. v. Ukraine* (41216/13) where ECHR supported these mechanisms for life prisoners who have served at least 15 years of prison.

14 *Vinter and Others v. United Kingdom*, 2016.

15 Article 3 of ECHR states: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

16 European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950.

standardization and sentencing to life imprisonment concerning the death penalty is recognized not only through the principle of humanity but also through the possibility of resocialization. For this reason, individuals serving life sentences are allowed to apply for release, giving them a renewed chance to reintegrate into society.¹⁷ Given the significant limitations on human rights that life imprisonment implicates, the primary stipulation in comparative criminal legislation is that it should be reserved exclusively for the most heinous crimes and the most extreme manifestations of severe criminal offenses. In recent years, there has been a growing discourse on the need for more individualized sentencing practices that consider not only the severity of the crime but also the potential for rehabilitation and reintegration. The fact that this penalty is reserved solely for the gravest criminal offences underscores its exceptional nature, implying that it should be imposed only when the aims of punishment in a particular case cannot be achieved through any other criminal sanction.¹⁸ This approach recognizes the need for a balanced and individualized response to criminal behavior, reflecting a commitment to justice that addresses the unique aspects of each case while upholding the overarching principles of fairness and societal protection.

During the second half of the twentieth century, mechanisms like conditional release were implemented to soften the harshness of the disciplinary regime applied to individuals serving life sentences.¹⁹ This development reflects a broader shift in penal philosophy towards acknowledging the potential for positive change in individuals serving life sentences, emphasizing a more rehabilitative approach. In that regard, resolution (76) 2 from the Council of Europe's Committee of Ministers regarding the treatment of long-term prisoners²⁰ includes a recommendation that member states should guarantee all prisoners the opportunity to apply for conditional release. While the resolution is not legally binding in European law, this principle has received strong backing from the jurisprudence of the ECtHR. The Court affirms that a whole life order can only be deemed a disproportionate punishment if there is no possibility, either in law or in practice, of early release, and if continued detention no longer serves any legitimate purposes of the sentence. In cases where a life imprisonment sentence is imposed, the mandated minimum duration of the sentence must be prescribed before becoming qualified for potential release. However, while acknowledging that life imprisonment, as a form of punishment, undermines the protection of human dignity by depriving an individual of liberty, while failing to support their reintegration or offer any prospect of eventually reclaiming that freedom,²¹ the Court also highlighted its opposition to a specific type of life

17 N. Paunović, Z. Pavlović /2021/, *Life Imprisonment in the Comparative Law Framework as Well as in the Jurisprudence of the European Court of Human Rights*, in: *Yearbook Human Rights Protection: Right to Life* (Pavlović Z., ed.), Belgrade: Provincial Protector of Citizens – Ombudsman and Institute of Criminological and Sociological Research in Belgrade, pp. 189–190.

18 N. Paunović, Z. Pavlović /2021/, *ibid.*

19 M. Caterini, G. R. Minelli /2021/, *The “Right to Life” of People Convicted in Italy to Life in Prison: Among Recent Jurisprudential Assessments and Perspectives De Iure Condendo*, *Right To Life*, p. 85.

20 Council of Europe, 2003.

21 *Vinter and Others v. United Kingdom*, 2016.

imprisonment that completely excludes the prospect of release or a possibility of review.²² This nuanced position underscores the Court's commitment to balancing the need for punishment with the imperative to uphold human rights standards. Although the Court does not oppose life imprisonment in general, it emphasizes the importance of maintaining a realistic prospect of release or review to ensure compatibility with human rights standards. In this context, even though conditional release mechanisms provide a pathway for rehabilitation, ongoing efforts in legislative reform and international cooperation are crucial to ensuring a consistent and rights-respecting approach to lifelong imprisonment across jurisdictions. Life imprisonment is incompatible with the principles of the Convention if the offender has no initial understanding of when, how, or under what conditions they may become eligible for conditional release.²³ In that regard, the European Court also concluded that a life imprisonment sentence can be in compliance with the Convention as long as the State implements a mechanism to evaluate the continued necessity of enforcing the sentence in relation to the purposes of the punishment.

