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БЕЗБЕДНОСТА КАКО ПРЕДМЕТ НА ИСТРАЖУВАЊЕ - ПРИСТАПИ, КОНЦЕПТИ И ПОЛИТИКИ

INTERNATIONAL SCIENTIFIC CONFERENCE

RESEARCHING SECURITY: APPROACHES, CONCEPTS AND POLICIES

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POLITICAL AND LEGAL SYSTEMS AND RULE OF LAW

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CONSTITUTIONAL CHANGES - PRE CONDITION FOR DEEP STRUCTURAL REFORMS IN THE REPUBLIC OF MACEDONIA

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Abstract

Up to now, the constitutional changes that have been done, and the reforms that have been made in the Republic of Macedonia are insufficient for faster and more qualitative economy rise and development, as well as the development in all spheres of public life.[1] So far the reforms were mostly shallow, partial and short-term. They do not embrace deeply in the structure of the system and its subsystems. Accordingly to the systemic theory[2], each system is actually a subsystem of the other bigger system. In contrast to the above mentioned, deep structural reforms in one systemic-strategic approach should be: 1) embrace deeper in the structure of the system and thus contribute to enabling quality, as condition for faster and more qualitative development. 2) simultaneously embracing within all crucial spheres in the whole society, such as: the political system, the law system, criminal law system, public and state administration, economic and financial system, local self-government, security system, civil society, public procurement and financing of the political parties; 3) coherent and complementary of the solutions, from one hand, among certain social segments, and on the other hand, among subsystems in the framework of the mentioned social segments.

For that purpose, Constitutional changes are needed, which will provide further legal regulation and operationalisation, creating a new qualitative normative and institutional structure or respectively systemic crisscrossed series of optimal independent institutions from the executive authority, but, not from a wider set of the control mechanisms of society. Actually, it is a newly developed system for authority division, with maximal development of its two immanent characteristics; balance of the power

[1] Miodrag Labovic/ Marjan Nikolovski, Organised Crime and Corruption, Faculty of Security - Skopje, 2010

[2] David Easton, A Systems Analysis of Political Life, John Wiley &Sons New York, 1965

between institutions and their mutual control. Namely, the main problem in the Republic of Macedonia and also for the countries similar to them, is how to decrease massive concentration with the uncontrolled power that governments have since the independence of our country until today. Thereby we should resolve our biggest weakness - how to arise the rule of law or practical application of the Constitution and Laws in Macedonia on the higher level than the existing one. With the new solutions, that should be qualitatively-progressive combination[1] between forms of liberal - representative democracy[2], participative[3] and direct - deliberative democracy[4], in a scientific original approach are given just the general directions of the basic idea for optimal independency of the key state institutions from the executive authority, as well as their mutual control. At the same time possible different modifications of the specific alternative solutions are not excluded.

Benefits from these long-term and qualitative Constitutional changes shall open way for deeper structural reforms, except the citizens, the government shall also have benefits in the adoption, and after, the execution of these reforms. 1) For this reason the Government will enter into history because it will create a system which will perform a stable work in a long term manner and the law will be implemented according to the will of that system, irrespective of who is governing and whether they have or do not have political will and moral integrity. 2) By creating this kind of system, the government will insure itself from political revenge and unfounded exile after its leaving. Having in mind the fact that all governments up to now, more or less have spent massive amount of the mandate exactly on that.

Key words: constitutional changes, deep structural reforms, systemic crisscrossed series of independent institutions.

INTRODUCTION

The numerous scientific and expert debates which are carried out in the Republic of Macedonia, and not only on the current political and security

[1] On the need for progressive combining of the different forms of democracy, see more in: David Held, Models of Democracy, Akademski pecat, Skopje, 2008

[2] Mil. J. S.: Considerations on Representative Government. Bo H. B. Acton (editor), Utilitarianism, Liberty and Representative Government, London: Dent, 1951

[3] Pateman, C. 1970: Participation and Democratic Theory. Cambridge: Cambridge University Press

[4] Fishkin, J. 1991: Democracy and Deliberation: New Directions for Democratic reforms. New Haven: Yale University Press; Gutmann, A. 1999: Deliberative democracy and majority rule. New Haven: Yale University Press;

crisis, according to the author of this paper present the most explicit culmination point of the system crisis which is permanently going on in the Republic of Macedonia, with a smaller or bigger intensity from the independence up to the present moment did not offer a clear strategic vision for the legal solutions, except for the assessment of the states and predictions for the security risks and threats in the Republic of Macedonia. Furthermore, according to the author, the system crisis is generated from inadequate constitutional solutions which have not been adapted to the specific determining factors characteristic for societies without a democratic tradition, with a low level of political culture, low legal awareness, and a special mentality and traditions. Yet, similar constitutional legal solutions, even weaker than those in Macedonia, in other countries with totally different specific determining factors have given excellent results. In the function of achievement of the most significant scientific aims, among the others also of the theoretical – explicative, normative – prescriptive and the practical –applicative function and aim of science, it has not only the right but also the obligation to offer strategic vision with solid solutions for overcoming of the various states. Of course, this legitimate calling of the science should not be related to its eventual abuse in daily political purposes, in which characteristic are the involvements in debates with flat party qualifications and political pamphletisation of the questions in contrast to the objective – neutral scientific approach of the basis of ascertained empirical facts and the most valid arguments which can be confronted on a rational basis. In this sense, so far a clear distinction has not been done yet, among: 1) the basic modalities (through which we could expect political solution, such as overtaking certain steps for reaching a political agreement for forming of technical, transitional expert or concentrative Government. In addition, the suggested steps in this directions are not arguable at all, at least not for those who are able to perceive the states realistically) then 2) the strategic approaches for legal solution of the processed solutions derived from the crisis, and in the same time for a long term, systemic, stable solution of the problems in the overall legal and political system, and in those frameworks also the security system, and 3) the various possible concrete solutions in the framework of certain strategic approaches, as well as for all other crucial social segments, and among the others, also providing for fair, legal and impartial trial of all involved parties in the cases which had already been processed to the Public Prosecution.

Namely, according to the author, the key question for the most essential problem which is to be answered and at the same time to offer systemic projected solutions for overcoming of the systemic crisis, is the question of the power division. But, I consider that this question should be observed in a completely different perception of the problem, in contrast to

the aspect of some of the most eminent authors. As the author says, the main and key question is: is Macedonia in a need of a qualitative new coherent and complementary normative – institutional structure, or, said in a different way, a systemic crisscrossed series of optimally independent institutions, which actually means a qualitatively modified, newly developed system of power division in which by force of the very system the law will be applied on a significantly higher degree than before and thus there will be a manner for solving of our main problems: a higher degree of the rule of law i.e. non-application of the laws and the other regulations, especially in the highest instances of the state-political power which are not controlled by any means, because de facto, an institution which could control them does not exist. The absence of the ruling of law is the basic precondition for all other problems of our society and the societies similar to it. And those problems are: a real competence and qualitative development in all social segments. If there is no a real competence, then there is no quality, and without quality there is no development, not only in economy (improvement of the living standard, reduction of the unemployment and poverty, but also in all other spheres of public life (security, protection of the human rights and values, education, healthcare, culture, etc.

For these reasons I consider that for the Republic of Macedonia and the countries similar to it, establishment of a new developed of the power division is necessary, and its two immanent characteristics will be: the mutual control and balance of the power should be most consequently and most consistently developed.[1] This is possible through establishment of a coherent and complementary normatively-institutional structure with a systemic crisscrossed series of optimally independent institutions. These institutions should be independent from the executive power, but not absolutely independent from a wider set of institutional controlling mechanisms consisted of representatives of the key social segments in the defined areas in a qualitatively new manner which will be suggested in the further text of this paper. By this a way will be provided for deep structural changes in all key spheres of the social life in the Republic of Macedonia. This is necessary for the Republic of Macedonia and the countries similar to ours for the reasons, among the others, that in the previous 23 years of constitutionality of the independent Macedonia there is not even one legal instance which is de facto optimally independent from the Government-party structures and which can independently point to the breaking of the constitutionality and the lawfulness on the part of any Government so far

[1] Montesquieu: The spirit of Laws. Chicago: William Benton, 1952; Manin, B.1994: Checks, balances and boundaries: the separation of powers in the constitutional debate of 1787. Bo B. Fontana (editor). The Invention of the Modern Republic, Cambridge: Cambridge University Press

(except for some smaller legal regulations which do not threaten significantly the interests of the ruling structures. This is a notorious empirical fact without even one exception. The fact that in the time of some of the so-far Governments – the Constitutional Court, for example, made decisions which were opposite to the interests of the so-far Governments does not reduce the veracity of this claim, because the so-far compositions of the Constitutional Court were selected by other parliamentary majorities and out of more reasons they had a need to be loyal to the political structures by which they were suggested and appointed.

I have to mention that it is important to follow the main, general idea for systemic and strategical approach for establishment of a systemic crisscrossed structure of optimally independent institutions from the executive power and their mutual control. Nonetheless, other possible more optimal suggestions for different modifications of the concrete alternative solutions were not excluded. A big number of our experts overemphasised the importance of the political will, the moral integrity and the credibility of the bearers of the highest functions of power, as well as objectivised criteria for high professional standards in the selection. But, why do we need high professional standards and criteria in the selection which, for some professions are still existent in the law, when our main weakness is precisely the fact that laws are not sufficiently implemented. Our most eminent experts also cannot see and understand that the system is not build and must not depend on categories which are moral integrity, credibility, authority, etc. Of course that these are very important categories and it is very desirable that they exist. Yet, the system cannot be built only on this basis for the reasons that they are very changeable, instable and relative categories. Of course that in certain periods, in exceptional circumstances in the time of one government it is possible that there can be a quite high degree of political will and moral integrity, so that the system will more or less function successfully even without the suggested solutions which will follow in the further text. But the question which arises here is what shall be done when in some other mandate there will not be such political will and moral integrity. This is in fact one of the basic neoliberal and neo-pluralistic credos: to create a system which will function with the lowest possible harm in circumstances of political hazard in a plural political system, when it is not known who next can come to power.[1] But here it is important to mention that this kind of a system will more rapidly change the awareness, which is otherwise changed most slowly and most difficultly. Opposite to this are the moral appeals for "revolution of the awareness" which, if they were sufficient in the so far known history of humanity of over 5000 years, there would not have been a

[1] See more in: David Held, Models of Democracy, Akademski pecat, Skopje, 2008

need for constant and more and more frequent appeals for the so much desired change of awareness and consciousness.

Theses which circulate in public for solving of our biggest problems in the functioning of the constitutional legal and especially the political system:

In the public discourse of the Republic of Macedonia circulate several theses for the strategic approaches to solutions – how should our fragile society deal with and overcome not only the acute political crises, but, also, according to the author, the deep economic crisis which, in a different amount and intensity has lasted chronically in the whole period since the independence up to the present moment. I do not have the intention to revitalise the current events which are only the most explicit culmination of all which has happened so far and will continue to happen in the future with a smaller or a bigger intensity, if we do not solve our problems systemically. Of course, the different perception of the relatedness between the reasons and the consequences which has led to the state of a systemic crisis, and it also has a different reflexion on the strategic approaches to the solutions. Out of spatial reasons, I cannot here explain the deeper relatedness between the reasons and consequences which led to this state. I will only try to present some of the most significant theses for strategic approach to the solutions. For this purpose, if we revoke arguments, it is necessary to observe the most correctly set, almost quoted strongest arguments on these different theses. By a rational confrontation of the arguments according to the logical principles of the rationalistic epistemology we can conclude that if there is a sufficient will, some of these theses can most optimally, in long terms, and systemically overcome the systemic crisis.

I. One of our most eminent professors of Constitutional law, Gordana Siljanovska – Savkova, to the above mentioned questions in the TV programme 24 Analysis on the channel 24 Vesti on 24th October 2014[1], answered that the key problem for solutions by constitutional changes should be the guideline of power division, because the Parliament would vote for distrust in the Government, by the fall of the Government, also the Parliamentary structure should fall. This is not disputable at all. It is so in the comparative law of the developed and traditional democracies, it should be so also in our country. But, is this the key dimension of the problem with the power division in Macedonia? In my opinion this is very important, but not the most important for Macedonia in the concrete phase of its development,

[1] http://24vesti.com.mk/24-analiza-24-10-2014
Compare to: Svetomir Shkaric and Gordana Siljanovska – Davskova, Constitutional Law, Second, edited publication, Kultura, Skopje, 2009

because we have had one difficult problem with the domination of the Government over the Parliament and not vice versa for all these 24 years. Further, it is also emphasised that in Article 9 of the Constitution, apart from the numerated bases for indiscrimination there should have been added also "other", which will cover all the other unmentioned bases such as the sexual orientation. And this is all right, it is important. But, is it the most important? Furthermore, the bill amendment for the State Law Regulations by which its independence was drawn, should have been moved from section II point 4 to section III – Organisation of the State power. This note is also all right, and it is important, but is it the most important?

II. In the upper stated sense, by valid contra arguments I will try to dispute and lawfully disprove the thesis of Professor Svetomir Shkaric for the so-called "liberating" democracy, which he elaborated in the TV programme 24 Analysis on TV Vesti on 24th December 2014.[1] According to professor Shkaric, his thesis was the solution to all our problems. Namely, if our political elites made the efforts to accept and apply this thesis, Macedonia would finally come on the right way. And, what is actually the essence of this thesis? Its essence is that the Government voluntarily should understand and accept the need not to put commercials on any future, even on regular elections, because by its work it had showed sufficiently during its mandate, so there was not a need for a commercial. On the contrary, its abstinence from active commercials would pave the way for the opposition to come to power more easily, of course, even if in such conditions it would be elected by the citizens. This "liberating" democracy was intended in Germany. But, as we all know, according to the easily approachable information nowadays, the ruling party of the Democratic Union of the current Prime Minister Angela Merkel, not only that she has no intention not to put commercials at the elections, but with all possible means she persists for several electoral cycles in a row to maintain the power in Germany. If for Germany this thesis is only abstract, not to say nebulosus, because it is contradictory with the essence of the plural political system and the political struggle of the parties for power, what can we say then for the totally unreal observation of the states in the Republic of Macedonia and even the more unreal expectations, our political elites to give up the most immanent characteristic of every political party – the struggle for power.

III. One of the theses that circulates in public and in their own way assisted by some journalists is put on as a determination in the public discourse in relation to the questions for strategic approaches (directions) in

[1] http://24vesti.com.mk/24-analiza-24-12-2014
Compare to: Svetomir Shkaric and Gordana Siljanovska – Davskova, Constitutional Law, Second, edited publication, Kultura, Skopje, 2009

which framework should be solved the most fervent questions in the political and the legal system of the Republic of Macedonia, is the thesis of professor Ljubomir Frchkovski for establishment of a broad governmental coalition. This thesis, in the media named as "an appeal for 4th Republic" he elaborated in the TV programme 24 Analysis on TV Vesti, on 04th March 2015 and again on 20th April 2015 on the same TV in the debating programme "Otvoreno".[1] According to his researches which I will try to present maximally correctly, what is necessary in the new constellation of political forces and relations, is that during the mandate of the transitional expert Government to create conditions for forming of a broad government coalition which should in long terms stabilize the things and bring to a minimum social tolerant level the problems which are now existent in the Republic of Macedonia and present a brake for its overall social development. In this sense, professor Frchkovski states the following postulates on which the broad coalition should be based as well as the arguments for optimality of its needs: 1) In the broad coalition come all political parties which had gained in the elections 3% or 5% from the votes of the electoral body. 2) By this it is stated that it will come to the end of the "sultan" parties. 3) In this way the concentration of power that now belongs to the political parties will be reduced, because when four or five parties will split the responsibilities, the possibilities for abuse of the power are much less than when the power is divided to one or two parties.

Objectively, logically observed this solution is much better than the present situation, of course if the key political parties would achieve an agreement for this. But, in the context of objective informing of the public and creating a possibility for observing the various valid conceptions for strategic directions towards which Macedonia should decide for solving of the corresponding problems, it is also necessary that we see the weaknesses of this approach and compare them with the other conceptions for systemic and strategical approach towards solving of the problems. According to this, 1) in this manner it is very probably that one of the advantages of the plural political system will be relativized and this is the overtaking of the political responsibility from the dominant ruling party. The political responsibility will be objectively reduced because, the winning party regardless of the number of delegate seats won in the composition of the Parliament, yet it will have to divide the power not with one (as the so-far practice) but with three or four more coalitional partners, at least. 2) By the ruling of a broad governmental coalition will be lost, or more precisely, faded the sharpness of the opposition as a main corrective and controller of the power in the

[1]http://24vesti.com.mk/24-analiza-04-03-2015
http://daily.mk/makedonija/frchkoski-osmani-nikovski-stojkovski-otvoreno-24-vesti

democratic plural political systems. 3) This is very probable to come to expression in societies such as ours, with specific determining factors, in contrast to the Switzerland convent system for example, where this kind of a model of functioning of the power gives excellent results. Among the other reasons for the possibility of non-optimal functioning of this model in our country is the very big probability of transposition of the tendency of power from monopolistic, i.e. bi-polistic to oligopolistic position of most of the coalitional partners in the Government. In such circumstances, it is real to expect that when the coalitional partners will get used to the comfortable armchairs of privileges that belong only to the power, they will very soon after forget on the promises towards the voters. 4) A contra argument of such a claim can be the real need of every political party on the following elections to gain votes as much as possible and thus ensure a better position in the division of the "prey". According to this, we can consider that the space for political competition has not been lost yet, and with it also the possibility for political responsibility. 5) Yet, again here is posed the question of whether it is sufficient only in times of elections to awaken the democratic and ethical awareness of the parties with a non-democratic tradition (which, we must not forge, is acquired very difficultly and slowly). This abruptly awaken awareness will drop even more abruptly when after the electoral results each of the relevant political parties, as governmental coalitional partners will be more interested in achievement of personal political if not of purely personal interests of the elites of the political parties than of the pre-electoral promises and the carrying out of the declared party programmes. This can be even more expected, taking into consideration the possibility in the framework of the broad coalition, if it comes to more serious waves and disturbance of the relations among the coalitional partners, that it can also come to provoking of irregular, premature elections, with the threat that some of the coalitional partners will lose the assure part of the "prey" of the most narcotic drug – the power.

IV. Opposite of these theses is the thesis for systemic strategical approach for establishment of a systemic crisscrossed series of optimally independent institutions from the executive power. This thesis should be compared in the framework of the rationalistic epistemology with the other stated theses. Sublimed, this thesis starts from several premises for defining of its need: 1) the main problem in Macedonia is actually how to reduce the enormous power of by no means controlled power of all Governments of our Republic since the independence to the present moment. In fact, according to the valid constitutional and legal system, it does not exist even one key state institution which can de facto point out to the violation of the constitutionality and the legality of the Governmental party elites so far. 2) Hence, the Republic of Macedonia need establishment of a qualitatively new

coherent and complementary normative – institutional structure, or in other words, a systemic crisscrossed series of optimally independent institutions of the Government, but not absolutely independent from a wider set of controlled institutional mechanisms constituted in a completely new, quality manner, by representatives of the key social segments. 3) This actually means a qualitatively new developed system of power division, in which most consequently will be developed its two most immanent characteristics: the mutual control of among the institutions at the highest state level and balance of the power among them. In such normative – institutional structure, by force of the very system the law will be implemented in a much higher degree than before and this will pave the way for solving of our main problems.

1) The solutions of this conception are realistically applicable and practically sustainable, because in near future through constitutional changes will be paved the way for further legal operating of the stated conception. In this way, in near future, the law, even of not ideally but in a bigger extent than before will be applied by the force of the system itself, even in the so-far untouchable zones of the highest positions of the institutional hierarchy of the system. This will gradually but surely take place when there will not be only partial, isolated segments in the society, as it is now the jurisdiction and maybe the universities, which are formally legally emancipated by the Government but de facto still dependent on the Government. This is so because all other segments are still under the Government, and the Government is the biggest investor (the survival of the bigger economic subjects literally depends on the gaining of a public tender, precisely from the Government), the Government is the biggest employer and the biggest recruiter of staff. In its broad powers is also the discretion for political nomination of numerous functionaries (the State Commission for Combat of Corruption, the various regulatory bodies and seemingly independent agencies, funds, and of course the prestigious diplomatic and consular representatives for whom the Government party elite decides more independently than together with the President of the Republic).

2) When the enormous concentration of uncontrolled power of the Government will disappear, gradually and inevitably will be created an atmosphere in which the representatives of all key segments in the society will understand that there is no reason for their fear from the Government and fall under its influence and pressures. Realistically, they will not be in any manner dependent on the Government. Their financing will be regulated analogously to the independent judicial budget or the financing on the part of the President of the Republic, which has to function continuously by force of the system as it had functioned also in conditions of cohabitation, when the President of the Republic was not from the same political party provenience

as the Government. Then, the long expected atmosphere that the Government is not almighty will be gradually created, and that the levers of control over the key social segments are not in the hands of the Government anymore.

3) The high degree of probability for taking place of the processes in a positive line is based on an argued premise according to which the Government functions will not be devaluated anymore, but they will be deduced to its originary authorities for leading of the current economic, social, ecologic, defending, agrarian, culture, educational and other type of policy, and not as the so-far too broad and uncontrolled powers de jure and de facto in all autonomic segments of society, such as prosecution, the constitutional court, the universities, the lack of transparency and the lack of independent bodies in the decisions of public procurement, open possibilities for interference in the most significant cadre decisions in diplomacy, the public and the state administration.

4) Benefits from these long term and qualitative constitutional changes which will pave the way to deeper structural reforms, apart from the citizens, also will have that Government which will have intellectual, moral and spiritual merit to recognize, adopt, and then implement these reforms. a) by this, that Government will enter the annals of the history because it will create a system which will function on a long term and stable basis, regardless of who possesses the power at that moment, and regardless of the existence, the absence, or the extent of existence of political will, moral integrity and credibility. b) By creating of such system, the Government which will have the merit to carry out this concept in practice will be insured by political revanchism and ungrounded criminal prosecution after its leaving, taking into consideration the fact that all the so far Governments of the Republic of Macedonia have spent the greatest part of their time exactly on this.