2.3. Argumentation for abolition of lifelong imprisonment as an absolute norm of ius cogens

In addressing the prospect of eliminating lifelong imprisonment as an inviolable norm under *ius cogens*, it is crucial to delve into the philosophical, ethical, and legal frameworks that historically provided justification for this rigorous punitive measure. This chapter discusses the evolving focus on life imprisonment as a prominent penological issue in Europe. It particularly follows the abolition of the death penalty across the continent, advocating for an evaluation of the abandonment of lifelong imprisonment, challenging its entrenched position as an absolute norm within the sphere of *ius cogens*.²⁴

After the abolishment of the death penalty in all of the countries in Europe,²⁵ the most important penological issue on the European agenda today is life imprisonment.²⁶ In recent decades, as the global use of the death penalty continues to decline, life imprisonment has begun to attract greater attention from international human rights lawyers and is likely to emerge as an increasingly important issue in future legal proceedings.²⁷ While the impact of international law on sentencing practices, such as life imprisonment, may be limited, the scientific community and European human rights organizations have focused on the subject. Initially, when life sentences were being introduced into legal systems, several countries chose to implement them without the possibility of parole. In addition to the condemna-

22 *Ibid.*

23 Caterini and Minelli /2021/, *op.cit.*, p.85.

24 R. L. Hassanova /2023/, The Prohibition of Torture and its Implications in the European Legal Sphere, *Central European Journal of Comparative Law*, № 1, vol. IV, p. 63.

25 With the exception of Belarus.

26 P. P. de Albuquerque /2015/, Life Imprisonment and the European Right to Hope, *Rivista*, № 2, p. 85.

27 N. Bernaz /2013/, Life imprisonment and the prohibition of inhuman punishments in international human rights law: Moving the agenda forward, *Human Rights Quarterly*, № 2, vol. 35, p. 471.

tion of this approach by the ECtHR, the European Committee on Crime Problems²⁸ also criticized the practice, holding it inhumane to subject individuals to lifelong imprisonment without any prospect of release. This concern aligns with a growing body of research indicating that long-term incarceration without the possibility of parole can have detrimental effects on prisoners mental health and rehabilitation prospects.²⁹ A crime prevention policy that accepts keeping a prisoner for life even if he is no longer a danger to society would not be compatible neither with modern principles on the treatment of prisoners during the execution of their sentence nor with the idea of the reintegration of offenders into society.³⁰ Moreover, the European Committee for the Prevention of Torture has issued a recommendation that individuals sentenced to life imprisonment should be provided with appropriate treatment to preserve their humanity throughout their sentence and to prepare them for eventual release.³¹ These guidelines are currently followed by all European countries, with the exception of the Netherlands.³²

Human rights law must extend to everyone and cannot differ for an entire category of human beings, those who have committed crimes. In this regard, it is important to stress that even though punishment is unavoidable, human rights law can and should serve as a framework for determining which forms of punishment are appropriate.³³ It is imperative for the prison system to be just and to provide the possibility of rehabilitation for each individual. In order to justify the imposition of life imprisonment, the system must establish procedures that allow prisoners to demand for their sentence to be reviewed. This would give them hope and a specific goal to work towards, serving as a source of motivation for a positive behavioral change.³⁴ Long periods of incarceration, including lengthy prison terms

28 Available at: <https://www.coe.int/en/web/cpt/-/council-of-europe-anti-torture-committee-calls-upon-states-to-review-the-treatment-of-life-sentenced-prisoners>.

29 See more in: C. Haney /2003/, Mental health issues in long-term solitary and “supermax” confinement, *Crime and Delinquency*, № 1, vol. 49.

30 “Nobody should be deprived of the chance of possible release.” This opinion is stated clearly in the following document: Council of Europe, 1977.

31 European Committee for the Prevention of Torture and Inhumane or Degrading Treatment or Punishment, 2016.

32 Since the abolition of the death penalty in the Netherlands in 1870, life imprisonment specifically means imprisonment lasting for the rest of the convicted person’s life without the possibility of parole. However, in 2016, the Supreme Court of the Netherlands passed a verdict stating that the current system of imposing life sentences without any chance of release, except for a granted pardon, is not in compliance with Article 3 of the ECHR. As per the court’s ruling, it is mandated that individuals who have been sentenced to life imprisonment must be granted the opportunity to have their cases reviewed within a maximum period of 25 years of serving their sentence. The court opined that in the event that a prisoner’s reintegration into society is not achievable after 25 years, the prisoner should be granted the right to periodic reevaluation of his sentence. While courts have the jurisdiction to evaluate the feasibility of a life-sentenced prisoner’s reintegration into society, still solely a pardon can release an individual who has been condemned to life imprisonment.