5) In contrast to the thesis for broader Governmental coalition, we have to say that this is less really expected option. This is so because it is more probably that they agree to a broader coalition than to the conception in which the chances for violation of the constitution and the laws will be minimal and the risk for criminal legal sanctioning will be big, if the key political actors have to agree to share the power with three or four more coalitional partners, by which of course the profit of their political prey will be reduced, but yet they will be left with something at the end. Nevertheless, even it is realistic, the stated option is less probable to be accepted, it is really more sustainable and it is based on practically feasible solutions. This is so because this conception can in a much healthier, realistic way reduce the enormous concentration of uncontrolled power of the Government than the thesis for a broader coalition. Another reason for this is that in the framework of this conception it is left a maximally opened space for political

competition and political responsibility, in the same time establishing a system in which no one will be anymore "untouchable" for the law. Thus, according to all objective parameters and valid arguments, this conception is actually the appeal for a real "IV Republic".

Which are the weaknesses of this conception? The need of fair, initiating political will of the political subject for recognizing, adopting, and carrying out of this conception is one of its main weaknesses. But, in the same time, this is its advantage. Why? Because, this is utopia. Yes, utopia! But, utopia in essence has a normative – projective and visionary dimension. Utopia has always been and it is going to remain (which is known in the relevant world literature) a herald of the avant-gardist and revolutionary ideas which move the limits of what is possible but yet, realistically feasible. Utopia in the expert literature is also found with a negative connotation, when it refers to some fiction which does not have any real basis for practical sustainability of the provided solutions. The systemic and strategical approach for systemic crisscrossed series of optimally independent institutions of the Government is utopia in its positive, real sense, which reflects the essence of the parole of the student protests from 1968 – be real but ask for the unreal. This parole expresses the essence of the real Utopia as a guiding idea of the overall advancement of the society. Without utopia, i.e. changing only of the possible, the world not only would have stayed in the margins of the mediocracy, but also the civilization progress would not have moved further from the level of the cave life.

METHODS

The methods which were used in the researches of this paper are the following: deductive method; inductive method; comparative method; the analysis of the content of various scientific theories, studies, legal acts, documents, journalistic articles and various reports; the empirical method of primary and direct observing of the author not as an instant cabinet theoretician, but as a direct participant in the practical combat against organised crime and corruption at all levels in the institutional hierarchy of the system of the Republic of Macedonia for almost 23 years, of which the last 16 years also as a scientific researcher; the logical speculative method in the context of rationalistic epistemology. In this context, I consider that it is necessary to emphasise that the original scientific research does not always imply also a survey of the public opinion of the citizens. Even more, such a survey in dependence of the complexity of the subject research sometimes does not have a purpose or grounds, because the citizens cannot be expected to answer questions which reach into the most complex deterministic circumstances of the eternal chain of reasons and consequences from which

derive the external manifestation forms of the multidimensional phenomena, processes, and relations in certain areas. Even the external manifestation forms are sometimes hidden in their most subtle and most sophisticated form - which is not reasonable not even for the scientific, even less for the expert and we should not even talk about the general public.

As to the comparative method, I consider that it is a respectable method, especially because the positive experiences from abroad should be taken into consideration. Yet, for the developed countries with long democratic tradition, another type of political culture and mentality, maybe such deep structural reform measures at least for now are not needed. They function well even with the already known normative – institutional structures. This is why a real scientific qualitative analysis of the factors is necessary. We must not make mechanical copying or, in the best case electoral synthesis of the legal solutions from more countries – landmarks (as it has already been done in the practice of providing of the Macedonian legislative), even though these solutions in the domicile countries give excellent results. This is so because every country has its own specific determining factors such as the democratic tradition, a special type and level of political culture, a different degree of legal awareness, too different mentality and traditions. These factors are the objective limits on which the fulfilling or failing of each and every social idea or a project which has the tendency to be realised in the society depends. The Constitution, as the highest legal and political act does not only possess a declarative – regulative dimension, but also a developmental – perspective dimension. This means that the Constitution should not set the norms only for the existing social relations and processes but also it should anticipate the visionary developmental relations and processes in every concrete society for at least 15 to 20 years ahead.

RESULTS: ALTERNATIVE PROPOSAL SOLUTIONS FOR CONSTITUTIONAL CHANGES AS A PRECONDITION FOR DEEPER STRUCTURAL REFORMS

On the bases of indisputable facts of the empirical reality in the Republic of Macedonia and the long term primary researches of the author for specific determining factors which lead to the states of systemic corruption and institutional organised crime in the framework of the systemic theory and the theory of power division, and also following the theoretical continuum of anthropologic pessimism consisted in the postulates of political theories and philosophic conceptions of the biggest minds in the history of political, legal, and philosophic thought, starting from Plato, Aristotle, through Machiavelli, Hops, Log, Montesquieu, Hegel, Madison, Weber,

Schumpeter, and all to Fredrick Hayek, it was built and developed the conception for a systemic strategic approach for establishing of systemic crisscrossed series of optimally independent institutions of the executive power, but not absolutely independent from a wider set of controlling institutional mechanisms which should be constituted in a qualitatively new manner. In the context of the normative prescriptive and practical applicative function and purpose of the science in the framework of the given conception further in the text, only some of the possible concrete alternative solutions for some of the key state institutions were given. Of course that out of spatial reasons, in this paper such suggested solutions are not given for all subsystems in the framework of the legal and political system as two most important subsystems among the other subsystems in the framework of the overall social system.

Draft Amendment for the Constitutional Court

In this sense, for example, how do we consider that the Constitutional Court can function most optimally with all proposed, broadened authorities (see the draft amendment XXXIX which was proposed by the Government, but it was not adopted,[1] if we do not before change the way of constituting, in the sense of who proposes, elects, and dismisses the judges of the Constitutional Court? Of course that the questions which were imposed as most frequently mentioned for this concrete amendment during the public discussion on the constitutional changes, such as: the preciseness and clearness of the competences, the all-embracing circuit of the rights, the question on the optimal number of judges of the Constitutional Court, as well as the competences and the rights which will be protected in front of the Constitutional court must not be in collision with the international conventions, are all very important questions. But, these are anyway second-degree and third-degree questions in relation to the most important question on the way of constituting of the Constitutional Court. Namely, can a Constitutional court which is constituted in the present manner and even with the present powers be emancipated from the role of the Governmental party instrument, taking into consideration that the biggest part of the propositions for judges of the Constitutional Court come from the Parliament of the Republic of Macedonia and the election is done by the Parliament which whether we like to admit it or not, is only a "voting machine" in the hands of the Government. Indisputable empirical fact is that in the 24 years of independence of the Republic of Macedonia, our Parliament did not vote even once against some proposition of the Government. For the sake of the

[1] Draft amendment XXXIX, No. 42 - 6292/1, Submitted by the Government of the Republic of Macedonia on 25.07.2014

truth, this rarely takes place even in the parliamentary democracies with a long democratic tradition, but yet, it takes place. Hence, it is maybe better that the Constitutional Court is constituted in the context of a qualitative progressive combination of the forms of liberal – representative, participative and directly deliberative democracy.

In the context of the above elaborated reasons, one of the possible alternative solutions, for example for constituting of the Constitutional court, can be:

The judges of the Constitutional Court should be nominated by the President of the Republic on the proposition of the expert body (Electoral Commission, or it is not important how this body will be called in the future, which can elect the judges directly), composed of one representative of: the Government, the opposition, the reformed Judicial Court (see below), the reformed Council of Public Prosecutors (see below), the university union, etc. As an additional alternative solution which does not eventually have to be accepted in the present concrete historical social moment, can also be the following addition: two representatives of the most representative professional associations of journalists, two representatives from the nongovernmental sector, etc.

The expert body (the Electoral Commission) decides with the majority of votes from the overall number of members. As proposed (elected) candidates are considered those who gained the biggest number of votes from the overall number of the members of the Commission among the applicant candidates for judges of the Constitutional Court in a public competition (which will be lawfully arranged in a manner that will make it impossible to be just a farce as all the so-far public competitions, even before they are announced, it is already known who has been elected.

The conditions and the procedure for election, as well as the bases and the procedure for ceasing of the function and the dismissal of the judges of the Constitutional Court are arranged by the Law on Constitutional Court which is legislated by a two-thirds majority.

Another alternative solution can also be one general formulation which will provide the basic idea for optimal independence, and which can be then by law regulated according to the most optimal modifications of the various solutions. Thus, for example, this general formulation can state: “the judges of the Constitutional Court are elected in a public competition. The decision for election of judges of the Constitutional Court from the applicant candidates is made by an expert body (Electoral Commission) composed of representatives of the state and key segments from the civil society, where the representatives of the state cannot be in majority”. The expert body (the Electoral Commission) decides by the majority of votes from the overall number of members. As selected candidates are considered those who gained

the biggest number of votes from the overall number of members of the Commission among the applicant candidates for judges of the Constitutional Court in a public competition. The structure and the number of the members of the expert body (the Electoral Commission), the conditions and the procedure for election, as well as the basis and the procedure for ceasing of the function and the dismissal of the judges of the Constitutional Court are arranged by the law on Constitutional Court which is legislated by a two-thirds majority.

In the framework of the future constitutional changes the provisions for broadening of the competences of the Constitutional Court should be included in the sense of the proposed draft amendment XXXIX, and here it is provided the possibility that the Constitutional Court brings decisions about a constitutional appeal (or a plea, there were disagreements around the adequacy of these terms), not only for the taxonomically numerated freedoms and rights, but also for freedoms and rights by the European convention for human rights. This attitude prevails within most of the participants in the public discussion on constitutional changes in 2014. Furthermore, in the future constitutional changes, I consider that the proposed provisions of the same draft amendment XXXIX on the possibility that the Constitutional Court brings decisions in an appealing procedure for the decisions of the Constitutional Council in relation to the election, dismissal and other disciplinal sanctions over the judge or the president of the Court of the regular legal apparatus should be supported. According to the positive legal provisions against the decision of the judicial council, the judge has the right to appeal to the council formed in the framework of the Supreme Court of the Republic of Macedonia for bringing decisions related to appeals against the decisions for dismissal or a sentenced disciplinal measure on the part of the Council. In my opinion, the better solution is that the judges lead the appeal procedure in front of the Constitutional Court. These strivings are based on the acquisition that up to now, the decisions of the council, even though they could have been appealed, yet they were appealed to the Council formed in the framework of the Supreme Court which is an organ in the framework of the legal apparatus, where also the judicial council belongs, which is the council whose decisions are appealed. The possibility for their appeal in front of the Constitutional Court directly contributes to consistent and consequent development of the immanent characteristics of the guideline for power division – the mutual control over the institutions.

In the same draft amendment XXXIX it is provisioned that the Constitutional Court brings decisions on appeals submitted against decisions of the Council of public prosecutors for election, dismissal, or other pronounced disciplinal sanction of the public prosecutor. According to the

valid provisions from Article 51, paragraph 2 of the Law on public prosecutors, against the decisions of the council the public prosecutor has the right to overtake an administrative dispute in front of the competent court.

With regards of the broadened competences and the new way of constituting of the Constitutional Court, I consider that this state institution should bear the name: CONSTITUTIONAL COURT OF JUSTICE.

Draft Amendment for the State Audit Office and other organs

By adequate analogy, similar to the above mentioned proposal solutions the constitutional provision of the State Audit Office should also be arranged, because optimal independence is not achieved by the fact that some of the institutions will be raised only to the rank of constitutional category or their mandate will be bigger than the mandate of the Parliament which elects them (see the Draft amendment XXXIX which was proposed by the government, but it was not adopted[1]. In a similar manner we should think about other significant state organs such as the State Commission for Preventing Corruption, the National Bank of the Republic of Macedonia, the Council for Public Procurement, the Bureau for Public Procurement, various commissions which decide in a secondary degree, the "independent" regulatory bodies (agencies, commissions, etc.). Here we should mention that the State Commission for Preventing Corruption or the other bodies do not have to be a constitutional category. It is sufficient that the new way of their constituting provides the maximum possible emancipation from the executive power. This can be arranged by a law which is legislated by a qualified majority. For that purpose, here we can state one of the possible alternative solutions for election and dismissal of the Head State Auditor and his or her deputy. According to the positive legal regulations, the Head State Auditor and his or her deputy are elected and dismissed by the Parliament of the Republic of Macedonia for a period of 9 year, without the right to re-election.

I am convinced that a more optimal solution is when the Head State Auditor and his or her deputy are elected in a public competition. The body which will bring decisions about the election of the candidates in the public competition and dismiss them should be emancipated from the Government to the maximum possible instance. In this direction, as a possible alternative solution for this body could be: that this body would be constituted by one representative of the Government, the opposition, the professional association of auditors, accountants and actuaries, the reformed judicial council (see below), or the professional association of judges, the reformed

[1] Draft amendment XXXVI, No. 42 - 6292/1, Submitted by the Government of the Republic of Macedonia on 25.07.2014

Council of public prosecutors (see below) and the professional association of public prosecutors.

Draft Amendment for the Judicial Council

The draft amendment XXXVIII on the judicial council which was proposed by the Government but was not adopted[1] formally legally strengthens its independent position by the fact that the members of the council are not anymore the functionaries such as the Minister of Justice or the President of the Supreme Judge. Another question, observed through the prism of the systemic strategic approach for leading of the overall reform process, is that another less known cognizance is revealed – that any partial solution, no matter how sustained it is, cannot give effects if it is not systemically treated, i.e. if the reforms partially embrace only one segment. Thus for example, our legal apparatus, observed comparatively, from a formal legal aspect even up to now was one of the most emancipated legal apparatuses in relation to the executive power, even among the countries members of the European Union, if not even wider. But, de facto the real empiric state in the Macedonian legal apparatus is a subject of a permanent and deliberate sharp criticism not only by the domestic political opposition, but also by the relevant international organisations. In order to prevent from this state, all-embracing and simultaneous deep reforms are needed in all key social spheres, to reduce the enormous concentration of the uncontrolled power in the hands of the Government.

Before we approach the constructing of the newly proposed reformed Judicial Council (see below), it is necessary to conduct a general re-election or a general audit of the professional files of the judges (which one of these two alternatives will be selected, is a matter of agreement among the political parties). For these reasons we should consider whether it is better to apply a general re-election (which is a more radical option, where judges will be re-elected, or the other alternative, which is a general audit where the professional files of all judges will be observed and they will not undergo a re-election. This ad hoc solution is extorted because of the acuteness of the situation, with the aim to re-establish the trust in the legal apparatus as one of the key pillars of the legal state. This does not mean that the ones who answered the criteria in their election and promotion and performed their duties correctly will not be re-elected, i.e. their position in the audit will not be confirmed. But, it will be inevitable that the judges who were elected or moved upward in their career in an illegal way will not have the opportunity for re-election, as well as those who flagrantly violated the law during the

[1] Draft amendment XXXVIII, No. 42 - 6292/1, Submitted by the Government of the Republic of Macedonia on 25.07.2014

performance of their duties. This seems necessary, with regards to the indicating facts which are still to be confirmed or certain judges were elected or moved upward in their career in an illegal way, and some had even mistaken in the law during the performance of their duties. In my opinion, the general re-election or the general audit should be conducted by an expert team composed of renowned experts, equally proposed on the part of the Government and on the part of the opposition, plus renowned international experts in law who should be the key in the deciding on the disputable questions, in order to escape the logjam.

I emphasised that the proposed draft amendment XXXVIII is a better solution than the so-far, which had also provided formally legal independence from the legal apparatus from the executive power, but yet it is weaker from the proposed draft amendment. I consider that the following proposal – alternative solution is even better than the both previously mentioned. Namely, ten members of the Judicial Council are elected by the judges from their ranks; five members are elected by the Parliament of the Republic of Macedonia, of which three are suggested by the opposition from the rank of university professors of Law, lawyers, notaries, and executors. Here of course is applied the regulation that there has to be a majority of the overall number of votes from the total number of Members of Parliament who belong to the communities which are not in majority in the Republic of Macedonia.

Draft Amendment for the Public Prosecution

This is a too essential question, inextricably related to the previous draft amendment; even though this question was not part of the proposed draft amendments on the part of the Government in 2014, it refers to another state institution par excellance, mature for changes through the Constitution, which is the Public Prosecution. It is a fact that in most countries, the Public Prosecution is part of the executive power. In our conditions, because of the specific determining factors, the Public Prosecution has to be optimally independent institution from the Government. This is not so now, because on the suggestion of the Government, on a previously obtained opinion from the Council of Public Prosecutors, the Public Prosecution of the Republic of Macedonia is elected by the Parliament. Taking into consideration that the Public Prosecution functions on the principle of hierarchy and subordination, and that the Public Prosecution of the Republic of Macedonia has very big competences in relation to the other Public Prosecutions, than it is realistic to pose the question: can in this way constituted Public Prosecution answer to all challenges even when it comes to cases in which the functionaries from the highest levels of the power in the Republic of Macedonia are involved. This question is sharpened even more, regardless of which is the

personification of the function of the Public Prosecution of the Republic of Macedonia, especially when according to the new Criminal Procedural Code, the Public Prosecution is the main coordinator of the overall previous procedure (pre-investigative and investigative procedure). This is why I consider that the omission from 2005 must not be repeated once again.

Before we approach constituting of the newly proposed, reformed Council of Public Prosecutors, it is necessary to conduct a general re-election or a general audit of the professional files of the public prosecutors (which one of these two alternatives will be selected, is a matter of agreement among the political parties, as well as for the judges). In my opinion, the general re-election or the general audit should be conducted by an expert team composed of renowned experts, equally proposed on the part of the Government and on the part of the opposition, plus renowned international experts in law who should be the key in the deciding on the disputable questions, in order to escape the logjam. This ad hoc solution is extorted because of the acuteness of the situation, with the aim to re-establish the trust in the legal apparatus as one of the key pillars of the legal state. This does not mean that the ones who answered the criteria in their election and promotion and performed their duties correctly will not be re-elected, i.e. their position in the audit will not be confirmed. But, it will be inevitable that the judges who were elected or moved upward in their career in an illegal way will not have the opportunity for re-election, as well as those who flagrantly violated the law during the performance of their duties. In this direction, one of the possible alternative proposed solutions could be: the Public Prosecution of the Republic of Macedonia is elected by the Council of Public Prosecutors (reformed), in a public competition, in a procedure as well as for all the other Public Prosecutions, and the conditions and the criteria for election of Public Prosecutors of the Republic of Macedonia should be according to strengthened and objectivised criteria for higher professional standards than for the other Public Prosecutions.

As I have already emphasised, the Council of Public Prosecutors should also be reformed. Even though, according to the amendment XXX of the Constitution of the Republic of Macedonia, the competences, the composition and the structure of the Council, the mandate of its members, as well as the bases and the procedure for dismissal of a member of the Council are arranged by law, yet, I consider that with regards to the meaning and the role, we have to give attention to this body in this paper. According to this, as one of the possible proposed alternative solutions, the following could be taken into consideration: the number of members of the Council of Public Prosecutors to stay the same as in the positive legal solution, but to change the structure of this body. Namely, from a total number of eleven members, six members who are elected by the public prosecutors from their ranks in a

way provided in the Law on the Council of Public Prosecutors in Article 6, to stay unchanged. But, the changes and amendments of Article 6 from the law refer to the fact that the Minister of Justice and the Public Prosecutor of the Republic of Macedonia should not be members in function in the Council anymore. In their place, together with the three members who are now elected by the Parliament of the Republic of Macedonia, I suggest that the Parliament should elect the rest five members, but in a completely new way, of whom: three should be in suggestion of the opposition from the rank of university professors of Law and lawyers. Of course, here stays the regulation for proportional representation of members of the communities which are not in majority in the Republic of Macedonia. The third alternative solution is: the Public Prosecutor of the Republic of Macedonia should be elected and dismissed a special expert body composed of one representative of the Government, one representative of the opposition, one representative of the Council of Public Prosecutors (the above suggested newly structured Council), one representative of the Judicial Council (the above suggested newly structured Council), and one representative from the ranks of the university community. The expert body brings decisions by the majority of votes from the total number of members in the election of the Public Prosecutor of the Republic of Macedonia from the applicant candidates in a public competition. The conditions and the procedure for election and dismissal, as well as the ceasing of the mandate of the Public Prosecutor of the Republic of Macedonia are arranged by the law.

DISCUSSION: CONCLUSIONS

Very often in the framework of the discussions, the question which was posed was: Which is the real political force which will benefit from the conduction of such deep structural reforms? The answer is: benefits from such long term and qualitative constitutional changes which will pave the way to deeper structural reforms, apart from the citizens will also have that Government which will have intellectual, moral, and spiritual merit to recognize, adopt, and then implement these reforms. a) by this, that Government will enter the annals of the history because it will create a system which will function on a long term and stable basis, regardless of who possesses the power at that moment, and regardless of the existence, the absence, or the extent of existence of political will, moral integrity and credibility. Consequently to this, the main benefit from such reforms is that the law will be implemented in a much higher level than ever before, by the force of the very system, regardless of who will be in power. b) By creating of such system, the Government will be insured by political revanchism and ungrounded criminal prosecution after its leaving, taking into consideration

the fact that all the so far Governments of the Republic of Macedonia have spent the greatest part of their time exactly on this. Benefits from the constitutional changes can also be drawn by the opposition, because the imposed question here is: whether the condition for transitional expert Government as a key condition for returning to the Parliament, then, victory on the future parliamentary elections and the possibility to enter history by a qualitative radical overturn of the so-far course of leading the policy in Macedonia, in order to achieve all this, the opposition maybe should not add to the primarily determined condition by accepting far more qualitative constitutional solutions i.e. a far more qualitative political offer, which will mean general restructuring or re-conception of the normative – institutional structure as an introduction in deep structural reforms for which to which the road can be paved precisely through changes in the Constitution. Certainly, such reforms will have to be done by some Government. Whether the current one, the next one, or any other following, one will be the one which will have the merit of a real avant-gardist and creative political force to be the bearer of the real qualitative changes in the society by which it will understand the need for such deep structural cuttings in the Republic of Macedonia. This will have to happen, not because the author thinks it will, but because it corresponds to the objective tendencies of regular development of the society. In fact, this is also the quickest way for making our country closer to the highly developed countries. There are also other roads, but they are evolutionary, long, and slow. They actually mean trotting behind the developed world towards which we are striving. This is a very slow approaching of our county towards the developed world and under the condition that we have an over average rate of economic growth and development, and the developed countries to stagnate.

The question of "who is going to keep us from the keepers" is an essential question of the conception of a systemic crisscrossed series of optimally independent institutions from the executive power. This conception is certainly not the ideal one, since the ideal one is not even existent, at least not for the possibilities of our limited human resources. Yet, t conception, observed through the prism of the logical principles of the rationalistic epistemology is far better than the present normative – institutional structure in Macedonia and by all the other conceptions which circulate in the public discourse for exit from the negative states. One of the contra theses to the thesis for establishing of a system according to the principle "who is going to keep us from the keepers" starts from the following contra arguments: 1) In this way we would go into immensity by mutual control. It would not be possible that everyone is controlled by everyone else. 2) The society needs a hierarchy. In relation to the first contra argument, I am giving the following answer: Yes, it is true that an all-

embracing, ideal mutual control is not possible. It would be the best solution if it was possible. But, the efforts to develop and achieve the highest possible degree of mutual control through institutions which would not be dependent and subordinate one to another, is the most optimal way of providing the maximum possible degree of the rule of law, especially in fragile societies such as ours. In relation to the second contra argument that the society needs hierarchy, my answer is the following: Yes, it is true that in the current development of the social awareness, it is not possible that the organisation of the society functions only on a horizontal basis. Yet, we should bear in mind that the balance of the power among the institutions (the aim is that there would not be dependent and subordinate institutions) refers only to the highest state level about the key state institutions from the various branches of the power, with the aim of most optimal achievement in practice of the mutual control, and with it to increase the degree of ruling of the law as a fundamental principle and basic precondition for development of all public spheres of society. Of course that this does not imply such balance i.e. horizontal organisational structure inside the separate social segments such as: the Government, the jurisdiction, the public prosecution, etc. In the framework of these segments, even more strengthened should function the principle of hierarchy and subordination, which means that these principles are not brought into question in the whole outspread and complex vertical organisational structure of the complex organisational systems in which a big number of subsystems exist and function.

With regard to all what was already said, we should not have illusions that such solutions will bring to magical results in only a fortnight. But I am deeply persuaded that they are much better than the current solutions and the proposed draft amendments of the Government as well as by the theses of strategic approaches for solving of the main problems in the Republic of Macedonia which dominantly circulated in public. This attitude I base on the following well-argued premises:

- In near future, through the constitutional changes will be opened a way for further legal operating of the coherent and complementary normative – institutional structure through a systemic crisscrossed series of optimally independent institutions of the executive power. In this way, it is inevitable that it will be created an atmosphere in which in the near future the law will be implemented to a much bigger extent than ever before by the force of the very system, even in the so-far untouchable zones of the highest positions of the institutional hierarchy of the system. On the other part, the awareness which is most difficultly and slowly changed, by establishing of such system will be much quickly provoked (not to say forced) to change. In this manner, in eo ipso and ipso facto will also start the democratic

processes in all segments of society, especially the so much needed democracy inside the political parties.

- This will gradually but certainly happen when there will not be only partial isolated segments in society as it is now the legal apparatus and maybe the universities, which are formally legally emancipated from the executive power. But, with regards to the fact that all other segments are still under the executive power, and the Government is the biggest investor (the survival of the other economic subjects literary depends on the obtaining of a public tender from the Government), the Government is the biggest employer and in its broad competences is also the discretional right for political nomination of numerous functionaries (the State Commission for Prevention of Corruption, various regulatory bodies and seemingly independent institutions, funds, and certainly the prestigious diplomatic - consular representatives for whom the Governmental political elite decides more independently than together with the President of the Republic. When the enormous concentration of uncontrolled power that is now possessed by the government will not be existent anymore, simply, the representatives of all key segments in society will understand that there is not a reason to feel fear from the Government, and neither directly nor indirectly they will be in almost no manner dependent from the Government. Their financing will be arranged analogously to the independent Judicial budget or the financing by the President of the Republic which will have to function continuously by the force of the system, as it functioned in circumstances of cohabitation, when the President of the Republic was not from the same political – party provenience as the Government.
- Hence, the main problem in Macedonia is actually how to reduce (to bring to the necessary minimum the enormous concentration of the uncontrolled by any means Government. By implementation of the above mentioned (or eventually even the more optimal) solutions, it will gradually come to the long expected atmosphere that the Government is not almighty, that the levers of control over the key social segments are not anymore in the hands of the Government, as it is the case now. The high degree of probability for development of the processes in a positive line are based on a well-argued premises because the Governmental functions will be brought to its originary competences for leading of a current economic, social, ecological, defence, agrarian, cultural, educational, and other type of policy, and not as the so far too broad and uncontrolled competences de jure and de facto in all autonomous segments of society, such as prosecution,

constitutional court, universities, the monopoly and the lack of transparency in the public procurement and an open way for interference in the most significant cadre decisions in diplomacy, the public and the state administration; through their cadres the Governmental political elites have an influence on the political character, partiality, and unprofessionalism in all key state segments. Here is the answer why the legal apparatus and the universities, although they have been even so-far formally-legally completely separated from the executive power in the Republic of Macedonia, yet, because of the dependence of all other key social segments from the executive power, these two segments are de facto under the control of the Government. By implementation of the stated solutions, in near future, when the circumstances would be changed people would also understand that the Government is not almighty anymore (as it is so-far), than our universities would be real universities not only by declared but also by real and free autonomy. As to the general assemblies of the professional associations and the other bodies of prosecutors, judges, university professors and the journalists, the economic, lawyers', notaries', executors', actuaries', and auditors' chambers, there would not be a real base on which they will be implemented by the Government, and there is not a reason why all these professions, in the election of representatives from their ranks, in fact, should be elected by the "will" of the Government as its "lengthened hands", Of course, even then it would not be ideal in any aspect; for example, maybe even then the best ones would not be elected, because of "X" more – layered reasons which cannot be easily overcome. But, one thing is certain: the elected representatives will be representatives of the professional rank, (the "guild"). They will be elected by short mandates as well as dismissed in the same manner as they were elected, by the association of the professional guild. They will represent the real voice and will be the real echo of the needs of the guild, which implies the respect of the application of laws and professional standards.

According to what we have already said, what is needed is the shadow of a new light in the context of the logical principles of the rational epistemology, for comparing, verifiability and the objectivity among the various concepts for strategic approach towards the solution of the biggest problems in the political and legal system of the Republic of Macedonia, towards the re-actualised question for the metaphorical "creation of the IV Republic" according to the re-vindication of Frchkovski whose "novelty" is the establishment of a broad Governmental coalition which is mechanically

and inadequately copied from the Switzerland's conventional system, and out of more reasons it is not immanent at all for the Macedonia plural political system. Especially, the fact that this solution in certain situations can to the final extent be only a temporary solution. But, in this manner the problems cannot be solved in long term, systemically and stably. What I wonder here is: is it maybe, now, the time that we started seeking for the IV Republic in the creation of a qualitative new, coherent and complementary normative – institutional structure, which through the systemically crisscrossed series of the optimally independent institutions from the executive power (but, not also from a wider set of institutional social control mechanisms), it should pave the way towards the solutions for our greatest weaknesses and problems and with it open a new page in the history of the Republic of Macedonia. Macedonia, not as an ideally imagined country in which problems will not exist anymore, but as a normal and functional state in which the application of law would be to a much greater extent than now, it would not be selective, there will not be untouchable zones for the rule of law even for the highest positions of the institutional hierarchy of the system; the competition (without which there cannot be quality, and without quality there cannot be development) from an abstract noun will start to become reality in all spheres of public life; the protection of human rights and freedoms will not be only in written form, but also a guaranteed, concrete protection; By this systemic possibilities, solutions of our biggest problems, such as unemployment, poverty, the low living standard, the more quality economic growth and development (in the place of the artificially fabricated) will be created, as well as an all-embracing development of the Republic of Macedonia in all spheres of the social living.

This conception is not only a list of aims. The aims are actually similar, if not the same, almost within all political parties. The aspect in which the parties should differ is the scientifically – conceptive approach for deciding how to achieve these aims.

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SOLVING THE MACEDONIAN NAME DISPUTE: HISTORICAL NARRATIVES AND POLITICAL AND LEGAL ASPECTS OF THE ISSUE

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INTRODUCTION

Encyclopedia Britannica notes that literally, "Europa" is thought to have meant "Mainland" as an appropriate designation of the broadening, extensive northerly lands that lay beyond, lands with characteristics but vaguely known, clearly different from those inherent in the concepts of Asia and Libya, both of which, relatively prosperous and civilized, were closely associated to the culture of the Greeks and their predecessors. Among the lands north of Greece today is also the Republic of Macedonia. Or is it? Since its independence in 1991 the country's name has been vigorously disputed by its southern neighbor. Beyond the questioning of the name of the country there are other elements of this question. In fact, the dispute has four dimensions: political, legal, cultural-historical and economic. The political aspect of the so-called "naming dispute" relates to the Greek blockade of the Euro-Atlantic integration aspirations of Macedonia. On the other hand, the legal feature of the conflict concerns first of all, the issue of the legality of Macedonia's admission to the UN, and secondly, whether the Greek policies towards the southernmost former Yugoslav republic at the 2008 Bucharest NATO summit were in accordance with the Interim Agreement signed between the two countries in 1995. The cultural-historical or identity aspects of the dispute relate to the right of self-identification of all the peoples in the regions of Macedonia, that is the right of the majority population of Macedonia to identify themselves as 'Macedonians' by ethno-national belonging, the right of the Greeks and Bulgarians in the Macedonian regions of these countries also to be identified as 'Macedonians.' This element of the dispute also relates to the right to label the Macedonian language as such. Moreover, it also pertains to the "right" to project the ancient Macedon

history as being an integral part of the ethno-genesis of the Greek and / or the Macedonian nation. This is a clash over historical narratives and the right to claim origins of the Macedonian ethnic group and nation today and in the ancient past. Finally, the 'naming dispute' touches upon the commercial rights to use the 'Macedonian' label in trade and commerce as in which country has the right to use the term selling products such as 'Macedonian' wine, cheese, etc.

This paper argues that there are political and legal solutions to the problem which will inevitably affect the other dimensions of the dispute. Thus a political solution accepted by both Skopje and Athens will inevitably be linked with legal clarification over the name 'Macedonia' and will also affect the issues concerning the culture, identity, and economy. A legal solution of the problem in the United Nations will allow the Republic of Macedonia to use this name within the UN but it might not help the country's accession to the EU and NATO, neither would solve the identity aspect of the dispute. Following a presentation of the history of the problem in all the dimensions the paper discusses the potential avenues for solution that have not been discussed, yet. I will argue that a full resolution of the problem is possible with a mutual acceptance of 'Republic of Makedonija' as an international name for the country. Alternatively, the Republic of Macedonia should aim for correcting the legal deficiencies of the admission to the UN under the provisional reference of the Former Yugoslav Republic of Macedonia. Once its preferred name in the UN is established, Macedonia could benefit from the international pressure on Athens to unblock the political segment of the dispute.

OVERVIEW OF THE ISSUE

On 17th November 1991 Macedonia declared its independence and asked for international recognition. On 4th December 1991 Greece declared that recognition of the new state depended on its constitutional guarantees against claims to Greek territory, cessation of hostile propaganda against Greece, and exclusion of the term "Macedonia" or its derivatives from the new state's name. To ameliorate the Greek concerns that the name of the country implies territorial claims against Greece, Macedonia adopted two amendments to its Constitution on January 6th, 1992. They assert that Macedonia "has no territorial claims against any neighboring states"; that its borders can be changed only in accordance with the Constitution and "generally accepted international norms"; and that, in exercising care for the status and rights of its citizens and minorities in neighboring countries, it "shall not interfere in the sovereign rights of other States and their internal affairs." The changes were not enough for Greece however, which continued

to insist that Macedonia relinquish the name 'Macedonia'. Using its political might Greece blocked the EU recognition of the Republic of Macedonia despite the fact that in January 1992, Macedonia met all the conditions for recognition imposed by the European Community.[1] Denied recognition by the EU, Macedonia turned to the United Nations filling an application for membership. Again Greece opposed this application. After prolonged process, the admission of Macedonia to the UN membership in April 1993 by the General Assembly Resolution 47/225 (1993), was associated with the provision that it be "provisionally referred to for all purposes within the United Nations as the Former Yugoslav Republic of Macedonia, pending settlement of the difference that has arisen over the name of the State." When the United States recognized Macedonia on 17th February 1994, Greece replied by severing diplomatic ties with Skopje, blocking the EU aid and imposing a blockade on Macedonian goods moving to and from the port of Thessaloniki with the exception of humanitarian aid on February 16th. Greece and Macedonia normalized their bilateral relations in an Interim Accord signed in New York on 13th September 1995. [2] Under the agreement, Athens had agreed to lift the one-sided blockade towards its northern neighbor while Macedonia in a bona fide concession renounced its 16-ray-shaped sun - the symbol of the first flag of independent Macedonia for which Greece claimed to possess historical copyright and amendment of Article 3 of the Constitution which envisages that it "has no territorial claims against any of the neighboring states." Both countries committed to continuing negotiations on the naming issue under UN auspices while Greece agreed not to obstruct the Republic's applications for membership in international bodies as long as it did so under its provisional UN appellation. This opened the door for the Republic to join a variety of international organizations and incentives, including the Council of Europe, OSCE and the Partnership for Peace. However, in 2008 Greece blocked Macedonia's integration to NATO and the dispute is still ongoing. In turn Macedonia took Greece to the International Court of Justice arguing that it had broken the Interim Agreement.

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[1] In its Report of 15th January 1992, the European Arbitrage Commission, headed by Robert Badenter presented the opinion that Macedonia and Slovenia completely fulfill the conditions for independence and international recognition, in pursuance with the criteria governing international recognition of states-successors to the SFRY contained in the European Community Declaration of 16th December 1991. Contrary to this recommendation, the recognition was delayed as a result of the opposition of Greece, presenting the explanation that the name Republic of Macedonia allegedly is a threat to its territorial integrity and an appropriation of the Hellenic cultural heritage.

[2] *Interim Accord* (with related letters and translations of the Interim Accord in the Languages of the Contracting Parties) signed in New York on 13th September 1995; entered into force on 13th October 1995, 1891 U.N.T.S. I-32193; 34 I.L.M. 1461

THE POSITIONS IN THE NAME DISPUTE

The Greek Position on the 'Naming Dispute'

The official Greek position regarding the name has not changed since the early 1990's.[1] Calling upon the exclusiveness of its own interpretation of history, the Greek government is trying to impose the view that the Republic of Macedonia does not have a historical right to use the names Macedonia and Macedonians and that it will have to add an adjective to these names in order to clearly differentiate and delimit itself geographically and historically from the Northern province in Greece. On the eve of the Bucharest NATO Summit the Greek Foreign Minister Dora Bakoyannis argued that the name "Republic of Macedonia" is linked to the deliberate plan to take over a part of the Greek territory that has had a Greek identity for more than three millennia and is associated with immense pain and suffering by the Greek people.[2] Today, the Greek Ministry of Foreign Affairs categorically claims that "historically, the Greek name Macedonia refers to the state and civilization of the ancient Macedonians which, beyond doubt is part of Greece's national and historical heritage."[3] For Greece: "there is no chance of FYROM acceding to the EU and NATO under the name of Republic of Macedonia" and that "FYROM Slavic Macedonians insistence in standing by their intransigent and negative stance towards efforts to resolve the issue."[4] Greece's key demands in the negotiations contained in the official document of the Greek Ministry of Foreign Affairs, are that the Republic of Macedonia accept: (i) "a definitive composite name with geographical qualification for all purposes (erga omnes)" and for all uses, while at the same time (ii) "genuinely renounce the usurpation of the historical and

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[1] For more details of the Greek position in the name dispute, see Demetrius Andreas Floudas, "A Name for a Conflict or a Conflict for a Name? An Analysis of Greece's Dispute with FYROM", *Journal of Political and Military Sociology* No. 24 (1996).; Nikolaos Zahariadis, "Greek Policy toward the Former Yugoslav Republic of Macedonia," *Journal of Modern Greek Studies*, No. 14/2 (1996), pp. 303 - 328; and Evangelos Kofos, «Greek Policy Considerations Over FYROM Independence and Recognition», in James Pettifer (ed.), *The New Macedonian Question*, Palgrave, 2001, pp. 226 - 263, and "The Current Macedonian Issue between Athens and Skopje: Is there an option for a breakthrough?," *ELIAMEP Thesis* No. 3 (2009).

[2] http://www.iht.com/articles/2008/03/31/opinion/edbakoy.php

[3] See "The FYROM name issue", Ministry of Foreign Affairs of Greece, available at: http://www.mfa.gr/www.mfa.gr/en-US/Policy/Geographic+Regions/)

[4] http://www2.mfa.gr/www.mfa.gr/en-US/Policy/Geographic+Regions/South-Eastern+Europe/Balkans/Bilateral+Relations/FYROM/FYROM+-+THE+NAME+ISSUE.htm

national heritage of the Greek people."[1] Athens insists that Skopje must use a compound name such as "New" or "Upper" Macedonia both internally and in bilateral and multilateral relations.

The Greek position is articulated in the writings of Evangelos Kofos, one of the most distinguished Greek authors on the 'Macedonian issue.' He claims that different historical, cultural, regional, ethnic and legal references are identified with one and the same name, Macedonia, and that whoever succeeds to impose on foreign languages its own version of 'Macedonian', acquires international monopoly for its use. Moreover, in an indirect way, it lays claim to anything identified as 'Macedonian', including different peoples or communities identified as 'Macedonian', diverse 'Macedonian' historical and cultural values, even commodities from different Macedonian regions or countries.[2] The current constitutional name, "Macedonia", is, however, identical with the name of the wider geographic region "Macedonia."[3] According to him, in the early 1990s the emergence of an internationally recognized Macedonian state stimulated and, to a certain degree, popularized the monopolization of the ethnic variant of the adjective 'Macedonian' at the expense of the regional or cultural one. Kofos explains that the Greek government, as well as all major parties - favour a compound geographical name for their neighbouring country, provided its state name clearly defines Macedonian regions within its own jurisdiction. Therefore, Kofos suggested a new constitutional name for the Republic of Macedonia, which will replace the current one as well as the temporary international appellation. This name will be a Macedonian name with a prefix which will describe or identify clearly the region over which this country exercises legal jurisdiction (North, Gorna, Vardarska).[4] Moreover, the new state name will apply to all uses (internal, bilateral, or international) while the citizenship will follow the state name. The name for the majority ethnic group in Macedonia internationally would be "makedonci" and the products of that country would also not be transliterated so the wine produced in present day in Kavadarci region of the Republic of Macedonia would be known as "makedonsko vino."

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[1] See "The FYROM name issue", Ministry of Foreign Affairs of Greece, available at: http://www.mfa.gr/www.mfa.gr/en-US/Policy/Geographic+Regions/)

[2] Evangelos Kofos, "The Controversy over the Terms 'Macedonians' and 'Macedonian': A Probable Exit Scenario" in *Southeast European and Black Sea Studies*, Vol. 5, No. 1, January 2005, p. 132

[3] E, Kofos, "The Current Macedonian Issue between Athens and Skopje: Is there an option for a breakthrough? ELIAMEP Thesis No. 3, April 2009, p. 2

[4] See Evangelos Kofos "Prospects for resolving the name issue", *NATO Parliamentary Assembly's Rose-Roth Seminar*; Skopje 20. 10. 2010, available at: http://www.macedonian-heritage.gr/Contributions/Prospects%20for%20resolving%20the%20name%20issue.pdf

The Macedonian Position on the 'Naming Dispute'

The demand on Macedonia to negate itself, in effect, is without precedent and any justifiable cause. Macedonia has a legitimate right to its name and identity. This right is based on various arguments, be that legal, moral, historical, or grounded on liberal- democratic ideas. The simplest Macedonian argument regarding the name dispute is that the case is unambiguous as there are no two states claiming the same nationality and the same name, a regional identity (in Greece) should not be mixed with the ethno-national identity in Macedonia. There cannot be confusion between a country and a region, the name "Macedonia" is used by Greece to designate one of its provinces which is not an international legal person. In that context there is a simple answer to the question 'who is / can be a Macedonian today?' If we speak about a person's (ethno) national belonging then a Macedonian is someone who lives in the Republic of Macedonia, or in Aegean or Pirin Macedonia, or elsewhere around the world for that matter, and chooses to belong to the Macedonian nation. Macedonians by citizenship on the other hand, are all those living in the Republic of Macedonia regardless of their choice of (ethno) national belongings. A Macedonian is also someone from any of the three regions of Macedonia who chooses to develop a regional Macedonian identity regardless of his or her own citizenship or ethno-national belonging.

The 'dispute' over the name is a euphemism to the Greek objections, in some cases direct and open and in others indirect and concealed, to the very existence of the Macedonian state and nation. The Greek uses of labels such as a formation (*morfoma*), little state (*kratidio*), hybrid (*ivridio*), "FYROM" or in the best case the "Republic of Skopje" for the country, and "Slavic Macedonians", "Skopje people"[1], and "Fyromians"[2] for the ethnic Macedonians, are ethnic slurs and mirror the blatant disrespect of Greece for the human rights and values. They are of equal footing to the label "Nigger" once used in offensively racial contexts against African-Americans. Sadly, in the case of Greece's foreign policy towards Macedonia and the Macedonians, we have even witnessed that not only the academic but also the international community of states has kept a blind eye to the racist bullying surrounding the acceptance of the Republic in the UN in the early 1990's and in NATO today.