33 Available at: <https://www.coe.int/en/web/cpt/-/council-of-europe-anti-torture-committee-calls-upon-states-to-review-the-treatment-of-life-sentenced-prisoners>: 495.

34 European Committee for the Prevention of Torture and Inhumane or Degrading Treatment or Punishment, 2016.

and life sentences, combined with inadequate support systems, limited opportunities to maintain relationships with family, and a lack of preparation for reintegration could have significant impact on the prisoners' adaption to the outside world.³⁵ Studies have consistently shown that prisoners who have a prospect of parole or sentence review exhibit better behavior and are more motivated to engage in rehabilitation programs, ultimately increasing their chances of successful reintegration into society.³⁶ Moreover, it is noted that prisoners serving life sentences frequently face more deprived conditions than other inmates, such as inadequate living environments, limited human interaction, and minimal or no access to meaningful activities or rehabilitation programs.³⁷ This situation presents numerous challenges for prisoners, especially when considering the fact that individuals sentenced to life imprisonment are frequently deprioritized, leading to their needs being perceived as less urgent.³⁸

The gravity of life imprisonment becomes apparent as it is exclusively imposed for the most severe and heinous crimes. When examining the concept of life imprisonment, the approach of the ECtHR reflects as progressive by highlighting the importance of periodic reviews for such sentences. This recognition indicates a shift towards a more forward-thinking perspective, highlighting the need to reevaluate life imprisonment cases. Within this context, an example worth mentioning is Norway, which in 1981 established a maximum prison term of twenty-one years³⁹ Since then, they have been implementing policies focusing on rehabilitation and the possibility of parole rather than imposing lifelong sentences. Even though official lifelong imprisonment has been abolished, there is still some space left for the state to intrude when needed. In that regard, the current Norwegian legal system incorporates a unique form of an indefinite penalty called preventive detention (*forvaring*), a sentence with a maximum imprisonment period of 21 years.⁴⁰ Initially, a prisoner must serve 10 years to become eligible for parole. However, if parole is not granted, the sentence can be extended for an additional 5 years. Although the possibility of ongoing extensions every five years theoretically implies the potential for life imprisonment, preventive detention is imposed only when an individual poses a significant risk to society.⁴¹

35 *Ibid.*

36 See more in: J. Petersilia, S. Turner /1993/, Intensive probation and parole, *Crime and Justice*, vol. 17.

37 Policy briefing, 2019, Available at: https://cdn.penalreform.org/wp-content/uploads/2018/04/PRI_Life-Imprisonment-Briefing.pdf.

38 Crime Prevention and Criminal Justice Branch, Life Imprisonment, 1994, paragraph 3.

39 D. Schartmueller /2015/, *Life imprisonment in Scandinavia: The ultimate punishment in the penal environments of Denmark, Finland, and Sweden*, unpublished doctoral dissertation, Northern Arizona University, Flagstaff, AZ, p.3.

40 Norway recognizes the exception of punishment of 30 years for crimes against humanity to fulfill requirements under the Rome Statute.

41 See more in: R. A. Berger /2016/, *Kriminalomsorgen: A Look at the World's Most Humane Prison System in Norway*, Social Science Research Network, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2883512.

3. PENAL POPULISM VS. EVIDENCE-BASED CRIME POLICY

Penal populism is a punishment strategy formulated primarily based on its anticipated popularity.⁴² There is no doubt that the primary aim of developing and implementing a policy is to generate change or impact, in other words, to ensure that the policy is effective.⁴³ The concept of penal populism encompasses a range of empirical, conceptual, and normative issues. It directs us to explore the dynamics between the media, the public, and political figures by examining their existing relationships. Additionally, it raises theoretical and empirical questions about the nature of public opinion, how it is measured and how it evolves over time.