Another argument in defense of the right of Macedonia to use its name is the right to self-determination. Self determination is a principle,

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[1]http://www.ana-mpa.gr/anaweb/user/showplain?maindoc=6284332&maindocimg=6267967&service=10

[2] http://www2.mfa.gr/www.mfa.gr/en-US/Policy/Geographic+Regions/South-Eastern+Europe/Balkans/Bilateral+Relations/FYROM/FYROM+-+THE+NAME+ISSUE.htm

often seen as a moral and legal right, that "all peoples have the right to freely determine their political status and freely pursue their economic, social and cultural development."[1] As Roemer writes "it seems that implicit at least within self-determination lies an acknowledgement that peoples, at the minimum, may freely pursue their own forms of culture and identity, it would follow that it is for these peoples to determine the content of their culture or identity, including their collective name."[2] Alternatively put, the right to ethnicity, nationality and to identity is a fundamental principle of the international law, a central tenet of the international order. A nation's existence is "a daily plebiscite, just as an individual's existence is a perpetual affirmation of life".[3] Macedonians have decided on their self-determination. In the fall of 1991, following a violent summer when fighting erupted first in Slovenia, and then throughout Croatia, Macedonia used its right to self-determination. On September 8th 1991, a referendum was held in which more than 95 % of those voting, voted for a sovereign and independent state. The referendum turnout was very high at 76%.[4] Despite all the Greek pressure, at the time of the Bucharest Summit and in all subsequent surveys Macedonian citizens by a large majority refused any changes to their identity and the name of the country even if NATO membership is at stake.[5] In 1991, in 2008, and in 2011 Macedonians have confirmed that the nation's existence as such cannot be questioned. In that regard, it is surely fundamental to the notion of sovereignty and self-determination that "a State should have the right to establish its own constitutional system in conformity with obligations imposed by the international law (for example, with respect to the human rights treaties), and to choose its own national symbols including both its name and its flag…the subject of the dispute between Greece and Macedonia clearly relates to an issue which, as a matter of sovereignty, should fall exclusively within the discretion of Macedonia itself.[6]

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[1] International Covenant on Civil and Political Rights, Article 1.

[2] Larry Reimer, "Macedonia: Cultural Right or Cultural Appropriation?" *University of Toronto Faculty of Law Review* No. 53 (1995). p. 359

[3] Ernest Renan, "What is a Nation? (Qu'est-ce qu'une nation?)," in Geoff Eley and Ronald Grigor Suny, (eds.). *Becoming National: A Reader*, New York and Oxford: Oxford University Press, 1996, p. 41

[4] See the referendum results in *Ustavno Pravo*, Union Trade: Skopje, 1994, p.359, pp. 376 - 380

[5] See survey results after the Bucharest Summit at: http://www.crpm.org.mk/Papers/Surveys/Changing%20the%20name%20or%20NATO%20membership.htm. Latest survey results are found in Sasho Klekovski, *Macedonia Name Dispute (Public Views in Macedonia),* MCIC and IDSCS: Skopje, 2011. This and more surveys on the topic are available at: www.mcms.org.mk.

[6] Matthew C. R. Craven, "What's in a Name? The Former Yugoslav Republic of Macedonia and Issues of Statehood," first published in 1995 in the *16th Australian Year Book of International Law* (199), republished in *International Law: Cases and Materials with*

The inherent right of a state to have a name can be derived from the necessity for a juridical personality to have a legal identity. In the absence of such an identity, the juridical person (such as a state) could, to a considerable degree (or even completely), lose its capacity to conclude agreements and independently enter into and conduct its relations with other juridical persons. The name of a state "appears to be an essential element of its juridical personality and its statehood, the principles of the sovereign equality of states and the inviolability of their juridical personality lead to the conclusion that the choice of a name is an inalienable right of the state".[1] Therefore, the inability to use the name of Macedonia is interference of the UN in matters of a state - such as the choice of its constitutional name - which are essentially within the domestic jurisdiction of that state, contrary to Article 2 (7) of the Charter. Macedonia is unequal with other UN member states due to the obligation to discuss its own name with Greece and has derogated juridical personality in the field of representation contrary to the principle of "sovereign equality of the Members", Article 2 (1) of the Charter. It is inconsistent with the principles of juridical equality of states[2] and non-discrimination in the representation and membership.[3] From the viewpoint of representation in international organizations, the condition imposed on Macedonia – "to be provisionally referred as the Former Yugoslav Republic of Macedonia", instead its constitutional name – Republic of Macedonia, is contrary to Article 83 of the Vienna Convention on representation of states, which provides that "in the application of the present Convention, no discrimination shall be made as between states."[4] Macedonia's consent to SC Resolution 817 and GA Resolution 47/225 to be referred with the provisional name does not affect its unlawfulness, because states cannot consent not to implement or not to be bind by the norms of *jus cogens*.

Traditionally, states have benefitted from what seems to be a generally understood right to freedom of expression. This ability for a state to do and say what it desires "comes not as an expansion of much newer human rights law, but rather from some basic notions of state sovereignty

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Australian Perspectives by Donald R. Rothwell, Stuart Kaye, Afshin Akhtarkhavari, and Ruth Davis, p. 238

[1] See Igor Janev's "Legal Aspects of the use of a Provisional Name for Macedonia in the United Nations System," *American Journal of International Law* 93 (1): 155-160, 1999

[2] See, General Assembly Resolution 2625 (XXV) of 24 October, 1970

[3] See, UN Doc. A / CONF. 67/16 (March 14, 1975)).

[4] Article 83 of the *Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character*, UN Doc. A/CONF. 67/16 (March 14, 1975).

and the equality of states".[1] Because the name of a state represents an inseparable and significant part of its sovereignty, Greece denies Macedonian sovereignty. Sovereignty comprises what is under the exclusive competence of the state - domain réservé, i.e., the political and the territorial sovereignty (which includes the population). The name of the state refers to both, i.e., it is linked to the state with regard to its political independence and territorial integrity whereby a state is physically and politically delimited from other subjects or states in the international community.[2]

Furthermore, it should point out that traditionally from the point of view of the public international law, states may "call themselves whatever they wish because a state's name is fundamentally a purely domestic matter, and it is a bedrock principle that every state 'has the right freely to choose and develop its political, social, economic and cultural systems".[3] It is an accepted principle of the international law that flows from the sovereign equality of States, that each State "has the right freely to choose and develop its political, social, economic and cultural systems".[4] There appears to be "no basis in the international law or practice for the Greek demand that Macedonia changes its name, claiming that the right to use that name should belong exclusively to Greece".[5] Most apparent from the Macedonian case is that its right to determine its own external forms of representation was violated since it has to be negotiated with Greece. The acquiescence of the international community is puzzling as "it seems clear on the facts, at least, that the Macedonians did everything Greece could reasonably have asked; the current impasse seems to result from the Greek intransigence, not the factual merits of its claims".[6] Moreover, historically Greece had no objections to the name of its northern neighbor during Yugoslav times.[7] From 1944 to 1991 the "People's Republic of Macedonia" and later the "Socialist Republic of Macedonia" was one of the six constituent units of

[1] Larry Reimer, "Macedonia: Cultural Right or Cultural Appropriation?", *University of Toronto Faculty of Law Review* No. 53 (1995), p. 359

[2] Jana Lozanovska. *The Name Issue Exposing and deconstructing the Greek arguments*, 2009, Evro Balkan: Skopje, p. 4

[3] A. Michael Froomkin, "When We Say US™, We Mean It!" *Houston Law Review*, Vol. 41.N.3 (2004), pp. 840 - 41.

[4] See Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, GAOR Res. 2625, U.N. GAOR, 27th Sess., Supp. No. 18, at 124, U.N. Doc. A/8018 (1970)

[5] Louis Henkin Richard C. Pugh, Oscar Schachter and Hans Smit, *International Law: Cases and Materials,* (3rd edition), Westgroup: New York City and Berkeley, 1993, p. 253

[6] A. Michael Froomkin, "When We Say US™, We Mean It!" *Houston Law Review*, Vol. 41.N.3 (2004), p. 856

[7] Dimitar, Mircev, "Engineering the Foreign Policy of a New Independent State: The Case of Macedonia, 1990 - 96", in James Pettifer (Ed.), *The New Macedonian Question*, London: Palgrave-Mackmillan, 2001

federal Yugoslavia. The 'dispute' over the name is a euphemism to the Greek objections, in some cases direct and open and in others indirect and concealed, to the very existence of the Macedonian state and nation. The Greek used labels such as "Slavic Macedonians", "Skopje people"[1], "FYROM" and "Fyromians"[2] are ethnic slurs and mirror the blatant disrespect of Greece for human rights and values. The Greek foreign policy towards Macedonia is the result of the ideology of ethnic nationalism that has dominated Greek society since its inception. Greece denies the existence of a Macedonian nation and Macedonian minority on its territory because such recognition would run counter to the templates of the ethnic homogeneity and purity that define the Greek ethnic nationalism.[3] Macedonians cannot exist for the very simply reason that nobody who is not Greek can properly speaking, be said to "exist" in Greece. In Greece, like in most states dominated by the ideology of ethnic nationalism, the "right to exist" like indeed any other right, derives from the person's belonging to the dominant ethnic group and not from his or her participation in the political community, his or her payment of taxes to the State or his or her obedience to the Constitution of the country.

CLASHING NATIONAL NARRATIVES

Every nation has a certain "national narrative", a set of historical, cultural, economic and political experiences that are passed to the future generations through the nation building process and family stories. Components of this "national narrative" may include stories and legends related to the nation's origin, great heroes, enemies, past sufferings (collective and individual), memories of war, as well as heritage related to poetry, literature and music. Nation building is a ubiquitous process as any given political system operates within a certain cultural framework and nation building is inevitably tied to a particular culture, language or history. Rarely however, states engage in 'liberal nation building,' nation building that takes into consideration the interests of the members of national minorities who wished to preserve their language, culture or particular

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[1] http://www.ana-mpa.gr/anaweb/user/showplain?maindoc=6284332&maindocimg=6267967&service=10

[2] http://www2.mfa.gr/www.mfa.gr/en-US/Policy/Geographic+Regions/South-Eastern+Europe/Balkans/Bilateral+Relations/FYROM/FYROM+-+THE+NAME+ISSUE.htm

[3] Takis Michas, *The Unholy Alliance: Greece and Milosevic's Serbia during the 1990s*, Texas A & M University Press, 2002

aspects of it.[1] More often the nation building process aims exactly to negate the "historical narratives" and cultural peculiarities of minority ethnic groups. The aim is to have the citizens accept a common "national narrative" and create a nation by transforming the collective identity of a society composed of one or a few ethnic groups.[2] It is a mistake to understand national histories as a set of historic truths; rather, they should be seen as something closer to stories. To hold them up to rational scrutiny "destroys the possibility of human community, national myths are not lies and fabrications; they are inspiring narratives, stemming from human *imagination*, in which we tell ourselves who we are or want to be.[3] Benedict Anderson makes this point explicit: "all communities larger than primordial villages of face-to-face contact (and perhaps even these) are imagined "communities are to be distinguished, not by their falsity or genuineness, but by the style in which they are imagined."[4]

In the Balkans the emerging nation states have developed historical narratives to help justify their irredentism and their historical rights in different parts of the Ottoman Empire. "Official" Balkan historical narratives postulate the existence of a nation back in time and then proceed to interpret the historical record as the continuous evolution of this "imagined community" from that particular point.[5] Modern Greek national identity is an outcome of a nation building process that took place in the Balkans between 18th and 19th century. Macedonian national identity is an outcome of similar nation building processes, with the difference that the idea of creating a Macedonian nation-state came decades later than the "national awakening" of other Balkan nations.[6]

However, the diffusion of historical narratives in the nation building process should not be accepted uncritically since they entail a considerable element of "myth-making". Clearly the Greek and Macedonian national

[1] For more on 'liberal nation building' see Zhidas Daskalovski, *Minorities in Nation-Building Processes*, Friedrich Ebert Stiftung: Skopje, 2005

[2] For more on nationalism as a social and political construct and the role of history in the process of nation building see: Craig Calhoun, *Nationalism*, Buckingham, Open University Press 1997, 48 - 92

[3] Arash Abizadeh, "Historical Truth, National Myths and Liberal Democracy: On the Coherence of Liberal Nationalism," in *The Journal of Political Philosophy:* Volume 12, Number 3, 2004, p. 293

[4] Benedict Anderson, *Imagined Communities*, London: Verso, 1991, p. 6

[5] See Kitromilides, Paschalis 1983 "The Enlightenment East and West: A Comparative Perspective on the Ideological Origins of the Balkan Political Traditions." *Canadian Review of Studies in Nationalism* 10 (1): 51 - 70

[6] About nation building processes in the Balkans, see Barbara Jelavich *History of the Balkans. Eighteenth and Nineteenth Century,* Cambridge University Press 1983, p. 173 - 291

narratives are no exception. As Anthony Smith notes "where there are clashing interpretations of ancestral homelands and cultural heritages as for example in Macedonia, Kashmir, Nagorno Karabagh, and Palestine – normal conflicts of interest are turned into cultural wars…"[1] The Macedonian controversy showed that the way history is narrated and myths are constructed domestically can determine the development of a crisis at the international level. In fact, the dispute between the two countries over the name of the new Republic is not only part of a 'global cultural war' that the two states have been fighting over the control of symbols, traditions and glorious ancestors, but it is also a conflict over the validity of the national narratives of both countries to a bigger or lesser extent attempting to convince the world audience that their historical narrative is correct.[2] It is a struggle for legitimating of a particular national narrative, and thus an identity that legitimizes a group as an entity that has a "right" to a territory as its "natural" habitat.[3]

National Narratives Clashing over the Definition of Macedonia

Macedonia is generally defined as the area that is bounded on the north by the Sharr Mountain, on the south by the Aegean Sea, Mountain Olympus, and the Pindus Range, on the east by the Rhodope Mountains, and on the West by Lake Ohrid.[4] The borders of the ancient Kingdom of Macedon in the Hellenistic Era roughly corresponded to this territory.[5] However, the Greek position is that ancient Macedon roughly corresponds to the territory of the Greek region of Macedonia. In fact, the borders of Macedonia in ancient times were not fixed and at one moment they indeed roughly corresponded to the today's borders of Greek Macedonia. Linking only the territory of the Greek region of Macedonia to ancient Macedon provides the Greeks arguments in favor of their position that people from the north, cannot in any possible way have anything to do with Macedonia and the Macedonians. In fact, Greek politicians and historians claim that the territory of today's Republic of Macedonia, was called Paionia in antique

[1] Smith, A.D, *Myths and Memories of the Nation*, Oxford: University Press, 1999, p. 9

[2] On the global 'cultural war' see Featherstone M. *Global Culture: Nationalism, Globalization and Modernity*, London: Sage, 1990, p. 10

[3] Pierre Bourdieu, "Social Space and Symbolic Power," in *Sociological Theory*, Vol. 7, No. 1, Spring 1989

[4] On the various definitions of what are the borders of Macedonia see Wilkinson H.R., *Maps and Politics: A Review of the Ethnographic Cartography of Macedonia,* (Liverpool: Liverpool UP, 1951), translated by Dimkovska Sonja, *Kartite i Politikata: Pregled na Etnografskata Kartografija na Makedonija,* (Skopje: Makedonska Kniga, 1992), pp. 35 - 38

[5] See the map in Rossos, A. 2008. Macedonia and the Macedonians: A history, Stanford, CA: Hoover Institution Press, p. 4

times.[1] On the other hand, Macedonian scholars and politicians like to emphasize the most extensive borders of ancient Macedon, those including most of the present-day Republic. That way they can link the Macedonian historic narrative to ancient legacies.

National Narratives Clashing over the History of Ancient Macedonia

Greece relies on historical arguments to prove continuity and significant links to the cultural symbols and the Macedonian territory. For Greeks the name 'Macedonia' and 'Macedonians' refer back to the ancient Macedonians who were of a Greek, and not of a Slavic ethnic identity. Moreover, for Greek historians and politicians, even if Slavic speaking peoples have been present in Macedonia since the 7th century AD, a distinct 'Slavic Macedonian' nation was an artificial creation of Tito, with the aim of pressing irredentist claims against Greece. According to this view, the only true Macedonians are Greeks. A careful study of the Greek views reveals that "Greeks do not dispute the existence of a nation, a language, or a republic after 1944, but rather refute the legitimacy of the appropriation of the Macedonian name for defining a Slavic people, a surgical-type operation for the mutation of the indigenous Slavonic inhabitants and their transformation into ethnic 'Macedonians.'"[2]

Since the ancient Macedonians were Greeks, and since the modern Greeks are the descendants of the ancients, "it follows that the name and the territory of ancient Macedonia are "legitimately" Greek and any claim to the contrary impugns Greek identity (by claiming that the ancient or modern Macedonians are not Greek) and therefore impugns the integrity of the Greek nation".[3] Therefore, the 'Slavic Macedonians' cannot possibly have a claim to a Macedonian ethnic identity, symbols which flourished during ancient times, or, more generally, to the name, 'Macedonia.' The main concern is that by the process of Macedonian homogenization "the provenance and identity of historical and cultural objects, although alien to FYROM and its ethnic Macedonians, ran the risk to be absorbed into their Slavonic Macedonian domain and pantheon, a long-established cultural property rights of Greek or Bulgarian provenance ran the risk to be legally

[1] See the argumentation in a letter sent to president Obama by 200 classical scholar siding with the Greek argument, available at:
http://macedonia-evidence.org/obama-letter.html

[2] Evangelos, Kofos. "The Macedonian Question: The Politics of Mutation", Thessaloniki: Balkan Studies, 1986. *Reprint, in Macedonia Past and Present*, (Thessaloniki: Institute for Balkan Studies, 1992: 159)

[3] Victor Roudometof, "Nationalism and Identity Politics in the Balkans: Greece and the Macedonian Question" *Journal of Modern Greek Studies* 14.2 (1996), p. 284

challenged."[1] Using the name of Macedonia by the 'Slavic Macedonians', ultimately questions the validity of the Greek national narrative in the region of Macedonia and the close relationship of Greek Macedonians with their past and their tradition. The use of the name 'Macedonia' and the ancient symbols would amount to a misappropriation of the cultural heritage of Greece, and an implicit questioning of the existing borders between the two states. The Greek argument is that symbols like the Sun of Vergina and the name Macedonia itself, belonged exclusively to the Greek cultural heritage.[2]

The core of the Macedonian name dispute is the purported link between the ancient people of the kingdom of Macedon and today's Greeks and Macedonians. Today, the ethnicity of the ancient Macedonians and their relations to the old Greeks is a hotly disputed topic with different interpretations especially since the ancient Macedonians left no writings about themselves, adopting the advanced culture and language of their neighboring Greek City States. According to Damianopoulos, the evidence in support of a Greek ethnic identity for the ancient Macedonians can be reduced to two major lines of evidence.[3] One line of evidence is from a surviving message from Alexander the Great to the Athenians accompanying the war panoplies captured after his first major battle at Granicus against the Persians which reads: "Alexander son of Philip and the Greeks, except the Lacedaimoneans, these spoils from the Barbarians who dwell in Asia."[4] The second line of evidence is from the excavated written evidence found in tombs located in Macedonia (including the Royal Tombs at Vergina) which is all in the Greek language (Andronikos, 1984). On the first line of evidence, Green dismisses Alexander's message as being nothing but a PR ploy to placate the Athenians in support of the Pan-Hellenic façade to the campaign against Persia as well as to forestall any future threats of rebellion. In relation to the second line of evidence, Borza points out that the language found in the Royal Tombs at Vergina and other excavated sites is in the Attic Greek (i.e., in the Athenian idiom) which had to be an adopted language for formal communication. One cannot imagine the Macedonians to be writing in impeccable Athenian idiom being more than 600 km to the

[1] See Evangelos Kofos "The Controversy over the Terms 'Macedonians' and 'Macedonian': A Probable Exit Scenario" in *Southeast European and Black Sea Studies*, Vol. 5, No. 1, January 2005, p. 131

[2] See also Evangelos Kofos, "Greek policy considerations over FYROM independence and recognition", in ed. James Pettifer, *The New Macedonian Question* (London: MacMillan Press, 1999), pp. 226 - 263

[3] Ernest N. N. Damianopoulos, *The Macedonians: Their Past and Present*, London: Palgrave Macmillan, 2012

[4] Peter Green, *Alexander of Macedon 358 -325 BC*. Oxford, UK: University of California Press, 1991, pp. 157, 181.

north of Athens while dialect differences existed among the Greek City States within a 200 km distance.

Contrary to the established Greek historic narrative are the views of authors who claim a distinct ancient Macedonian identity. In fact, analyzing the major works on the ancient Macedonian history, Damianopoulos argues that the 'balance' of the available evidence suggests a separate ancient Macedonian ethnic identity apart from that of the Greek.[1] Indeed there is evidence to suggest that in antique times, the Macedonians and Hellenes considered themselves to be separate and distinct people. Ancient Athenians explicitly classified the Macedonians as foreigners, by applying the word "barbaroi", to them.[2] Moreover, the considerable surviving lists of Olympic victors do not list any Macedonians, thus for example, Greek athletes on the spot refused to run against Alexander I the "Philhellene."[3] Finally during the treason trial of Philotas, one of Alexander's outstanding commanders, Philotas was asked whether he should be tried in the Macedonian or in the Greek language.[4]

In essence, for the present day Macedonian dispute it is of great importance that: "no single argument is conclusive, but the case builds in quality as it grows in quantity of evidence, and, in the end, is persuasive. Despite the efforts of Phillip II and Alexander the Great to bridge the gap between the two cultures, Greeks and Macedonians remained steadfastly antipathetic toward one another (with dislike of a different quality than the mutual long term hostility shared by some Greek City States) until well into the Hellenistic period, when both the culmination of Hellenic acculturation in the north and the rise of Rome made it clear that what these peoples shared took precedence over their historical enmities."[5] Establishing a distinct Macedonian identity in ancient times helps the version of the Macedonian historic narrative that legitimizes the "right" to Macedonia on the basis of a direct link between the modern and the ancient Macedonians.