Penal populism is primarily a political narrative that openly or implicitly dismisses the perspectives of experts and liberal elites, asserting instead the authority of the people, whose views on punishment it claims to represent.⁴⁴ It often manifests as a competitive process among major political parties, where they strive to outdo each other in presenting themselves as tough on crime.⁴⁵ Penal populism refers to a public perception that crime is widespread and a common issue during elections when politicians propose tough measures to increase the number of offenders in prison before sentencing and lengthen prison sentences. In this regard, political discourse over punishment tends to serve to public opinion rather than prioritizing the relevance of criminological data or expert standpoints. In contrast, populist measures are infrequently guided by evidence, and they are also not substantiated by cost–benefit analysis or equipped with evaluative criteria and performance metrics.⁴⁶ Populist policies, aiming to gain public support and political advantage quickly, prioritize aligning with public opinion and the will of the people.⁴⁷ Rather than relying on empirical findings from scientific research on public opinion, these policies respond to media headlines and emotional expressions of the public.⁴⁸ Thus, it is important to consider the legal maxim *hard cases make bad law*, which suggests that following the temporary outrage of the public may not always be the most efficient way. In that context, the issue of whether it is permissible to integrate public sentiment into the development and implementation of criminal law may come into question.⁴⁹ Although penal populism is often associated with push-

42 Z. Boda et al. /2022/, Two decades of penal populism – the case of Hungary, *Review of Central and East European Law*, № 1, vol. 47, p. 117.

43 M. Kolaković-Bojović /2022/, Human Rights Protection: From Populism to the Evidence-Based Policy Making, in: *Human Rights Protection from Childhood to The Right to a Dignified Old Age – Human Rights and Institutions* (Pavlović Z., ed.), Belgrade: Provincial Protector of Citizens – Ombudsman and Institute of Criminological and Sociological Research in Belgrade, p. 65.

44 D. Garland /2021/, What's wrong with penal populism? Politics, the public, and criminological expertise, *Asian Journal of Criminology*, № 3, vol. 16, p. 258.

45 Available at: <https://www.populismstudies.org/Vocabulary/penal-populism/>.

46 Garland /2021/, 259.

47 *Ibid.*

48 For deeper analysis see: D. A. Green /2012/, *When children kill children: Penal populism and political culture*, Oxford: Oxford University Press.

49 F. Miró-Llinares, A. B. Gómez-Bellvis /2021/, Does public opinion matter for criminal law? Re-visable life imprisonment in Spain and its relationship with social demands, in: *Criminal Law-Making: Theory and Practice* (Becerra J., ed.), Cham: Springer International Publishing, p. 110.

ing criminal law toward harsher and more punitive measures, it is also conceivable that populist policies might embrace more lenient approaches when such measures reflect prevailing public attitudes.⁵⁰ That highlights the need for careful consideration, analysis, and reliance on evidence-based approaches in order to ensure the formulation of sound and just legal policies.

Besides penal populism, the scientific fields of criminology and criminal law are aiding in the construction of evidence-based criminal policy. However, whether policymakers pay attention to research and consider evidence depends on the subject, whereas some topics bring up significant normative and ideological concerns, such as the discussion regarding capital punishment or the severity of sentences.⁵¹ When creating the normative framework for life imprisonment, it is crucial for the legislator to consider the desired outcomes. Ideally, the preferred approach would involve examining prior studies conducted. However, there may be situations when such studies are not available. At that point, it becomes necessary for the state to evaluate the effects of the newly enacted regulations after a certain period of time has passed since their implementation. This assessment allows for a comprehensive understanding of the impact and effectiveness of the regulations, enabling potential adjustments or improvements to be made based on empirical evidence.

4. CONCLUSION

In conclusion, the global shift away from the death penalty has brought lifelong imprisonment to the forefront of criminal justice discussions. The ethical considerations surrounding the taking of human life have propelled societies to explore alternatives, leading to a critical examination of the conceptual, legal, and human rights aspects of lifelong imprisonment. The evolving trends in lifelong imprisonment reflect a nuanced approach, acknowledging the potential for rehabilitation and reintegration. The focus on individualized sentencing and parole or conditional release mechanisms underscores a commitment to a more humane and rehabilitative justice system. However, the argumentation for abolishing lifelong imprisonment as an absolute norm of *ius cogens* highlights significant concerns. The potential detrimental effects on prisoners' mental health, the importance of preserving hope, and the need for periodic reviews align with a growing body of research and human rights principles. As shown, Norway's preventive detention case serves as an example of a system that combines punishment with rehabilitation and the possibility of parole.

The dichotomy between penal populism and evidence-based crime policy introduces a critical perspective on the influence of public sentiment on criminal justice discourse. While penal populism tends to prioritize public opinion over em-

50 Garland /2021/, 259.

51 M. Tonry /2010/, Public criminology and evidence-based policy, *Criminology & Public Policy*, № 4, vol. 9, p. 792. In that regard author states that academics' complaints usually are directed at the most contentious and emotional issues – capital punishment, mandatory penalties, and long prison sentences – and the gravamen of the complaints is less that evidence has been ignored than that complainers disapprove of particular policies.

pirical evidence, an evidence-based approach emphasizes the importance of careful consideration, analysis, and reliance on scientific research in shaping legal policies. Finally, in navigating the complexities of lifelong imprisonment, it is crucial to strike a balance between the gravity of the crimes committed, the imperative to protect human rights, and the potential for rehabilitation. The examination of evidence-based approaches, along with a consideration of normative and ideological concerns, should guide policymakers in crafting legal frameworks that align with justice, fairness, and societal well-being.

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KAZNA DOŽIVOTNOG ZATVORA, LJUDSKA PRAVA I PRAVDA ZASNOVANA NA DOKAZIMA U ERI NAKON UKIDANJA SMRTNE KAZNE

REZIME

Kako sve veći broj država napušta primenu smrtne kazne, doživotni zatvor postaje njena najvažnija alternativa, što otvara prostor za produbljenu analizu njenog pojmovnog određenja, pravnih okvira i implikacija po ljudska prava. U radu se razmatraju različita norma-

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tivna rešenja i kulturne perspektive, uz poseban osvrt na porast oslanjanja na ovu sankciju u kontekstu napuštanja smrtne kazne na globalnom nivou. U tom svetlu, suprotstavljanje penalnog populizma i krivičnopravne politike zasnovane na dokazima nudi važan uvid u to kako javno mnjenje može oblikovati krivičnopravni diskurs. Dok penalni populizam neretko favorizuje percepcije i očekivanja javnosti nauštrb empirijskih nalaza, pristup zasnovan na dokazima naglašava potrebu za temeljnom analizom, stručnom procenom i oslanjanjem na relevantna istraživanja pri oblikovanju kaznene politike. Konačno, savremeno sagledavanje kazne doživotnog zatvora uključuje i razmatranje mogućnosti rehabilitacije i reintegracije, uz balansiranje etičkih dilema, novih tendencija i obaveze zaštite ljudskih prava. Rad ukazuje na složen i višedimenzionalan karakter ove kazne i važnost njenog promišljenog uređenja u skladu sa savremenim shvatanjima pravde i humanosti.

Ključne reči: doživotni zatvor, ljudska prava, smrtna kazna, pravda zasnovana na dokazima.

IZ ISTORIJE KRIVIČNIH NAUKA

ДА ЛИ ЈЕ ПРЕПОРУЧЉИВО ДА СУДИЈА МОЖЕ ЗА ЈЕДНУ РАДЊУ КОЈА ИЗРИЧНО НЕ УЛАЗИ У ЗАКОНСКУ НОРМУ ДА КАЗНИ И ДА ЈЕ СМАТРА ПРОТИВПРАВНОМ?¹⁾

I

Принцип легалитета освештан у законским текстовима, названим казним или кривичним кодексима, а који сачињавају интегрални део уставних принципа, је толико емотивно проткан и укорењен у душу савремених правника, те изгледа да је немогуће посумњати у његову апсолутну вредност.

Као што се зна, овај принцип је постављен у Европи у почетку XIX века, после његовог неограниченог признања од стране законодавства Француске Револуције. Он је произвео такав утисак по своме демократском карактеру, да је брзо усвојен у Европи.

Неки налазе порекло принципа легалитета у Енглеској у XIII веку (Magna Carta). Али, ако је то тачно, овај принцип у Енглеској није био апсолутан принцип, као што то ни данас није у овој земљи.

Интересантно је да је овај принцип био освештан неограничено у првом европском Кодексу: Кодексу Српског цара Душана, изгласан (135 чланова) у Народном Сабору 1349, и допуњен (са 66 нових чланова) у Сабору 1354. Одиста прећутан принцип овога кодекса је да су кривична дела само оне радње које су оглашене као такве, у његовим одредбама, раније извршене. И казна је предвиђена било (по правилу) у самом кодексу, било у Синтагми (порекла византијско-ремског), помоћном тексту кодекса, било, да Синтагма не садржи кривично дело у питању, у јавном обичајном праву. Овај принцип налази потврду чак изрично, мада индиректно, у једном од 201 члана кодекса, Чл. 172, који наређује: „Да судије суде по овом кодексу непосредно како је написано у кодексу, а да не суде по страху и моћи (власти)“.