National Narratives Clashing over the History of Ottoman Macedonia and of Greek (Aegean) Macedonia

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[1] Ernest N. N. Damianopoulos, *The Macedonians: Their Past and Present*, London: Palgrave Macmillan, 2012. The historians writing on ancient Macedonia cited here are: Badian, Ernst, 1967 "Greeks and Macedonians" in *Macedonia and Greece in Late Classical and Early Hellenistic Times Studies*. Studies in the History of Art Vol.10.Washington: National Gallery of Art. Borza, Eugene, *In the Shadows of Olympus: The Emergence of Macedon*; pp 90 - 97. Princeton, NJ: Princeton University Press, Green, Peter 1991 *Alexander of Macedon 358 -325 BC.* Oxford, UK: University of California Press.

[2] Borza, 1990: 96.

[3] Badian, Ernst, 1967

[4] Green, 1991: 344

[5] Borza,1990: 96

Ottoman Macedonia became the hotspot of the Balkans in the second half of the nineteenth century as a result of the growth of nationalism in the region. In the 1870's and especially after the 1878 Congress of Berlin, the Macedonian Question can be formulated as an offshoot of the more general Eastern Question, which "encompassed the dilemma of dealing with the territories of the defunct Ottoman Empire."[1] Thus, the Macedonian Question directly dealt with the issue to whom should this land belong after the Ottoman Empire's collapse - to the newly created, expanding Balkan states, to the Great Powers, or to a new, independent state.

At that time, the nascent Macedonian nationalism, which fought for an autonomous status of Macedonia, competed with the expansionism of the neighboring countries, Serbia, Bulgaria, and Greece, who sought political annexation and control of Macedonia. In the case of the Ottoman Macedonia, the three: Bulgaria, Greece, and Serbia, vigorously campaigned to present their "cases" to the great powers. All three of them used different means to certify that once upon a time Macedonia was part of "their" lands and that therefore it should be brought "back" to them. The Bulgarian and Serbian governments also used the linguistic closeness of the Macedonians to the Serbian and Bulgarian people to show that Macedonia is in fact Bulgarian or Serbian land, while the Greeks in their propaganda efforts relied on historical proofs, and the role of the Patriarchate. Hellenism in Macedonia also relied on the flourishing Greek schools and on a class which enjoyed in some measure an economic superiority; a class which was conservative, which had everything to lose.[2] The Greek and Bulgarian-speaking ecclesiastical and cultural elites saw Macedonia as a contested territory, a much coveted prize to fight for. The local Greek and Slavic speakers as well as sizeable Vlach, Sephardic and Muslim communities needed to be converted to the competing nationalisms.

As Rossos notes, most sources find the Slavic speakers, the Macedonians, the majority of the population of Macedonia before 1913. He cites ‘‘a fairly reliable British Foreign Office estimate in 1912” where the ethnic percentage of the population of Macedonia was: Macedonian Slavs 1,150,000, Turks 400,000, Greeks 300,000, Vlachs 200,000, Albanians 120,000, Jews 100,000, and Gypsies (Roma) 10,000. Greek authors, on the other hand, have no doubts that at the beginning of the 20th century Hellenism overwhelmingly prevailed in Macedonia. They quote the official Turkish statistics of 1905 compiled by Hilmi Pasha for the vilayets of Thessaloniki and Bitola which note that in these two *vilayets* there were

[1]See Giannakos Symeon, "The Macedonian Question Re-examined: Implications for Balkan Security", *Mediterranean Quarterly*, Vol.3, N.3, (Summer 1992), pp. 25 - 47

[2] Daikin, D. 1966. *The Greek struggle in Macedonia 1897 - 1913*, Thessaloniki: Institute for Balkan Studies, pp. 117 - 8

678,910 “Greeks” (adherents of the Patriarchate) and 385,729 “Bulgarians” (adherents of the Exarchate).[1] For the name dispute, a crucial discussion is over the history of the Greek (Aegean) Macedonia. While Greek historians and politicians emphasize the rightfulness of the incorporation of this region in the Hellenic state, Macedonian historians note that Macedonians were a majority in the Aegean part of Macedonia before the Balkan Wars and that therefore the forceful conquest of this territory by Greece was illegitimate. Moreover, Macedonian historians and politicians stress the ruthlessness of the process of making Greeks out of a heterogeneous demographic population of that region, especially noting the illiberal nature of the nation building practices aimed at the ethnic Macedonians. They stress that all pre-1913, non-Greek statistics find Macedonians the largest single group in Aegean Macedonia. The figures range from 329,371, or 45.3 percent, to 382,084, or 68.9 percent of non-Turks, and from 339,369, or 31.3 percent, to 370,371, or 35.2 percent of the total population of approximately 1,052,227 inhabitants. [2] As Rossos writes, Todor Simovski prepared one of the most detailed breakdowns of the region (of Aegean Macedonia) just before the Balkan Wars. Using Bulgarian and Greek sources, he estimated 1,073,549 inhabitants: 326,426 Macedonians, 40,921 Muslim Macedonians (pomaks), 289,973 Turks, 4,240 Christian Turks, 2,112 Cherkez (Circassians), 240,019 Christian Greeks, 13,753 Muslim Greeks, 5,584 Muslim Albanians, 3,291 Christian Albanians, 45,457 Christian Vlachs, 3,500 Muslim Vlachs, 59,560 Jews, 29,803 Roma, and 8,100 others.[3] Greek historians on the other hand claim that Greeks were a majority before the Balkan Wars and that the share

[1] Vavouskos, C. A. (1973). *Macedonia’s Struggle for Freedom*. Thessaloniki: Institute for Balkan Studies, p.9, Martis, Nicolaos K. (1984). *The Falsification of Macedonian History*, Athens, p. 109, Cosmopoulos, Michael B. (1992), *Macedonia*. Winnipeg: Manitoba Studies in Classical Civilization, p. 57

[2] See Rossos, A. 2008. *Macedonia and the Macedonians: A history*, Stanford, CA: Hoover Institution Press, p.5. According to Greek historians the total Slavic-speaking population of Greek Macedonia in the period of the Balkan Wars was about 250,000. See *The History of Macedonia* Edited by Ioannis Koliopoulos, Museum of the Macedonian Struggle: Thessaloniki, 2007. “The Statistical Battle for the Population of Greek Macedonia”, by Iakovos D. Michailidis, p.280. Greek sources claim that before the Balkan Wars Macedonia had a population of approximately 1,205,000, of whom just 370,000 (31%) were Greek speakers, 260,000 (21.5%) were Slav-speakers (Patriarchists and Exarchists) and 475,000 (39.5%) were Muslims, with Jews and other groups making up the remaining 98,000 (8%). “Population Shifts in Contemporary Greek Macedonia” by Iakovos D. Michailidis, in *The History of Macedonia* Edited by Ioannis Koliopoulos, Museum of the Macedonian Struggle: Thessaloniki, 2007, p. 357.

[3] Todor Simovski, “The Balkan wars and their repercussions on the ethnic state in Aegean Macedonia” in *Glasnik* (Skopje) 16, no. 3 (1972), p. 61, cited in Rossos, 2008: 142

of the Macedonians after the population exchanges in the 1920's was very small.[1]

The Balkan Wars (1912 - 1913) marked the end of the Ottoman Empire and the "liberation" of Macedonia. This liberation resulted in the partition of Macedonia among Serbia (Vardarian Macedonia), Bulgaria (Pirinian Macedonia) and Greece (Aegean Macedonia). After the First Word War the new borders were affirmed at the 1919 Versailles Treaty. In their three countries, policies on education, language and surnames sought to eradicate any sense of a separate Macedonian identity. Between the two world wars, "Macedonians in all three regions of Macedonia were subjected to violent campaigns of assimilation and denationalization whose goals were to deprive them of their true Macedonian identity and convince them that they were actually Serbs, Bulgarians, or Greeks." Thus, the partitioning of the Macedonian territory had a tremendous influence on the development of the Macedonian national identity and culture.

The ethnic map of Macedonia was significantly changed in 1919 when Greece and Bulgaria signed a convention for 'exchange of populations'.[2] As a result, around 60,000 Macedonians "voluntarily" left Greece and settled in Bulgaria while approximately 30,000 Greeks left Bulgaria.[3] Soon after, in 1924, a similar convention was signed between Greece and Turkey. Following the 1923 Greco-Turkish exchange of populations, 354,647 Muslims left Greece, 339,094 Greeks arrived in Greek Macedonia from Anatolia.[4] The result of this shift of populations was disastrous for Macedonians; they became a minority in the region where before the Balkan Wars they were majority of the population.

Since the Balkan Wars Greece transformed the ethnographic structure of Aegean Macedonia by removing 127,384 Macedonians and settling 618,199 refugees and colonists.[5] The settling of the Asia Minor settlers in 1920s has been the cornerstone of the Greek argument that Macedonian demographic composition has changed decisively in favor of the Greeks.[6] Greece's census of 1928, and its successors, presented the kingdom as

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[1] The share of the Macedonians after the population exchanges in the 1920's in different Greek sources range from 70,000 to 80,000. See *The History of Macedonia* Edited by Ioannis Koliopoulos, Museum of the Macedonian Struggle: Thessaloniki, 2007. "The Statistical Battle for the Population of Greek Macedonia", by Iakovos D. Michailidis

[2] Often known as the Nouile Treaty as it was signed in Nouile

[3] Pentzopoulos, D. *The Balkan Exchange of Minorities and Its Impact Upon Greece*, Paris and The Hague: Mouton, 1962, p. 60

[4] Pentzopoulos 1962: 69, 107

[5] Rossos, A. 2008 *Macedonia and the Macedonians: A history,* Stanford, CA: Hoover Institution Press, p. 142

[6] Evangelos Kofos, *Nationalism and Communism in Macedonia*, Thessaloniki, 1964, p. 40

ethnically homogeneous. It classified Macedonians as ‘‘Slavophone’’ Greeks and cited only 81,984 of them.

LEGAL SOLUTIONS

On November 17th 2008, the ‘Former Yugoslav Republic of Macedonia’ instituted proceedings before the International Court of Justice (ICJ), alleging that Greece’s objection to its application to join the North Atlantic Treaty Organization (NATO) breaches the 1995 Interim Accord between these two States. Macedonia’s is that, in blocking its membership to NATO, Greece committed “a flagrant violation of its obligations under Article 11” of the Interim Accord signed by the Parties on 13th September 1995. That provision provides that Greece would not object to the Former Yugoslav Republic of Macedonia’s membership “in international, multilateral, and regional organizations and institutions of which Greece is a member”. The admission of Macedonia to UN membership in April 1993 by the General Assembly Resolution 47/225 (1993) was associated with the provision that it will be "provisionally referred to for all purposes within the United Nations as the former Yugoslav Republic of Macedonia, pending settlement of the difference that has arisen over the name of the State." Under pressure, Macedonian Government committed to adhere to a UN process to discuss a possible solution to the "name dispute." Yet the additional conditions related to the name of the state constitute violations of the Article 4 (1) of the UN Charter interpreted by the Advisory opinion of ICJ of 28th May 1948 (which was accepted by the General Assembly Resolution 197/III of 1948).[1] At the time of the UN’s 1993 decision, the Macedonian Government strongly objected to the use of this provisional

[1] The UN Charter at Article 4, paragraph 1, states that: “Membership in the United Nations is open to all other peaceloving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.” The ICJ Advisory opinion noted that the five conditions in Article 4 were “exhaustive” in character, and thus a member state that believed the applicant to “(1) be a State; (2) be peace-loving; (3) accept the obligations of the Charter; (4) be able to carry out these obligations; and (5) be willing to do so” had no legal grounds on which to require more. Furthermore, once an applicant is admitted to the UN, “the applicant state acquires an unconditional right to UN Membership. In the words of Court’s Advisory Opinion, and the resolution GA Res.197/III (1948), “a Member of the United Nations, when pronouncing its vote in the General Assembly or Security Council, is not juridical entitled to make its consent on the admission of a state to UN membership dependent on conditions not expressly provided in Article 4 (1)”. See Igor Janev’s “Legal Aspects of the use of a Provisional Name for Macedonia in the United Nations System,” *American Journal of International Law* 93 (1): 155 - 160, 1999, and “Legal Responsibility of the United Nations for Unlawful Admission of Macedonia to UN Membership”, *Macedonian Affairs 3* (1): 53 - 88, 2001

name, stating that "under no circumstances" was it prepared to accept that designation as the name for the country.

The preamble to the Security Council Resolution 817, by which Macedonia was recommended for admission, recognized that "the applicant fulfils the criteria for membership laid down in Article 4 of the Charter of the United Nations." According to the Admission of a State to the United Nations and the General Assembly Resolution 197, this statement means that the applicant has fulfilled all the required conditions for admission to membership in the United Nations and that no other conditions may be imposed.[1] The invalidation of part (b) of the UN Resolution 47/225 (1993) can be done by a new resolution, which would also affirm the use of the constitutional name of Macedonia within the UN system. Alternatively, Macedonia should request the General Assembly to question before the International Court of Justice the legality of resolution of 47/225 (1993) and the Security Council resolution 817 (1993) in their parts related to the imposition of additional conditions on Macedonia regarding its name for its admission in UN membership (i.e. their compatibility with the provisions of Article 4 (1) of the Charter).[2]

POLITICAL SOLUTIONS

There is a compromise solution that the UN mediator has not put forward and that would respect the concerns of both sides. The solution would be for the country to be known internationally as the Republic of Makedonija. This is a name of Slavic origin and how Macedonians refer to

[1] Ibid.

[2] As Mr. Janev argued the General Assembly cannot "obstruct such a request for an advisory opinion of being put before the Court because the requested opinion is related to the legality of its own act. Such an obstruction (based on whatever reasons) would essentially mean that the General Assembly, as political organ, is imposing its own response to the question regarding the legality of its own act, or, imposing its own judgment in a case in which it is itself a 'party' (representing the Organization). This would be incompatible with the basic legal principles of juridical equality and bona fide, and with the mission and the duty of the UN Organization regarding the respect of international law." The text of the resolution could be "Are the specific conditions enshrined in resolutions GA Res. 47/225 (1993) of the General Assembly and SC Res. 817 (1993) of the Security Council in their parts relating to the denomination "Former Yugoslav Republic of Macedonia", with the requirement for settlement of the "difference that has arisen over the name of the State", outside the scope of the exhaustive conditions of Article 4 (1) of the Charter of the United Nations and legally in accordance with the Charter of the United Nations? " See his "Legal Responsibility of the United Nations for Unlawful Admission of Macedonia to UN Membership", *Macedonian Affairs 3* (1): p. 83, 2001

their country in their own language. Greece would be left with the name ‘Macedonia', which it could use for the northernmost region of the country and, indirectly, to invoke ancient Macedon. Makedonijans could co-exist along with the Greek Macedonians. As part of the compromise, a declaration in which the Republic of Makedonija would acknowledge that ancient Macedonia is part of Greece's historical legacy could be adopted by the government in Skopje. In return, Greece would allow the members of the Macedonian ethno-cultural nation to be named as "ethnic Macedonians" and the language to be called "Macedonian (Slavic)." Both governments could claim victory, one having won international recognition under basically the same name as in the constitution, the other having protected the Macedonianism of Greece's history and present.

This is more than a matter of gaining membership of the EU and NATO – Macedonia's very future depends on a resolution. If the EU sides with Greece, it would in effect be declaring that the Copenhagen criteria for EU membership are not important in Macedonia's case and that the most important factor is an additional criterion unrelated to democracy or the rule of law. Public opinion would turn against the EU in Macedonia. As a result, no Macedonian government would have much incentive to continue with reforms demanded by the EU. The EU's leverage would decrease. More importantly, the possibilities for further soft mediation by the EU in the Macedonian - Albanian political disputes would diminish. Macedonian nationalism might grow, while Macedonia's large ethnic Albanian minority might become restive watching the state of Albania, already a member of NATO, moving forward with the EU integration. The ethnic Albanian nationalism is already being encouraged by Kosovo's independence. Supporting the Greek position signals to nationalists around the Balkans that Macedonia is not yet a “normal” country, a state that has a secure and prosperous future in the EU. With Kosovo‘s independence, Bosnia-Herzegovina’s problems and Serbia’s objections already complicating Balkan realities, the EU does not need another crisis. Macedonian stability, which brought this country a remarkable freedom of the press, is crucial as any new conflict there could cause a wider conflict including Bulgaria, Turkey, and Albania.

CONCLUSION

Presenting an overview of the conflict in the 1990s and referencing it to the conflicting elements in the national narratives of Greece and Macedonia, we have shown that the Macedonian name dispute is impossible to solve amicably. We demonstrated how the dispute is about the “right” to project the ancient Macedon history as an integral part of the ethno-genesis

of the Greek and / or the Macedonian nation. This is a clash over historical narratives and the right to claim origins of the Macedonian ethnic group and nation today and in the ancient past. The paper elaborated on the importance of historical narratives for ethnic groups and the Greek and Macedonian nation building projects. Arguing that it is impossible to solve the dispute due to the mutually exclusive historical narratives we will propose political and legal options for unraveling the "Macedonian naming problem". We have outlined the legal remedies to the 1993 UN admission of the country under the provisional reference and a political solution with an agreed international name for the country "Republic of Makedonija". This is a name of Slavic origin and how Macedonians refer to their country in their own language. Greece would be left with the name 'Macedonia', which it could use for the northernmost region of the country and, indirectly, to invoke ancient Macedon. Both governments could claim victory, one having won international recognition under basically the same name as in the constitution, the other having protected the Macedonianism of Greece's history and present. Both the political and the legal solution are more likely to solve the dispute than an agreement over the historical narratives of Macedonia and Greece.

Finally this paper argued that the European Union (EU) has a stake in the dispute. The best foreign policy tool of EU since the fall of the Berlin Wall has been its enlargement policy. Using what has been labeled as 'conditionality' EU has modified the political institutions and behavior in the neighboring countries many of which have joined as full members. Considering the questioning of the principle of legitimacy, a vital EU policy instrument, the Union must engage directly in finding a compromise solution to the naming dispute between Skopje and Athens. We have argued therefore that instead of being a passive player the EU should work on achieving a political resolution. A political solution with an agreed international name for the country "Republic of Makedonija" is likely to solve the dispute, preserve the legitimacy of the EU principles in the region and improve the relations between the two countries.

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THE CONCEPT OF DIGNITAS HOMINIS IN ROMAN LAW

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Abstract

Roman law is the most important cultural heritage of antiquity, and the period of the old Roman state is one of the most important in the history of every state and law. The influence of Roman law onto modern legal systems is huge since numerous institutes are based on its concepts. The first book of Justinian's Institutes *Liber Primus* gives a definition of justice as a stable and continuous willingness to render to each what belongs to him, but also an outstanding overview of the basic rights of every person which endured the test of time. Ulpian stated that the precepts of law were: *honeste vivere, alterum non laedare, suum cuique tribuere*- to live honestly, to injure no one, and to render to each his own. How this system was important is best explained by *dignitas hominis*. Status and dignity of the people of Rome largely depended on observing this maxim. Natural law as we know it today has evolved under the influence of the concept of *ius naturale* that in ancient Rome meant a set of human rights that belong to man by birth and cannot be taken away by a human factor. In his work *De officis*, Cicero deviates from the common opinion and states that even the concept of *Dignitas hominis* is natural for every human being and that this should not affect personal reputation, morals, ethics, and human behavior towards others. The question is how we find the traces of the institute in today's law? One of the explanations is given by prof. Alan Watson who put forward the theory of legal transplants i.e. the legal borrowing. What is certain is that the influence of Roman law on the present law is significant, and it is a sophisticated system which gave rise to the modern notion of the position of the individual and his rights.

Keywords: Roman law, *dignitas hominis*, human rights, natural law, reception.

Throughout history, the idea of existence of basic human rights appeared almost 4000 years ago during the reign of the Babylonian king Hammurabi in the 18th century BC. [1] He remained known in history primarily as the one who enacted the Code of Hammurabi. Although the Code had its predecessor in the area of Mesopotamia, such as, for instance, the Urukagina Code advocating freedom and equality, it was the best preserved specimen of the time as well as the beginning of the official history of human rights. Well preserved specimens of the Code of Hammurabi, besides penalties for various illegal acts, also treat the issues of a wide range of human rights, discussing even the rights of slaves which make it a unique and preserved Code of its time. In the prologue of the Code of Hammurabi the importance of justice is emphasized, and it is stated that the ruler, after God's order, "ushers law and righteousness".[2]

In addition to the Code of Hammurabi, an important role in history of human rights had the Code of Cyrus the Great, the founder of the Achaemenid-Persian dynasty. The surviving copy of the code is known as the Cyrus Cylinder, which was issued in 539 BC by the great king on the occasion of the conquest of Babylon. He guaranteed religious rights and the right to return to their homes to the persons who had been detained in Babylon by the then defeated country. In the 20th century, the Cyrus Cylinder became the subject of numerous controversies out of which the basic one rises the question of whether it deals with human rights or not. Some experts and institutions consider it today the first official document on human rights and its copy is now in the Headquarters of the United Nations as a symbol of human rights throughout history.

In Europe, the decisive role in the development of law and human rights had the Roman state and Roman law. The most significant contribution is the Law of the twelve tables and the concept of natural right. In addition to the fact that the Roman Empire legally regulated the issue of citizen rights, it first in history passed the laws regarding the protection of specific human rights of slaves. This was first done by the Emperor Claudius who decided that a slave abandoned by his master could become a free man, what was soon followed by his successor Nero with the law that a slave can file a lawsuit against his master in court. [3] The highlight of the rights of

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[1] Waldstein, Zur juristischen Relevanz der Gerechtigkeit bei Aristoteles, Cicero und Ulpian, in: *Beck Mannagetta/Böhm/Graf* (n.2) 44.

[2] Marko Petrak, Reception of Ulpian definition of justice in Croatian medieval sources, *Collected papers the Faculty of Lawat the University of Zagreb*, 2007, p. 958

[3] On the institution of slavery in the ancient Roman legal system, see eg Kaser, Das römische Privatrecht. Erster Abschnitt. Das altrömische, das vorklassische und klassische Recht, München, 1971, 112 sqq., 283 sqq.; idem, *Das römische Privatrecht. Zweiter Abschnitt. Die nachklassischen Entwicklungen*, München 1975, 124.; Wieacker (n. 21) 363.

slaves emerged almost 100 years later when Marcus Aurelius decided that masters who killed their slaves should go on trial for murder. Renowned Roman lawyers left many sayings on law so to show the general idea of law, justice and jurisprudence. Ulpian believes that the fundamental principle of law is *(iuris praecepta): "honeste vivere, alterum non leadere, suum cuique tribuere"* - to live honestly, to injure no one, and to render to each his own. [1] Celsus said that law was the art of right and righteousness *(ius est ars boni et aequo)* [2]. These sayings include philosophical statements that emphasize the ethical character of law.

Cicero said that the essence of fairness was twofold - this is, in one sense, what corresponds to the truth and is based on law, and in another sense it is what can be justified by reasons of equal and good. Especially interesting is the case of legal practice at Cicero's time, which is presented by professor Anton Malenica who cited the example of litigation regarding expensilation, a strictly formal contract of old *ius civile*, where Aquilius Gallus acting as the trial judge, and being in collision of what prescribed the legal norm with what was honorable and honest, opted for the latter. This case is known thanks to the retelling of Valerius Maximus, the Roman writer of the first half of the first century C.E.

Roman lawyers divided law into *ius civile*, *ius gentium* and *ius naturale*. Cicero in his Topica defines *ius civile* as an equality established for those who belong to the same *civitas*, so to be applied in their matters[3]. Cicero comes to this definition by defining the procedure *per genus et differentiam*. The Genus for law is *aequitas* (equity), and the *differentia* is created for those who belong to the same *civitas* so to be applied in their matters. The aforementioned leads us to the conclusion that, at the end of the pre-classical period in the Roman Empire, law was considered only the rules of conduct that applied equally to all citizens[4]. This definition of law is

[1] Ulpian, in his definition of justice instead of the phrase "*suam dignitatem cuique tribuere*" used the phrase "*jus suum cuique tribuere*". It would therefore be reasonable to conclude that the great classic lawyer thus made the transformation of one of the Greek philosophical concepts in a specifically legal concept. However, this conclusion is not universally accepted. In fact, some of the lawyers since the time of glossators have considered that the concept of *ius* in the context of the Ulpian definition is actually synonymous with the term *dignitas*. More in: Marko Petrak, Reception of Ulpian definition of justice in Croatian medieval sources, *Collected papers of the Faculty of Law at the University of Zagreb*, 2007, p. 959.

[2] The definition of Celsus refers to law as a whole, common law, not only to the ius civile. The term ars some authors translated as skills (J. Danilović- O. Stanojevic, *Texts from the Roman law, Practicum for exercise*, 1970, p. 132.

[3] Antun Malenica, Concept of law in the classic Roman doctrine - only a history or challenge, *Collected papers of the Faculty of Law in Split*, year 43, 3-4 /. 2006, p. 332.

[4] Ibid.

associated with the Code of the Twelve Tables, i.e. the norm that prohibits voting privileges in the meetings of Roman citizens.[1] In support of the above statements that law for the Romans meant equality, there are also Cicero's citations in his work *De re publica* saying that the different positions of people cause conflicting interests that distance them from one another, so one should find something that would connect them and keep them together. He comes to the conclusion that for the citizens who live in the same republic equal rights must be established. [2] Cicero held that the *ius civile* is not only equality, but also fairness/justice, and that law exists only if the laws which apply equally to the citizens are at the same time righteous.[3]

How the system of fairness and equality was an important concept is best explained by *dignitas hominis*. Status and dignity of the citizens of Rome largely depended on observing this maxim. The concept of human dignity as the overall value of society has evolved throughout history. In the Old Rome the term *dignitas hominis* was linked to the status of an individual.[4] Such an understanding of dignity has long existed in different legal systems, where it served as the basis for the protection of personal dignity, and yet conditioned by status, reputation and privileges of individuals. However, in addition to the term of *dignitas hominis* that signified the dignity of the individual in Old Rome, there was another term in use, *maiestas*, which gave perhaps greater importance, and marked the dignity of the whole Roman people.[5] Violation of *maiestas* was classified as one of the worst offenses, which was even punishable by death /penalty/. However, what it specifically included has never been specified, so its meaning in practice might be interpreted in different ways. The meaning of *maiestas*, which basically means the dignity or reputation of the Roman people, was eventually extended and included various forms of treason, rebellion, or served to highlight the failure to fulfill obligations arising from public office. [6] In legal systems based on Roman law, dignity has been linked to the right to personality and status where in cases of violation thereof, criminal and civil sanctions were provided, while in the field of international law, the concept of dignity has long been associated with the status of diplomatic representatives of foreign countries. [7] The forerunner of

[1] Tab. 9.1. "No law may be passed against an individual" (Privilegia ne inroganto).
[2] De. Rep. I 32. 49.
[3] Antun Malenica, Concept of law in the classic Roman doctrine - only a history or challenge, *Collected papers of the Faculty of Law in Split*, year 43, 3-4 /. 2006, p. 334
[4] Drexler, H., "Dignitas", in Das Staatsdenken der Römer, R. Klein (ured.), Darmstadt, 1966., 232.
[5] Žika Bujuklić, *Forum Romanum, Roman state, religion and myths*, Law faculty, University of Belgrade, Belgrade, 2005, str. 378 – 379.
[6] Ibid., p. 378.
[7] Ottman Henning, Human dignity, *Political thougt Vol XXXIII*, (1997), no. 4, p. 33.

modern understanding of human dignity is the attitude of a classical Roman theorist, Cicero, who linked the term *dignitas* to the dignity of all human beings regardless of their status.

There are also discussions that challenge religious or philosophical basis for the concept of human dignity (*dignitas humana*) which would refer to the whole of humanity. There are two examples for such claims: Den Boer's "Private Morality in Greece and Rome: Some historical aspects" and Risto's "Human Value, a study in ancient philosophical ethics". They claim that there are ancient authors who provide their records to create the illusion that the people had a belief in the dignity of man, but it was a dignity of only those virtuous people who were important, people who possessed arete (excellence, virtue).[1] Only a balanced man expresses required virtues so that other people might think he possesses dignity and it is because of this that the listed authors believe that the idea of human dignity does not exist in the writings of classical Greek and Roman authors. Natural law as we know it today has evolved under the influence of the concept of *ius naturale* that in ancient Rome meant a set of human rights that belong to men by birth and cannot be taken away by a human factor. In Justinian's Institutes *ius naturale* it is seen as unchanging, metaphysical equity law. Cicero in his *De officis* deviates from the common opinion and states that even the concept of *dignitas hominis* is natural for every human being and that this should not affect personal reputation, morals, ethics, and human behavior towards others. A similar understanding was represented by School of Natural Law in the XVII century. The development of Roman law is the best indicator that there is no unchanging and perfect law, and that law is subject to constant change under various influences. Certainly, Roman law represents an excellent foundation for further development of basic human and civil rights. Cicero emphasizes the main objective of law: "It is likely that laws are invented for the good of the citizens and for the security of citizen communities, as well as for peaceful and happy life of people. [2]

In classical Roman law the essence of the science of law is in fairness/justice.[3] This is why Justinian's compilers entered in the first chapter

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[1] Christopher McCrudden, Human Dignity and Judical Interpretation of Human Rights, *The European Journal of International Law*, Vol. 19, No. 4, 2008, p. 655.

[2] De leg. II 5.

[3] On the concept of classical Roman jurisprudence and its fundamental features, see eg Von Savigny, *Vom Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft*, Heidelberg, 1840, 28, 31, 157; Pringsheim, The Unique Character of Roman Classical Law, *Journal of Roman Studies 34* (1944) 60 ; Schulz (n. 12) 117; Wieacker, *Vom römischen Recht*, Stuttgart, 1961, 148., 161.; Kaser, *Römische Rechtsgeschichte*, Göttingen, 1967, 170.; Arango-Ruiz, *Storia di diritto romano*, Napoli, 1972, 270.; De Marini Avonzo, *Critica testuale e studio storico di diritto*, Torino, 1973, 39.; Waldstein (n. 28) 3.; Künkel, *Römische Rechtsgeschichte*, Köln/Wien, 1990, 99.; Behrends, Anthropologie juridique de la

of the first book Digesta fragments called "On justice/fairness and law- *De justitia et de jure*".[1] On the other hand, Ulpian gives a remark that the term law (*ius*) was derived from the word justice (*justitia*).[2] The first chapter of the first book Digesta contains a definition of justice which was taken over by the compilers from Ulpian books of legal proverbs: Justice is the constant and perpetual desire to give each man his due right.[3]

Numerous are the examples showing that Roman law is actually the cradle of numerous human rights, which are given great attention in the modern age. For example, the legal basis of the Institute of equality before the law can already be found in the Code of Twelve Tables from the 5th century BC. Also, the beginnings of the principle of the necessity for lower regulations to be in compliance with the higher ones (principle of legality) and principled prohibition of retroactivity of laws have already been in the Constitutions of the Emperor Theodosius (5th c.) and the Emperor Justinian (6th century). Furthermore, modern legislation took over one of the fundamental criminal legal principles *nulla poena sine lege* ("no punishment without law"), whose foundation is found in the famous classical Roman jurists Ulpian (*Ulpianus*) (2-3 p.), as well as the rule that no one shall be liable to be tried again for an offence for which he has already been finally convicted in form of a final and binding judicial decision – this is about one of the classic Roman procedural principles *ne bis in idem* ("not twice in the same thing") and *res judicata pro veritate accipitur* ("a thing adjudged must be taken for truth"). What is very important in law today is the right of free association, whose distant roots, according to records of the classical Roman jurists Gaius (Gaius) (2nd c.), can be found in the ancient Code of the Twelve Tables.

In the end, it should be noted that guaranteed fundamental human rights originated from the Roman legal heritage, where property rights and the right of inheritance are emphasized as well. The said human rights were guaranteed for the Roman citizens, even in the early stages of the development of Roman law, while in the socialist system they were largely limited. This is best evidenced by the importance and applicability of heritage in Roman law by using the so-called legal transplants or legal borrowing, which is explained by prof. Alan Watson.

The concept of human dignity *dignitas hominis*- changed over time, from the first foundation in Roman times to the modern understanding, when

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jurisprudence classique, *Revue historique de droit français et étranger* 68 (1990) 337.; Bretone, Il 'classico' e la giurisprudenza, Labeo. Rassegna di diritto romano 45 (1999) 7.

[1] Antun Malenica, Concept of law in the classic Roman doctrine - only a history or a challenge, *Collected papers of the Faculty of Law in Split*, year 43, 3-4 /. 2006, p. 336.

[2] D. 1.1.10.2. Ulp. Lib. 1 reg.

[3] D. 1. 1. 10pr. Ulp. Lib. 1 reg.

it is placed in the context of fundamental human rights and entered into international and regional documents (recognized in the Charter of the United Nations, it is an integral part of the "Universal Declaration of Human Rights ", as well as the famous Article 1, Item 1 of the Constitution of the Federal Republic of Germany). Dignity is a value that represents the basis for law as a general term, but also for all other basic human rights.

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INSTITUTIONAL BUILDING OF LAW AND FIGHT AGAINST CRIME

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Abstract

Contemporary state and society is characterized by a very important and difficult problem to combat organized crime. Its basis is inadequate response to the state and society to its emergence and its sanctioning. Confluence kriminaliteta in politics and government. The inadequate response of the state and its institutions in the prevention, detection and punishment of crime. What the government can and must do is to strengthen the institutions of the system through legislative, executive and judicial power creates the preconditions for the fight against all forms of crime. Competencies in human resource states should resist all the assaults on the system and the state. The paper aims, looking at the role of politics and the state in strengthening state institutions in the fight against crime.

Key words: politics, government, institutions of the system, the legislative, executive and judicial powers, kriminaalitet

INTRODUCTION

Modern state and society through policy and legislative authorities creates an environment and conditions for strengthening the organs and institutions of the system in the fight against crime. Policies of modern country strategies for the fight against organized crime aim to provide

comprehensive measures of society participation of all relevant stakeholders in the materialization strategies defined solutions.

Criminality and its business on globally level impose the need for a comprehensive and organized operation in preventing and its suppression in the beginning of the local community and national levels.

THE INFLENCE OF POLITICS AND THE STATE ON THE OCCURRENCE OF CRIME

Science has found that crime is as old as the state, or that it existed, that there is and will be. Science has its analyzes and attitudes found that the product of criminality state and society in all aspects of regulation of the state and society.[1] In recent history (New World Order), the demolition of the Berlin Wall and the disintegration of the socialist countries (USSR, Czechoslovakia, Yugoslavia), comes to the creation of new states. The newly created state different dynamics undergoing the process of transition. The transition process is more or less in all countries is favorable for the operation of organized crime organizations.

State and politics have a duty to their actions through the institutions of the system, strengthen the legislative, executive and judicial system of government, creating the environment for combating and eliminating all forms of crime. This state policy and create a safe society and the state. In this way, the security of citizens and trust in the institutions responsible for combating crime. Looking at the impact of politics and the state in its infancy, the development and the growing crime in area of former Yugoslavia, Federal Republic of Yugoslavia, Serbia and Montenegro the Republic of Serbia point to the turbulence and the consequences in the development and creation of new democratic politics in the Republic of Serbia.

Former Yugoslavia of 90s year its policy of contributing to the beginnings, development and strengthening of organized crime through: uneven economic development of the State (the ratio of the Republic of Slovenia to the Republic of Serbia, ie, the ratio of the Republic of Montenegro to the Croatian etc.). The disintegration of Yugoslavia, the war in the former Yugoslavia, the introduction of international sanctions Republic of Serbia and the great inflation conducive to organized crime organizations, its activities and its increasing. The international community imposition of sanctions against Serbia, it is economically and economically vulnerable and dependent in part of the strategic necessities of life of the population and the functioning of the economy and public activities, thus

[1] The forms of organization: capitalism, socialism, monarchy, communism and other forms.

creating the conditions for the operation of the gray market and the development of crime.

The Republic of Serbia as a newly created states in the former Yugoslavia was characterized by a certain degree of instability. Various conflicts, especially with the Albanian population which had separatist tendencies[1]. The unresolved status of the borders between the newly formed states, states of the former Yugoslavia (according to Albania to Macedonia, to Croatia, Bosnia and Herzegovina, etc.).

The migration of the population (refugees, displaced persons, asylum seekers), which found a sanctuary in the Republic of Serbia. Political life in the Republic of Serbia, which is characterized by the diversity of organizations, political parties, movements, associations, on the one hand and non-governmental organizations (civil society sector) on the other hand, creates an unfavorable climate for the functioning of institutions and provides space for the operation of corruption [2] and the organization of organized crime. Economic instability and economic state, which reflected through unfavorable ownership transformation and privatization process, resulted in a large number of unemployed and falling living standards. The above findings indicate that the Republic of Serbia has seriously confronted with the phenomenon of organized crime[3] and corruption at all levels, from individuals, community groups, local communities and the state.

ROLE AND PLACE OF ORGANIZED CRIME IN THE STATE AND POLITICS

The emergence and development of organized crime Organisations and their activities in the country, especially in countries that have passed or are still in transition, favoring the following conditions:

- The process of globalization
- Difficulties and problems of political and economic system
- Inadequate normative legal regulation
- Inadequate state solutions in supply and demand, which leave room for money laundering[4]

[1] Hatidza Berisha, Political violence in Kosovo and Metohija, Foundation, Belgrade, 2013, p. 29 - 32

[2] Corruption is a relation based on abuse of authority in the public or private sector for personal gain or benefit for another. Source, Mila Jegeš, security operations in terms of procurement in JP. Petroleum Industry of Serbia specialist work, Civil Defence, Belgrade, 2005, p. 67

[3] Momcilo Grubac, Organised Crime in Serbia, Proceedings of the Faculty of Law in Split, Year 46, 4/2009, p. 701 - 703

[4] Mico Boškovic, Organized crime and corruption, Banja Luka, 2004, p. 59 - 60

- Market liberalization
- Transfer money and capital
- Porosity of borders
- Inadequate technical and technological equipment

Based on the top elements of organized crime after the breakup of Yugoslavia found its footing both in the region and in the territory of the Republic of Serbia. The elements that have contributed to the emergence and development of crime in the Republic of Serbia are:

- The wars in the former Yugoslavia (contributed to creating an environment that had the potential for the development of organized crime [1]
- Coupling of politics and government organizations with organized crime
- Ownership transformation (state and social ownership changes shape and titulare- auction, grants loans that are non-refundable financial injections that make privatization less desirable as well as the uncertain option).
- Processes of public procurement in the public enterprises and public services[2] (bid-rigging [3])

The above mentioned elements are inconsistent and insufficient application of the commission policy, state, executive and judicial authorities in the implementation of laws and regulations that have contributed to the state weakens and collapses. Individuals from politics and the government during the period of sanctions providing the missing products and raw materials used solely for personal interests. Gaining profit and achieve political objectives with the aim of staying in positions of power and used in conjunction with the criminal organizations that have developed and nurtured for personal interests to the detriment of the system and the state. This starts the collapse of state institutions in the country, strengthening the crime and its legalization participation in the political life of the country.

[1] The decline in living standards, the weakening of institutions: the system must have a distorted image, and possession of illegal arms transfers from the battlefield and traffic illegal channels, trade and trafficking of drugs, (author's note)

[2] Public services in terms of the public service are considered institutions, companies and other organizations established by the law who perform the activity or activities that ensure the realization of the rights of citizens, that meet the needs of citizens and organizations, as well as exercising other legally established interest in certain areas, source: Law on Public Services (Sl.gl.br.42 / 91 and 79/05)

[3] In defining elements for the tender (leakage of information services that are in preparation for tendering in state institutions and public enterprises), made possible through the individuals receiving the information, the key to successfully winning the tender and award of procurement or public works. More judicial process is conducted on the subject ..... (eg court judgments) (author's note)

Individuals from organizations organized crime (which dealt with cigarette smuggling, arms trafficking, trafficking in oil and oil derivatives, money laundering), using its connections with individuals from politics and government are legal and legitimate members of the legislative and executive branches. In this way, or through individuals or personally affected by the adoption of laws that legalize their interests. At the scene was trading in influence and corruption is a step in the system's institutions as an integral part of the legislative, executive and judicial powers. Controversial privatizations indicated by the European Union, which are the product of different ownership transformations in the country where the altered form of ownership based on laws passed by the legislative power, have made, based on the law basics, changed the title, and often bidding enabled individuals to obtain large values for the low price of state and social ownership (Example twenty four privatization that have been registered by the Council for the Fight against corruption and certified by the competent institutions of the European Union). Examples of subsidized loans conjunction talk about individuals from government and politics with banks and individuals through which pull out the money, and did not present adequate guarantees, which the budget of the Republic of Serbia and the taxpayers' money emptied the pockets of individuals, whether from government policy or owners of private companies. And today we have a case that some owners of big money (Tycoons) and in addition to laws and regulatory bodies and the National Bank of Serbia, the budget spending taxpayers' money because with the consent of all relevant representatives of state institutions receiving loans from banks, which did not return, and for which were not given adequate guarantees.

Public procurement in the public enterprises and public services are also used to abuse the state capital and the taxpayers' money for private purposes. The Public Procurement Law is aimed disciplining participants in the procurement process, however, did not mind that individuals from politics, executive and judicial powers unite with representatives of crime and commitment to various forms of abuse and corruption, collapse the system and capture the state (various kidnapping , murder, public works, privatization, bankruptcies etc.).

At one point, the state could not have reacted that later shyly responded statements and reporting in the media.Country in which the event of liquidation and assassination of the highest government officials (former president was killed in that period the current defense minister and deputy minister of police were killed, Director General of the state airline was killed, police general was killed, judges, politicians, journalists, and then the current prime minister), indicates that the policy has not been defined to deal

with individuals from politics, government and organized crime, which was occupied country and dictated the terms function [1].

Country of experience to her murder current Prime Minister should indicate that it has authority and power, and all the levers to combat all forms of crime, we just need to make a crucial decision that "wants" to fight against crime, the state that has to change key elements in the country. States must never let anyone stop to deal with crime, corruption, with their own enslavement by organized crime organizations.

The state must represent competencies in, professional, highly moral, credible, strong and educated personnel. Human resources are the key to strengthening the institutions of the state.

STRENGTHENING THE INSTITUTIONS OF THE SYSTEM IN THE FIGHT AGAINST CRIME

Modern states and modern society defined their relationship in the fight against organized crime with strategy and policy. The aim is to create a state policy and legislative framework for the functioning of the executive and judicial branches. Country, creating a legal framework and conditions for the fight against all forms of crime and attacks on the country, primarily must adhere to the principles that will ensure the materialization of her goals. These principles apply to the consistent selection of high moral, professional, knowledgeable, professional staff, who have credibility in their attitude and in their work. If the system's institutions have defined objectives and selected personnel for the realization of the goals, the political will of the state and its institutions in the fight against crime and corruption will be reduced to an acceptable extent. This suggests that neither the state nor the system can not be eradicated nor corruption nor crime, but it can lead to a measure of systemic controlled the activities of organized crime. The political will of the state to eradicate crime and not to allow its development, given the task of legislative and executive authorities are constantly monitoring and analyzing the adopted standards and measures. Monitoring the implementation of adopted standards and measures and constant upgrading of laws, must be a permanent task at all levels of the executive branch. The judicial power of its functioning and its justification before the legislative authority defends professional, timely, judgments based on the law, which will give security to the citizens to believe in law and justice in the system and order. For this to happen important is the fact that citizens may in practice to convince the

[1] Momcilo Grubac, Organised Crime in Serbia, Proceedings of the Faculty of Law in Split, god.46, 4/2009, p. 701 - 703, see more in Mico Boškovic, Organized crime and corruption, Banja Luka, 2004, p. 59 - 60 (Organized Crime in the part related to cigarette smuggling, narcotics, weapons, kidnapping, murder, human trafficking, prostitution, etc., is only possible with the participation of policy, executive and judicial authorities).

court, prosecution, law enforcement and other representatives of state institutions working for the benefit and interest of the citizens.