1) Thomas GIVANOVITCH, Est-il désirable que le juge puisse retenir et punir un fait qui ne rentre pas expressément sous les termes d'une disposition légale? *Revue internationale de droit pénal* — 1937 — p. 404—409. Чланак проф. др Томе Живановића објављен у листу „Правосуђе“, бр.3, 1938. (Са француског превео др Бранивоје Д. Петровић).

У овој одредби се констатује тако исто принцип независности правосуђа према извршној власти, дакле одвајање ових двеју власти. И пошто је законик био заједничко дело двеју скупштина (сабора) из 1349 и 1354 исто као и Цара Душана, законодавна власт је исто тако одвојена од извршне и судске власти. Принцип легалитета законника, вели се, консеквенца је ове деобе трију власти.

II.

Заиста је да, од законодавног освештања принципа легалитета, има писаца који су се мање или више изјаснили против овога. Али ови писци су увек били у знатној мањини.

Тако исто, позитивна кривична права која не признају принцип легалитета сачињавају у Европи ретке изузетке.

Међутим од скоро нова реакција са великом снагом отвара себи пут против овог принципа у извесним европским земљама. Може се разликовати под овим видом више струја:

1) Одмах треба констатовати да, у једној од ових земаља, Немачка, појавио се је закон који је повредио принцип легалитета, прописујући смртну казну за паљевину са р е т р о а к т и в н и м дејством за извршиоца паљевине још неосуђеног (познат случај са van der Lubbe).

С друге стране, у овој истој земљи, више теоретичара (истина најмлађих, и политички оријентисаних), изјаснили су се против овог принципа, оспоравајући му његову апсолутну вредност која му је опште призната. Према овима, довољно је да радња буде к р и в и ч н о д е л о у времену гоњења. Ако је то тако, казниће се извршилац, мада радња није била инкриминисана у моменту њеног извршења (чиме се раскида са принципом легалитета кривичног дела и кривца). Осим тога генерализира се принцип закона van der Lubbe тако да се захтева (то што су извесни старији немачки писци већ предložили) да се увек примењује прописана казна од стране закона под чијом владавином радња се гони (чиме се прекршава принцип легалитета казне).

Најзад скоро је прекршен у Немачкој принцип легалитета законом од 28 јуна 1935. г. који је изменио § 2 овлашћујући и на примену аналогије. Тако према новој редакцији § 2 кажњава се и за дело које није оглашено законом за кривично, али које заслужује да му се извршилац казни, „п р е м а о с н о в н о ј м и с л и н е к о г к р и в и ч н о г з а к о н а, и п р е м а з д р а в о м о с е ћ а њ у н а р о д а.“ Додато је још да у случају, где се ни један одређени закон не може да примени, „непосредно“ на дело, дело се кажњава „према закону чија му основна мисао најбоље одговара.“

2) Тежак прекршај начела легалитета, и готово напуштање тога начела догодио се је, пре поменутих немачких прекршаја, у Совјетској Русији. Према чл. 6 и 7 совјетско-руског кривичног законика (Р. С. Ф. С. Р.), одредбе његовог посебног дела имају само карактер индикације дате суду о томе шта треба сматрати кривичним делом. Тако: 1) Према чл. 6 општег дела, сматра се као социјално опасно (сцил. као кривично дело) „свака радња управљена против совјетског режима или правног поретка установљеног од сељачке и радничке класе за време периода преласка на комунистички режим“, дакле чак и онда ако дело није предвиђено у посебном делу. 2) Према чл. 7 могу се применити мере „друштвене одбране“ не само на лица која су извршила радње „опасне по друштво“, већ исто тако и на лица која „представљају опасност својим везама са опасном средином или својом прошлошћу“. Предвиђају се чак у напомени додатој уз чл. 6 и чл. 8 случајеви, где се не примењују санкције на радње предвиђене као кривична дела у посебном делу (то су случајеви: 1) — где је дело изгубило „услед очигледно мале важности и отсуства штетних последица свој карактер специјалне опасности“. 2) — чл. 8. „Где је дело изгубило у тренутку истраге или суђења свој социјално опасан карактер, било због измене кривичног законика, било због наступелих промена у социјалној и политичкој конструкцији“, или ако се извршилац према нахођењу суда у горе наведеним моментима не сматра као опасан по друштво (в. превод Петује-а 1935).

3) Најзад треба поменути један покрет теоријског карактера, који се непосредно тиче тумачења закона, али има за последицу озбиљно одступање од начела легалитета. То је тенденција да се тумаче кривични закони држећи се критеријума вредности. У томе се циљу прави разлика између нормативних елемената кривичног законика и његових дескриптивних елемената. Први будући подложни оценјивању вредности, треба да буду тумачени на бази критеријума вредности (правна вредност). Типичан је случај дела против јавног морала, где се захтева да објекат буде, девојка на пример од 16 година. Ту се кажу ради о нормативном елементу, па треба допустити да се под девојком од 16 година ваља подразумевати свака девојка која се телесно и умно налази на ступњу девојке од 16 година, макар била стара 16, 17 и 18 година. Овде се ради о примени доктрине о вредности у кривичном праву.

III.

1) Примена казне је, за разлику од оштете, врло снажно задирење у добра појединаца, да би се могла извршити без незадо-

вољства, и протестовања савременог слободног грађанина, ако би се кажњавало за дела непредвиђена као кривична у кривичном закону, у време њиховог извршења. У ствари, кажњавање би се осетило у томе случају као не п р а в и ч н о и п о н и ж а в а ј у ћ е у и с т и м а х. С једне стране човек се је привикао на своју с л о б о д у и тако звану ј а в н у с и г у р н о с т, које се сматрају као врло високе индивидуалне вредности, и које би биле укидањем начела легалитета, изложене опасности непрекидне нестабилности. И с друге стране, укидањем начела легалитета које би изложило грађане неминовно чак у њиховим најдрагоценијим добрима, као животу, слободи, чисти — самовољи јавне власти, човек би био повређен у своме осећају ч о в е ч ј е г д о с т о ј а н с т в а, једне од н а ј в и ш и х м о р а л н и х в р е д н о с т и.

2) Тежња за напуштањем начела легалитета се оснива првенствено на а у т о р и т а р н о м начелу. „Све у држави и за државу“. Признаје се да напуштање тога начела представља жртву за правну сигурност и личну слободу, али се то оправдава као виша државна потреба. Заборавља се при томе да држава није творевина разума (екс рационас), чиста апстракција, већ да је једна друштвена реалност, наиме људска заједница, и да према томе постоји само ради заједничких интереса људи који је састављају, а не ради тога да испољава своју врховну власт заповедања, макар и средством аката самовоље. Доследно, без једне апсолутне потребе, а таква је само потреба одржавања државе, не може се захтевати од људи који чине то друштво, једна тако тешка жртва, и када таква потреба не постоји. Оправдање напуштања легалитета чисто и просто вишим интересом државе, је такође једна од примена и д е а л и с т и ч к е (рационалистичке или спекулативне) на место р е а л и с т и ч к е методе.

3) Чак и са начелом легалитета, правна сигурност човека векова није потпуно обезбеђена од сваке неизвесности. У ствари, законски прописи допуштају, као што је познато, често дивергентна и контрадикторна тумачења, упркос свим прецизностима у редакцији, и упркос дефиницијама за које се трудило да се донесу да би се избегло поменуто зло и тако обезбедило поштовање начела легалитета. Чак са начелом легалитета, какав год био начин којим се хтело да се оно обезбеди, не зна се ипак увек сигурно, да ли ће ни бити кажњена или не таква и таква радња. Тако, циљ коме тежи поменута укидања начела легалитета, може чак да леге да буде задовољен бар у извесној мери захваљујући томе недостатку механизма обезбеђења начела легалитета, имајући нарочито у виду утицај који врши, у извесним земљама извршна власт на правосуђе. Не види према томе човек целисходност тежње, већ саме по себи неправичне, да се грађани изложе отворено, непосредно и потпуно самовољи судске власти.

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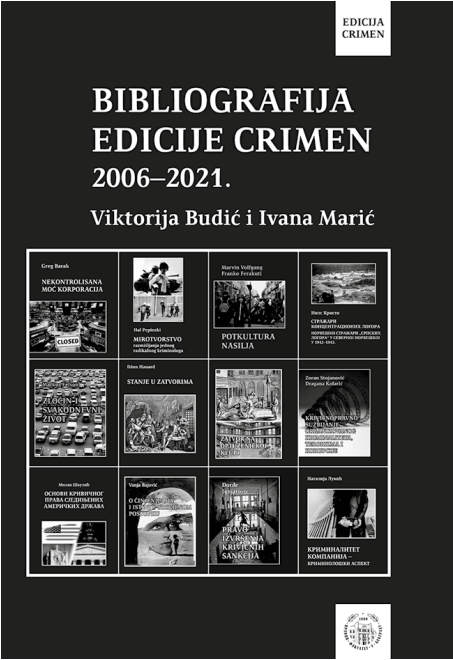