We see strengthening the institutions of the system in the commitment of the state to develop awareness of the legal state, protected from crime and corruption in the institutions of the state of the local community and representatives of the legislative power. To develop awareness of citizens across the basic cell of society, through families (where life is born, to grow, to educate), through the education system. Strengthening the system of education from pre-school to the academic level of education in the state and society should enable the young generations gradual cognitive and learning about values, about life, about postulates essential for the duration of the state and society, the role of the state and society and the role of each individual in state and society. Through a system of education for young people on the basis of law, learning and cognition, on the basis of enlightenment and overcome all types and forms of struggle against organized crime.

Strengthening the legislature, through the clear commitment of policy and its determination to deal with all forms of crime, a message is sent to the executive and judicial authorities to the institutions of the system must perform legally defined tasks, and those relating to the consistent and steadfast implementation of laws and norms.

Executive power with its consistent implementation of the law respecting the principle of application compentent and on the norms and law-based operation, ensure the implementation of the legislative policy of local communities to the highest authorities. With such a system is performing its role the executive has the opportunity to apply all aspects and forms of control over the work of administration, thus contributing to the strengthening of the system within the institution and reduce the potential for misuse to individuals in the executive branch and access control representatives crime individuals from the administration. Both the prosecution and the courts have a particularly important role in creating an environment for strengthening state institutions in the fight against crime. Prosecution primarily plays the role of the task that their actions create security for the citizens that they are protected, they are sure to be taken care system and the state and its timely response and making protecting life, liberty, and property rights of citizens. To the right of citizens of Serbia defined by the Constitution, but the institutions of the system to have its functioning and to prove. Citizens, as taxpayers, have an obligation to provide benefits in the state budget, but also the right to security, protection and transparent information to the budgetary funds are spent. The control functions of the state are tasked with defined responsibilities and tasks consistently, without exception, perform, how could I not going to be

selective controls make concessions to the owners of big capital or rarely illegally acquired capital, or capital acquired with the help and participation of individuals in politics and government (it is known that some owners of big capital in the transition period acquired capital which is measured with the size of the capital of the state itself). Control authorities must determine the origin of capital[1].

Strengthening independent bodies is one of the key roles in achieving the fundamental principles of a democratic society and the creation of security to protect the rights of citizens of all shapes and attacks on the right and freedom to legitimately and lawfully exercising their basic human rights and dignity. For protection against various forms of crime and attempted criminalization of certain entities and systems.

The modern state of non-governmental organizations have a special place and role. They have the task to transparent mode of functioning contribute to the system and institutions in the system of executive power developed in accordance with European and international values. That joint projects strengthens the role of the state in all aspects of its functioning from education, the environment, human rights, minority rights, the right to provide the conditions for participation in international organizations and institutions of culture, science, sport to other forms of cooperation that will provide faster development and strengthening of the state, its institutions and organizations. These are the elements that contribute to all aspects of crime transparent work of the state and its institutions observed in the beginning and prevent or sanction the very beginning, the intention. All those elements are the basis for the state to strengthen ourselves and our of institution, in the fight against organized crime organizations. The most important element is the consistency of objectives and competence and integrity of personnel who are tasked to conduct defined responsibilities.

CONCLUSION

1. Science noted that crime is as old as the state and that it is a product of the state and society.

2. Tranzicion process more or less in all countries is favorable for the operation of organized crime organizations.

3. Nonconsistence of politics and the state in the implementation of the highest legal acts of the country, which define the protection of the sovereignty, territorial integrity, independence, freedom and human rights,

[1] Addressing the President of the Council for the fight against corruption in the government of Serbia Verica Barac, the origin of the capital and the 24 disputed privatization (which are mention on the bodies of the EU on reports).

the right to live and work, provide space for the unlawful actions of both individuals organized groups, organized crime organizations, terrorist groups with the aim of weakening the institutions of the system and the subordination of the state crime. Organised crime aims to get across individuals in politics and the state infiltrate and through the legislative and executive branches of government achieves its objectives and impacts (impact of trade and corruption). By creation legal framework for combating all forms of organized crime and attacks on the country, the legislative, executive and judicial power must be strictly complied with their statutory requirements.

4. The materialization of legally defined tasks will be consistently implemented, only if the state at all levels of its operation ensure the selection of high-moral, professional, knowledgeable, professional staff, who have credibility in their attitude and in their work. If the system's institutions have defined objectives and selected personnel for the realization of the goals in the fight against crime and corruption, organized crime will be reduced to the extent reasonable and controlled. Strengthening the institutions of the local community, district, province, to the state level in the work of the executive and judicial power over control and independent bodies and organizations and with transparency functioning, creates the possibility of fighting crime and corruption in the bud.

5. The key to combating crime at all levels are competent, credible, educated and highly moral personnel at all levels and in all institutions in the country.

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RELIGION AND POLITICS IN SOUTHEAST EUROPE (SOME QUESTIONS AND DOUBTS IN XXI CENTURY)

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Abstract

In this work accent shall be put on the part of the development of the religion and politics in Southeast Europe from the past several centuries until present days. The complex long-term processes inevitably manifest moments of decline in certain parts and degrees which are most often present following the points which are defined as culmination of the development process in this certain region. The analysis of the religion and politics in Southeast Europe at the sole start of the insertion is a useful tool for understanding and avoiding certain negative influences. Many scholars believed that religion will eventually lose importance and because of that societies will face a decline of religious beliefs. However, by the end of the 20th century many changed their views and acknowledged that secularization theory does not work and that religion is as important as always. Recently, scholars have also advocated that religion emerges in times of crisis such as, for example, the Arab Spring, the breakup of former Yugoslavia, the current economic crisis that is shaking the world etc. It is questionable whether we can truly discuss secularization as a phenomenon or we should simply turn our attention to the notion of religion in all of its aspects and try to increase understanding of this complex phenomenon. But, if democracy is understood as the method of electing and changing government and that a country can be called democratic, the possibility of the co-existence of Islam and democracy remains an open issue.Taking into consideration all of that, in this paper I will try to skretch some aspects of the functioning of the Multi-ethnic and Multi-religious States in XXI Century in correlation with the question of the interrelationship between democracy and Islam in Southeast Europe.

Key words: Religion, Politics, Southeast Europe, millet system, democracy, Islam.

Introduction

It is completely certain that the study of religion and politics in the region of Southeast Europe is a very complex and extremely complicated process.

It is understandable that in approach of these complex social phenomena the first challenge facing the researcher consists of mass information that gather history, anthropology and psychology, which through the complexity of many legal and philosophical content are creating the first barrier that explicitly instructs them to systematize in a thoughtful system through which there is a possibility for further research.

Anyway, at the very beginning, it is important to point out that today, as well as a century ago, the relationship between religion and politics in Southeast Europe is a very important issue that is connected directly to the security situation and to the well-being of the people and because of those reasons that issue needs to be treated with serious caution.

On the basis of the above written, it is inevitably to agree with the conclusion that trying to define the general meaning of the term "religion" is undoubtedly that basically no one is completely sure about the true origin of the word. What is known is that its root comes from Latin and it was used with different meanings . If we look at them , we will find that the Latin root of the term signified:" to be taken care of some activity {religere} or something firmly connected {religare}". Therefore, in its transmitted sense, it has been developed to the point that it is nowadays representing the beliefs, behaviors and the social institutions. "Because of all these concerns about the non-empirical world that is somehow out or at the other side of the human history, it is usually thought that the things we call "religious" are in an opposite with the institutions that we call "political".[1]

On the other side, the term "politics" has an antique Greek root and since ancient times has signified "the proficiency in ruling the country or any branch of the state affairs."[2]

It is without a doubt that the perceptions of the meaning of politics depend on the interpretations of human nature.Since Aristotle, where „a man is a political being by its nature, which can shape its human nature only in a community with other people"[3] – until today, it is clear that „the different perceptions of politics could be established in the abstract – theoretical

[1]Нов Лајонов Прирачник *Религии во светот*, Главен уредник Кристофер Партриц, Младинска книга Скопје, 2009. p. 11.

[2] Миќуновиќ, Љубо, *Современ лексикон на странски зборови и изрази*, Наша книга, Скопје, 1990. p. 469.

[3] Аристотел, *Политика*, Слово, Скопје, 2006. p. 8.

models, with a greater number of variations, depending on the historical events and the wealth of the political thought ".[1]

Without any specific tendency of going into the terminological benchmarks and theoretical debates that constitute the empirical upgrade of the same, it is more than clear that these two social phenomena have multiple meanings and also a huge impact almost on the entire history of the civilization.

According to H. J. Blackhaw: „What started as magical pursuing of objectives that were not available for the usual means, over time has been developed into a complete and comprehensive system of ideas that gives the man a conception of the nature and the purposes of the world as a whole and a pattern of principles to guide the relations with the close ones. Philosophy and science have resulted from a critical development of these religious views on the nature of the world, and the study of human and society is a result of religious observations on the human soul and fair course of its behavior".[2]

On the other hand, Emile Durkheim in his work "Les forms élémentaires de la vie religieuse" (Elementary Forms of Religious Life) noted that: „religion in its essence is a projection of the highest values and goals of society".[3] This attitude of the French sociologist differed a lot from his predecessors from the Age of Enlightenment, who treat religion as a kind of instrument or a bond, which determined the organization of society before the French Bourgeois Revolution (1789).

Modern theoretical views are louder in the conclusion that the secularization thesis is essentially nothing more than just a myth. In this dichotomy of beliefs for the religious vision in the modern world, while taking into consideration the aspects of what influences the cultural configuration of the world after two world wars and based on the fact that civilization is the broadest cultural entity, it is certain that the global politics is in every sense getting a new relief along with the cultural boundaries.

For these reasons, it is indisputable that under the objective historical circumstances, the entire region of South East Europe in the past two and a half decades has become a great "laboratory" in which it has been realized the transition from political one party system into political pluralism. Therefore, it is not at all mentioned that some countries from the region almost for the first time have met with an opportunity given by history to establish as a parliamentary democratic and some have turned back at this

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[1] Шкарић, С. Иванов. Ѓ. *Политички теории Антика*, Правен факултет „Јустинијан Први", Скопје, 2006. p. 45.

[2] Блекхо, Кренстон, Фолкис, Хук, Џац, Лори, Мекреи, Квинтон, Смарт, *Растежот на идеите*, Култура, Скопје, 1995. p. 11, 12.

[3]Durkheim,É. *Les formes élementaires de la vie religieuse*, PUF, Paris, 1968. p. 55.

kind of establishment after more than half a century. Therefore, confusion in which this process takes place is not surprising or whatsoever."[1]

When we add the religious factor to this, a number of religious concepts, which have had their tradition since the beginnings of Christianity, undoubtedly meet each other and interweave in a certain manner in the region of Southeast Europe, in a limited geographic area. Under the influence of the Great Schism between the two state - religious systems, i.e. Rome and Constantinople, their cultural and religious transformation occurred and contributed to the result of this historical process to be written in the religious map where a western piece of Southeast Europe belongs to the Roman Catholic ecumene whereas the remaining part is predominantly Orthodox. For those reasons, the religious affiliation in the region is undoubtedly a mark with which affiliation to a certain religious group with a certain national mark is deeply interlocked.

All these indicators, to which one must indisputably add the long reign of the Ottoman Empire that had also anchored the presence of the Islamic religious mark in the region, leave a permanent mark, above all, on the creation of ethnic issues that had embodied national movements, which on their part, exerted essential influence on creation of national states that underwent several phases of adaptation and transformation throughout the 20thcentury. These processes have been still compelling until the very day and represent the field in which the nationalism and religious division will confront in the future as well.

Historical Development of Religion and Politics in Southeast Europe by 1453

Starting from the root meaning of the Christian religious system, first we must unquestionably mention the basic philosophical – theological elements, which are firmly sealed in its cultural foundation, where the two elementary pillars rest i.e. the Old Acadamey and the Christian Church of Jerusalem.[2]

It is known that, starting with the Edict of Milan, an edict of tolerance of Christianity from Constantine from 313 AD in the Roman Empire began a

[1] Лазаревски, П. *Политика и стратегија*, НикЛист, Скопје, 1995. p. 1.

[2] In this sense we speak of Platonism, which unquestionably was a dominant philosophy in the first centuries AD. In this context recognize the claim of Dr. Vladan Perishiђ expeditious which concluded that: "... the Christian Fathers of the first century, many thought the Jewish (Old Testament) than the Greek (philosophical) categories, but as early as the second and third century Platonism, fully suppressed other philosophical orientations and is a major "aid" of philosophical theology of the Fathers and teachers of the Church ... ". For this, see more in his book *И вера и разум*, ЈП Службени Гласник, 2009, Београд, p. 14.

new era of complete socio – political and cultural transformation. In terms of political – legal aspect, this transformation has created the major Christian ideological directions that, after the Schism of the Empire, continue to have an impact, primarily, on Christian Europe.[1] Hence, the relation of the ruler to the law marked the enormous role on social development in the Byzantine Empire performed by Justinian I with the codification of the Roman law - Corpus iuris civilis.[2]

In this context, we find the idea for divine origin of the Empire in the introduction to the second part of Corpus iuris civilis i.e. in Digests[3] where the governance of the Empire according to the God's will is accentuated explicitly. In Justinian's legislation, an idea that the emperor came immediately after God was presented as a belief that he reigned in the name of Christ.

The Great Schism between the West and the East Roman Churches and the political process that actually divided the Great Roman Empire into two in 1054, contributed to the deepening of tensions that were typical for that period and continued even after the physical division of the Empire. They influenced the development of social relations in the East Roman Empire where as a result of that upheaval, soil was created on which the spiritual and cultural ethos typical for the Byzantine Empire elevated, from which the orthodox Church was actually brought about.

One of the basic issues that are posed when the Byzantine Empire is in question is certainly the issue of the relation between the state and the church, i.e. the relation between the secular and ecclesiastical authorities and a possible dominance of one over another. In this regard, it is important to mention that the maxim "God's kingdom on earth" represented the true reflection of the conception which Rhomios i.e. Byzantines had for themselves.[4] Hence, it is especially important to emphasize that such vertical organization of the Byzantine society remained present during the entire existence of the Byzantine Empire. The understanding of its own world order in the Byzantine society imposed the belief which under no circumstances tolerated any contest, either inside or outside, because it was deemed that the Byzantine order was under the utmost – the divine protection. For this reason, any disputing of the order in Byzantium was regarded not only as opposed to the state principles and interests, but also as something that was

[1] Sarkic.S. *Pravne i politicke ideje u Istocnom Rimskom Carstvu*, Naucna knjiga, Beograd, 1984, p. 252.
[2] Ransimen.S, *Vizantijskacivilizacija*, Minerva/Subotica – Beograd, 1964. p. 70-71.
[3] Digests quoted and summarized the opinions of the Rome's greatest legal thinkers about the laws. It consisted of 50 volumes.
[4] Оболенски. Д. *Византискиот комонвелт Источна Европа 500 – 1453*, Слово, Скопје, 2002. p. 325.

against God's will and it was treated as heresy and as an act of God's enemies and opponents of the "true faith". Taking all this into account, we can understand much better why the state of Byzantium almost never made some substantial reforms in its institutions.

For all these reasons, when it comes to the Byzantine Empire, a different relationship between church and state is characteristic, so apart from the ruler who was chosen by the Lord, the role of the religious head was limited to the spiritual functions, that is, to the preservation of the purity of faith within the Church. In spite of this proportion of relations, the emperor also took a special part in the church service. Namely, the Byzantine Emperor was the only laic who was allowed to attend the Eucharist behind the altar, by which God's grace was confirmed and by that act the emperor was made equal to a clerical person. The relationship between the Christian emperor and the head of the church was perceived as harmony, which implicated that the Church accepted the Emperor as its protector and a guardian of the unity of faith, while the Church voluntarily limited itself to the purely spiritual field.

This concept would later become known as caesaropapism, or a concept of the unlimited power of the emperor over the church, spread throughout the Orthodox ecumene.[1]

In the complex and strictly hierarchized social order of the Byzantine Empire, the head of the church could not easily fall into temptation to claim the right to political and legal authority through his spiritual authority. The conflict within the so perceived order and hierarchy was possible only where the emperor himself would breach the teachings of the church, and the head of the church could use only his religious beliefs to warn the emperor. Therefore, the danger of disruption of the harmony could happen only when the emperor would break his authority and would interfere with the internal freedom of the church and with the spiritual matters.

Such organisation in the Byzantine Empire was present until its final dissolution and it became the platform on which a new and almost unknown Islamic order to Southeast Europe, which in continuity of five centuries contributed to creation of religious pluralism that would undoubtedly influence the cultural and social transformation of society in the next historical stage.[2]

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[1] Острогорски. Г. *О веровањима и схватањима Византинаца*, Просвета, Београд, 1970. p. 225.

[2]For this, see more in Nicol. D. M. *The End of the Byzantine Empire*, Holmes & Meier Publishers, INC. London, 1979. p. 86 – 91.

From the Millet System to a New Civic Society

With the final fall of Constantinople in 1453 and with the Ottomans conquering the Balkans, the rise of the Islamic dominance was felt in all levels of social living in the new Empire. The introduction of the Sharia as a state religion set the bases that developed the system of norms regulating hierarchy and order, which also included life of non-Muslims within the great Ottoman Empire. In this regard, until the complete fall of the Empire, the issue of religious affiliation, or more specifically, the issue of the church jurisdiction permeated the consciousness of the subordinated people, besides the main preoccupation related to agrarian relations. This relation was also specifically important because with the very establishment of the Ottoman rule in the Balkans, the Ottomans recognised non-Muslims as citizens with limited rights, besides Muslims who were full citizens.[1] Beside this protection, non-Muslims in the Ottoman Empire also enjoyed other rights and privileges within the millet system, typical for this Empire.

As a social form with the religious character, the millets in the Ottoman Empire as their primary goal had the application of moral and religious values within the state arrangement of the Empire.[2] For those reasons, functioning of the Ottoman system was based, above all, on religion and its institutions. The Islamic religious system was directly installed in state institutions, the Christian and other heterodox communities and although of second level, it managed to preserve internal autonomy thanks to religious institutions. In parallel with this, attempts of the Sublime Porte for its own administration reform took place. This essentially laid the foundations of the system of centralised and spiritual rule.

At the very beginning of the 19thcentury, the future of the great Ottoman Empire became uncertain because of a sum of social and economic relations, as well as political circumstances that insufficiently reflected on the process of its transformation into a modern state. Under the influence of western ideas about the nation in the Ottoman society, the contents of the millet system started to change gradually at the time. Millet community elites, by accepting those ideas, gradually started to express their own language, their customs and traditions characteristic for their groups. They started to work in compliance with the political aspirations of their ethnic or linguistic group, trying to break the religious frameworks of the millet and

[1]Itzkowitz. N. *Ottoman Empire and Islamic Tradition*, The University of Chicago Press, 1972. p. 38 - 40.

[2] Milla, the Turkish form of which is Millet - has the Aramaic origin and originally, it means a "word." Hence it denotes a group of people who accept a special word or book of revelation. It was used for the religious community of the Islam, but it was also used by other, including non-Muslim religious groups.

build solidarity with people who talked the same language and shared the same culture. In this manner, the ethnicity and uniqueness started to be emphasised in the Orthodox millet. Since then, the Patriarchate of Constantinople, which had been a uniting institution in the Orthodox millet until then, started to transform itself into a political institution and identify itself with the Greek people, assuming the role of the Greek national church.[1] At the same time, that encouraged other people in the Balkans who belonged to the Rum Millet to start their struggle for the national independence.

For those reasons, the Sharia legal order experienced important changes within the whole social order, under the enormous influence of events. It was especially characteristic the judiciary system within which inequality between Muslim and non-Muslim population was evident, where as a result of distrust to the official institutions in the system, the Christians often preferred to settle disputes within the church autonomy of municipalities. Based on that principle, the Church had jurisdiction over a large number of issues, including the issues related to marriage and family and especially over trade cases of disputes in which only Christians were involved. Although theoretically, criminal cases such as murders and thefts were under the control of the Muslim judiciary, the Orthodox councils often resolved such cases if no Muslim factor was involved in them.

In serving justice, the church based its decisions on the Canon law, the Byzantine statutory law, the local customs and church manuscripts and tradition. The ecclesiastical councils were able to made rulings such as: imprisonment, fine and exile, as well as one's depriving of holy customs and excommunication. A part of those penalties persisted by the end of the Empire. The Christian population preferred to seek shelter in those courts where they were tried on an equal basis, and their witnessing was of greater importance.[2]

In that manner, on the one hand, the Ottoman millet system played a positive role in preserving the religious and linguistic identity of the non-Muslim population. On the other hand, in the 19thcentury, the Millet system had a negative role for the Ottoman Empire itself, contributing to its dissolution. With the very fact that it enabled division of society along the religious lines, the millet system became a serious obstacle in the attempt of the state to integrate all subjects into a common society. All that affected significantly the creation of the Balkan pattern on which nations and states were created in Southeast Europe.

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[1]Јовановски, Д. *Балканот од 1826 до 1913 година*, Универзитет „Св. Кирил и Методиј" Филозофски факултет – Институт за историја, Скопје, 2011. p. 13 – 16.

[2] Стојановски, С. *Основни претпоставки за поставеноста на правниот систем во рамките на доцно османлиската империја*, Зборник, на Правниот факултет „Гоце Делчев" Штип, 2010 година, p.185.