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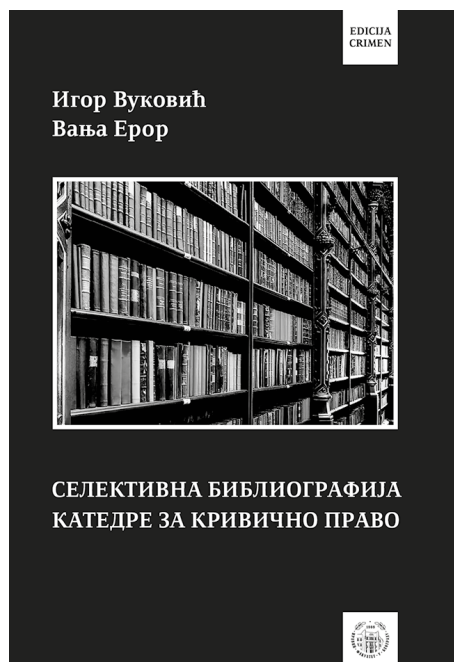
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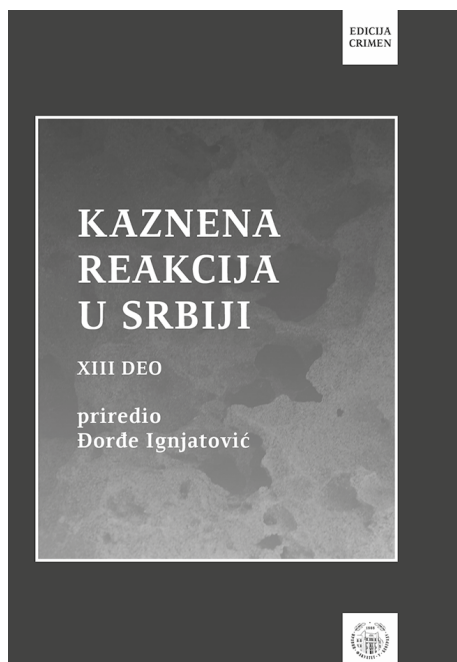


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P. Reichel (2005). *Comparative Criminal Justice Systems*, 4th ed., Upper Saddle River, p. 40.

Prevodi knjiga

G. Barak (2020). *Nekontrolisana moć korporacija*, Beograd [orig. G. Barak (2017). *Unchecked Corporate Power*, Abingdon], p. 77.

Zbornici

E. McLaughlin, J. Muncie (eds.) (2013). *Criminological Perspectives – Essential Readings*, 3rd ed., Los Angeles, p. xii.

Ponovljene i uzastopne reference

P. Reichel, p. 140.

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K. von Lampe (2019). Tackling Organized Crime, *CRIMEN – Časopis za krivične nauke* 3, p. 219.

Prilozi u zbornicima

U. Beck (2013). The terrorist threat – world risk society revisited. In: *Criminological Perspectives – Essential Readings* (eds. E. McLaughlin, J. Muncie), 3rd ed., Los Angeles, p. 641.

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http://crime.about.com/od/sex/a/rape_myths.htm, 27. mart 2010.

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1.1. Druga potcelina potamnjena slova (bold)

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1. The contributions must be original, they may not be published or submitted elsewhere. Articles should preferably have an overall length of one author's sheet (not more than 45 000 characters including spaces). Text to be in electronic form in latin in Word for Windows, font Times New Roman, font size 12, double spacing including footnotes.

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Collections of papers

E. McLaughlin, J. Muncie (eds.) (2013). *Criminological Perspectives – Essential Readings*, 3rd ed., Los Angeles, p. xii

Repeated and subsequent references

P. Reichel, p. 140.

5.2. References to texts in Journals and Collections of papers

Articles in Journals

K. von Lampe (2019). Tackling organized crime, *CRIMEN – Journal for Criminal Justice* 3, p. 219

Contributions in Collections of papers

U. Beck (2013). The terrorist threat – world risk society revisited. In: *Criminological Perspectives – Essential Readings* (eds. E. McLaughlin, J. Muncie), 3rd ed., Los Angeles, p. 641

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Beside the Internet address, date of access to the document should also be written

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