Dilemmas and Challenges in Southeast Europe in the 21st Century

In the era of the emergence of nationalism in the Southeast European region, the three most important factors that determined further pace of the events that followed in the 20thcentury were met. Those were: the increasing sinking of the great Ottoman Empire, the process of revival of the Balkan peoples and the entrance of the great European forces into the Balkan politics. During the whole 20thcentury, as a result of the above mentioned factors, the region was marked with a number of military conflicts, territorial divisions, displacement of populations, and formation and disappearance of a number of alliances and state forms. Deep ideological disagreement directed the ideological conflict during the whole century, and ideology of communism resulted as a direct consequence on changes in the traditional life that were conditioned, above all, by industrialisation, as well as the need of great forces for dominance and superiority in the world after the Second World War.

What is of special interest in research conditions is certainly influencing in the creation of the specific social and political pattern, which Marija Todorova defines in the following manner: "Geographically, the Balkans is an inseparable part of Europe, but culturally it is construed as an "inner otherness," the Balkans have conveniently served when absorbing the ample externalised political, ideological and cultural frustrations that originate from tensions and contradictions typical for the regions and societies outside the Balkans. Over time, Balkanism became a convenient replacement for the emotional discharge that used to be enabled by Orientalism, since it freed the West from charges for racism, colonialism, Euro-centrism and Christian intolerance to Islam. Actually, the Balkans is in Europe, Balkan people are white, mainly Christian and therefore by projecting one's own frustration on them, the usual racial and religiously coloured insinuations can be bypassed. As in the case of the Orient, the Balkans served as a warehouse of negative characteristics against which a positive and self-complacent image of the European and the West was constructed. With the re-emergence of the East and Orientalism as independent semantic values, the Balkans remained the European serf, anti-civilization, alter-ego of Europe, its dark side."[1]

If we look back historically, great ideological barriers which created this characteristic geopolitical space following the Second World War were undoubtedly ruined along with the demolishing of the Iron Curtain. For those reasons, it is not surprising that the West perceives this region with the

[1] Тодорова, М. *Замислувајќи го Балканот*, Магор, Скопје. p. 277 – 278.

maxim: "The Balkan people produce more history than they can consume."[1] However, one should also emphasise that the events in Southeast Europe cannot be possibly analysed separately, without taking into account the events globally. Events in Afghanistan, Iraq, a tendency for cleansing the country from Christians made by extremist organisations (e.g. ISIS), the situation in the Gaze Strip and the eternal struggle for Israel, the latest events in Ukraine and the Serbs' express participation in helping their "brothers by religion, the Russians" and many other examples unavoidably have influence on the events, emergence and development of extremist organisations and their activity in the region. It is quite certain that those influences, besides the nationalist background, have a deep religious background since the main characteristic of conflicts in Southeast Europe is certainly the religious factor, i.e. that the general perception is concentrated on development of extreme fundamentalism, regardless of whether this is about the Islamic, Orthodox or Roman Catholic extremism.

Starting from military conflicts that emerged following the dissolution of former Yugoslavia until the emergence of Serbian extremist groups, the Greek nationalism, the idea of a Greater Albania, the 2001 armed conflict in Macedonia and the proclamation of independence of Kosovo, it seems that this geopolitical region still remains an alarming zone of ethno-political conflicts that are an open door for destabilisation of the continent. It is also undoubted that ethnic conflicts that flooded the region of Southeast Europe in the past decade of the 20thcentury were mainly conditioned by major social changes brought about by globalisation.

For those reasons, the statement that "At the time of rule of communism, nationalist and ethnic conflicts in East Europe were frozen for half a century" is quite true. With the end of the Cold War and removal of the Soviet hegemonism, many of those tensions melted down. For example, rivalries between the Serbs, Croats, Muslims and Kosovo Albanians in former Yugoslavia became noticeable and important with the end of the Cold War and the end of its communist governance and this led to horrifying consequences for the country."[2] All that had an impact on opening the room in which influences of the West interlocked with the emergence and presence of various extremist, dominantly Islamic groups, which continually create the picture of intolerance and division to "we" and "they" (in ethnic terms), and to "ours" and "theirs" (especially in religious terms).

[1] Лори. Б. *Балканска Европа*, Матица Македонска, Скопје, 2003. p. 215.
[2]Нај. Ц. С. Помладиот, *Разбирање на меѓународните конфликти, вовед во теоријата и историјата,* Академски печат, Скопје, 2008. p. 335.

Conclusion

Taking the above into account, it becomes clear that the countries in the region of Southeast Europe are the ground that is subject to the emergence and development of various forms of extremism and fundamentalism. Numerous conquerors and liberation movements directed against the Ottoman Empire paved the way for a rise of the nationalist spirit. The Byzantine cultural heritage, Islamisation, colonisation and numerous changes in the social life, various directions of impact and their interests as well as interference in the Balkan affairs by the Great Powers also led in the direction of strengthening the nationalist movements. However, it seems that the events in the former Socialist Federal Republic of Yugoslavia and its dissolution, loss of connections with religion during its existence, different treatment of ethnic and religious groups within it as well as the inability for one's religious expression encouraged the interference of extremist organisations during armed conflicts. Thus, these processes became the strongest catalysts that determined the emergence of the religious fundamentalism on the ground of the Southeast Europe.

In this context, one cannot neglect the fact that the issue related to the role of the Islamic factor under the new conditions of globalisation trends of existence is subject to an indirect generalisation arising from intolerance towards this civilisation paradigm. This religious dimension, in correlation with the Christian one in the region of Southeast Europe, represents autochthonous cultural and social dimensions which, in the newly created conditions, are subject to instrumentalisation on a daily political basis.

Therefore, it is obvious that the role and the influence of the Islamic fundamentalism in the region of Southeast Europe is subject, first of all, to the assessment of the Western attitude of the functioning of the global social system and to a great extent, it is not clarified, at least if observed in terms of the contemporary civilisation history.

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STRENGTHENING THE RULE OF LAW AND THE RESPONSIBILITY OF THE INSTITUTIONS: JUSTICE IS DONE OR JUSTICE NEEDS TO BE DONE?

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Abstract

Lately, in Slovenia a lot of attention has been focused on the role, decisions and (in-) dependence of the judiciary. The possible reasons are[1] some high-profile criminal cases, such as the Patria case, due to which the lay public might get the impression (based on the mass media articles analysis) **that individual businessmen and politicians are untouchable.** This further undermines the reputation of the judiciary and **triggers the citizens' doubts into the rule of law.** While the polls show low confidence in the judiciary, the number of litigation and other legal matters filed to the court by citizens increases each year. When judges are evaluated in terms of fairness, impartiality, professionalism, independence and understanding, the average values vary between 4.62 and 6.03 on a scale of 1 to 10. Nevertheless, the Global Competitiveness report, which classifies countries according to the independence of the judiciary, ranks Slovenia to the 91st place. Various controversies have encouraged the professional public and the authorities to address two messages to the public, promoting the judiciary's special and important role in the society. As the guarantor of fairness in the fundamental rights of the rule of law, the judiciary must enjoy public confidence if they are to be successful in carrying out their duties. Several already issued constitutional decisions state that the judges are independent and bound by the Constitution and the law in the performance of their judicial functions. On the other hand, the review of the public opinion polls in the last decade suggests that the level of trust in the judiciary decreases constantly, with the exception of the research published in October 2014

where the level of confidence in judiciary is still evaluated as negative, but in comparison with 2013 it rose by 19%. The judiciary and other professional public have already adopted a systematic approach to the problem by organizing roundtables, expert public debates and by introducing some amendments to the Law on Courts and Judicial Service Act, as it is necessary to protect confidence into the system against destructive attacks without any real basis. These changes and the commitment signed between the judiciary and the executive branches have created good conditions for the efficient functioning of the courts. Consequently, the administration of Slovenian courts and the judiciary as a whole has improved in the recent years, the fact remarked by both, Slovenian and foreign professional public. The judiciary consistently raises the quality of their own work, but there are still many opportunities for improvement in relation to the various stakeholders. All the respondents clearly emphasize the importance of and the need for an independent and impartial judiciary. Great efforts will still need to be invested in ensuring the procedural fairness that would strengthen public's confidence in an independent and impartial judiciary, since the latter is one of the important factors for protecting citizens against the abuse of the state power.

Keywords: *justice, trust, independence, impartiality, public opinion, legislation, research*

INTRODUCTION

The level of confidence in the judiciary has been for some time one of the most important issues in Slovenia. The level of confidence in the judiciary can be one of the cornerstones of a successful democracy and an indicator of the country's development. The last decade has seen quite a few studies on this topic. The results of the research encouraged the judiciary to actively approach solving the mentioned problems. The reason for this may lie in some high-profile criminal cases, which included well-known people from the political and economic field, and significantly polarized the citizens (the professional public as well, but only those who participate in the debate and dare to express their opinion publicly.

However, as Novak stated: The relationship between the independence and the accountability of the judiciary should really be a standard for a modern state and its political system[1]. This mutual conditionality is ultimately also provided by our Constitution. The Article

[1] Novak, Marko., Sodstvo med neodvisnostjo in odgovornostjo ter primer Patria, September 15, 2015, www.iusinfo.si

125[1] of the Constitution guarantees the independence of judges, but also binds them to respect the laws and the Constitution, and in this framework also the constitutional principle of popular sovereignty under the Article 3 of the Constitution[2]; on the basis of this contract between the people and the judiciary, the latter was awarded a mandate to administer justice in the country.

Since the judiciary under the Constitution received a mandate to implement this kind of power from the people, they are also responsible for its operation, which is reflected in different ways in the constitutional system of checks and balances. For the high quality operation, we need a socially responsible judiciary, independent of all kinds of political influence on decision-making as well as the relevant legislation. In order to achieve this objective we amended the Law on Courts[3] and the Law on the Judicial Service.

THE WORK OF THE COURTS

In the past and also the recent years, the Court has repeatedly been the target of negative criticism concerning the efficiency and the speed of judging. Therefore, for a start, let us have a look at the labor statistics in the field of judiciary.

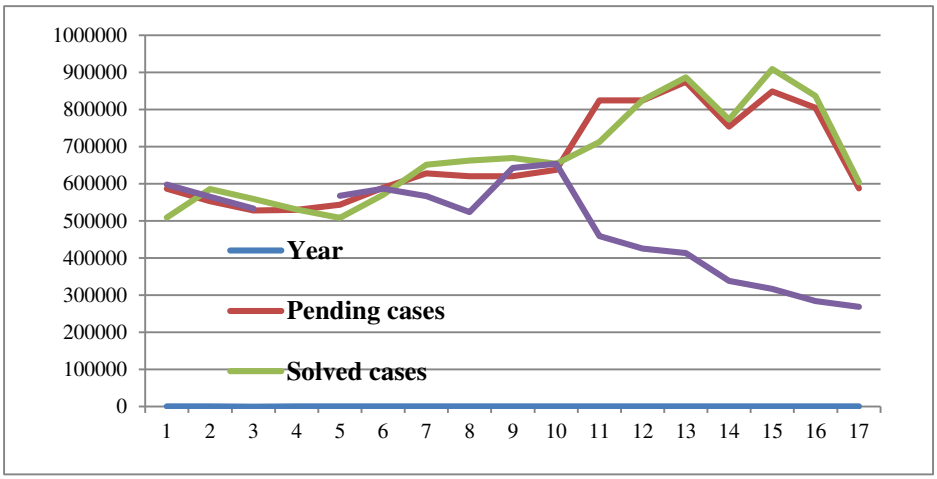
Judicial Statistics

The Judicial Statistics is each year prepared by the Ministry of Justice on the basis of the data from individual courts regarding the progress and the settlement of the open issues. In this case, we will focus on the number of new cases, resolved cases and pending cases that the courts dealt with at that time. The following graphic shows a compilation of data on the basis of the case data from 1998 to September 2014, relating to the before mentioned report on the movement and settlement of cases:

[1] http://www.us-rs.si
[2] http://www.us-rs.si
[3] The act proposal on Changes and Amendments of the Act on Courts, accessed on October 25, 2014, http://www.google.si/

Tabel 1 : Judicial Statistics from 1998 to September 2014 (The annual reports of the Supreme Court from 2004 – September 2014[1])

Year	Pending cases	Solved cases	Unresolved cases
1998	586740	509409	597587
1999	553324	585695	565352
2000	527856	558779	533255
2001	529981	530215	/
2002	543119	508050	567839
2003	588957	570236	586424
2004	628396	651459	566395
2005	620354	662840	524016
2006	620354	669748	642993
2007	637964	653618	653618
2008	824319	713009	459256
2009	824319	825399	425614
2010	874335	886573	413369
2011	753951	773078	338462
2012	848968	909239	316572
2013	804972	836541	284188
2014	587900	604042	268376



Graf 1: Judicial Statistics from 1998 to September 2014 (Number 1 in the year is the year 1998 2 covers data from 2009 and on. 17 includes data up to September 2014)[2]

[1] http://www.sodisce.si/
[2] http://www.sodisce.si/

In the period from 1990 to 2000, the number of new cases received by courts decreased. For the second part of that period, from 1998 to 2000, there is a trend towards the increasing number of resolved cases, leading to a gradual reduction of the delays. This is the period during which the problem of the excessive judicial backlog was acquired by the professional and general public. At the same time, all three branches of the government responded with the measures for its gradual reduction and elimination[1].

From the tables on the movement of all cases in the years 1998 to 2014 one can see that in all subsequent years (after 1990) the annual number of new cases was decreasing. The lowest point was reached in 1995, during the "judiciary reform". The materials, which were presented at amending the Law on Judicial Service in the year 2001 and within the twinning projects, repeatedly pointed out that the average number of judges in the Republic of Slovenia (in terms of population) was among the highest in Europe. For the year 2001 as of 31th December 2001 the statistics reported the extent of the backlog at different levels and types of courts and fields (types of cases) and areas of their work. The number of solved, unsolved and new cases drastically dropped in the period from 2007 to 2011, despite the fact that the number of the litigations and other legal matters filed by citizens was increasing year after year. Consequently, the Courts of Justice had to cope with new and novel judicial writings each year. For example, in 2010, the courts received a record number of 969,955 cases, which is 4.8 percent more than in 2009, when they received 925,360 court cases. All together, the courts resolved by 7% more cases than in 2011. In the following years, the trend of resolving issues was constantly decreasing.

The level of confidence in the judiciary - the analysis of* a *research

A). We will present below some of the quite extensive studies, which also included the research on the level of confidence in the judiciary. During the period from 1990 to 2001, the survey on the level of trust in the judiciary gave the following results[2]: Among all three branches of the government, the judicial authorities usually enjoy the highest level of trust from the public. Also in the Slovenian public opinion survey regarding personal trust in the institutions according to a seven-grade scale (1 = not at all trust, 7 = completely trust) the courts received the highest average rating. The results revealed the following level of confidence in the institutions: 3.5 for the Parliament, 4.0 for the Public Administration and 4.1 for the courts. The 51%

[1] Summary statistics for the period from 1990 to 2000, http://www.mp.gov.si
[2] Igličar, 1995

of the respondents replied “yes” to the question "Do you think that Slovenia is a state governed by rule of law?"

B). EUROPEAN SOCIOLOGICAL SURVEY[1]

The presentation of the results for 10 years: from 2002 to 2012; According to the expressed confidence, the Courts of Justice fall somewhat in the middle of the scale; about three fifths of the respondents pronounced distrust, but a good third of them stated confidence.

C). SURVEY: DEMOCRACY IN SLOVENIA[2] - the rate of democracy in Slovenia; the research was conducted in March 2011 by the Faculty of Applied Social Studies in Nova Gorica. During the survey, 907 adult residents of Slovenia were interviewed: in comparison to the year 2010, the level of confidence in the judiciary significantly reduced from 2.38 to 2.26.

D). EUROPEAN SOCIAL SURVEY, ESS 2012[3]

The survey was conducted on a representative sample of 2250 people. 1257 respondents older than 15 years completed the questionnaire. The questionnaire was filled out. (N = 1257). Respondents using a scale from 0 to 10 assessed their personal trust in the courts. The results were the following: 2001 - average score 5,2; 2002 - average score 9,7; 2004 - average score 9,1; 2006 - average score 9,10; 2007 - average score 8,4; 2008 - average score 7,7; 2009 - average score 2,6; 2010 - average score 1,4.

E). SATISFACTION WITH THE FUNCTIONING OF THE SLOVENIAN PUBLIC COURTS[4]

The survey was ordered by the Supreme Court of the Republic of Slovenia. The survey was conducted by the Centre for Public Opinion Research at the University of Primorska in the period from September to October 2013.

A public opinion among the general public: People's confidence in the judiciary is relatively low, as the average ratings of trust or distrust on a scale of 1 to 10 reached the value of 4.43. The characteristics of judges in average were evaluated with low values as the average grade of selected personal characteristics did not reach values higher than 6.03 on a scale of 1 to 10. The best evaluations were given to the professionalism of judges, with an average rating of 6.03. The assertions that judges are sympathetic and fair

[1] Toš, 2012
[2] www.fuds
[3] http://www.cjm.si/
[4] www.sodisce.si

got the grades 5.08 and 5.03, respectively. The lowest level of confidence was expressed for impartiality (4.94) and the independence (4.62) of judges.

The survey among professional public: 5.6 per cent of the surveyed representatives of the professional public believe that the Slovenian courts enjoy good reputation in public. The major part (75.7 percent) of the participants of the survey considers that the courts do not enjoy the reputation in the public while almost a fifth (18.7 percent) takes a neutral position. Concerning the confidence in the functioning of the courts, the respondents were rather divided: one third (34 percent) expressed trust in the functioning of the courts and also a third (34 percent) expressed distrust. Only slightly fewer percentage (32.1 percent) neither trust nor distrust the functioning of courts.

F). STUDY ON THE FUNCTIONING OF THE SLOVENIAN COURTS AMONG THE GENERAL PUBLIC[1] DURATION OF THE STUDY: FROM 30 SEPTEMBER TO 14 OCTOBER 2013

The sample included 730 surveyed individuals. Around a quarter (23.9 percent) of the respondents replied affirmatively to the question of whether they trust the judiciary. More than a quarter (26 per cent) of the people surveyed defined themselves neither positive nor negative in relation to the confidence in the judiciary. At the same time, slightly less than a half (49.6 percent) expressed a negative view. Among the latter, the extreme distrust is expressed by 27.1 percent of all respondents. As it can be seen from the above data, the average scores of the respondents' views on the selected aspects of the functioning of the courts fluctuate between the values of 3.11 and 4.61. Due to the fact that the answers were given on a scale from 1 to 10, the opinions reflect more disagreement than agreement. The respondents least agree with the argument that the court settles the case without undue delay (3.11), and that court proceedings are not expensive (3.88). Slightly smaller but still clearly expressed disagreement of the respondents was noted in relation to other claims, the average evaluation ranging between 4.32 and 4.61. Specifically, the respondents on average do not agree that the courts enjoy a good reputation among the public (4.32), that their functioning is clear and transparent (4.52) or that the socially disadvantaged have access to the courts (4.55). They also disagree with the fact that the number of pending cases in recent years has been reducing (4.58) or that the time to solve cases has been shortening (4.61).

[1] www.sodisce.si

G). THE RESEARCH "THE MIRROR OF SLOVENIA"[1]

The independent research "the Mirror of Slovenia", which has been conducted on-line since December 2012 by a marketing consulting and research company Valicon, measures the overall mood of the citizens and their expectations on the one hand, and their trust in the institutions and professions on the other. The study includes the measurements carried out in December 2012 (1733 respondents), from February to December 2013 (577 respondents) and in the second half of 2014 (898 respondents). The survey measured the level of trust in the institutions, organizations and professions by comparing the number of those who trust them and those who do not. For the purposes of this paper, we present a part of the research that is related to the functioning of the judiciary. The latest measurements perceived the largest increase in the trust in judges and courts, namely for additional 19 percentage points compared to 2013, but the overall rating was still on the negative side. Zorko sees this as the consequence of the recent high-profile media trials. The judiciary consistently enhances the quality of their own work[2], aware, however, that there are still many opportunities for improvement in relation to the various stakeholders. All the respondents to the public clearly emphasize the importance of and the need for an independent and impartial judiciary. While the professionalism and attitude of the judge are relatively well estimated, it is still necessary to invest a lot of effort in ensuring procedural fairness that would strengthen the public confidence in an independent and impartial judiciary[3]. However, we should not overlook the fact that the judiciary enjoyed the highest level of confidence around the year 2000. This is the period in which the major part of the case backlog was created, the largest number of cases was barred, the legal proceedings were the longest, and the operation of the judicial system the worst[4]. Recently, the judiciary has been systematically resolving the problematic internal factors and the average decision-making time, which also caused the emergence of backlogs and influenced the attitude of the political branches towards justice, has been the shortest in history and is still reducing.

LAY V. PROFESSIONAL PUBLIC

Lately, there has been a lot of re-writing and speaking about the Judiciary in the Republic of Slovenia (especially the criminal branch), regarding its application, decisions, (in-) dependence etc. The reasons for the

[1] Zorko, 2014
[2] http://www.vlada.si/
[3] http://www.mp.gov.si
[4] http://www.sodisce.si; Dimnik, 2011

excitement are some high-profile criminal cases, which particularly point out the extreme importance of the work of criminal justice and its fragile and sensitive role in the society. Through their work, many judges at all levels of the judiciary demonstrate their personal uprightness and the commitment to the justice and the law; there is no doubt that they are worthy of the full confidence of the people on whose behalf is the judge. However, it is generally known that the letters on paper anywhere in the world - and thus also in Slovenia - do not ensure that all the regulations (e.g. those concerning the criminal procedure and substantive law) will be always and everywhere properly put into practice. The judiciary approached changes, partially due to the above-presented research. Our former minister Pličanič[1] stated that more self-criticism of the judiciary would contribute greatly to the changes within its own ranks. One of the changes that the Ministry of Justice intends to propose in the 2015 is the abolition of judicial investigation. The Former Minister Pličanič explained that the Ministry has to significantly change the entire criminal proceeding in order to introduce this alteration. "The judicial inquiry will be cancelled and the tasks related to it will be transferred to the prosecutor's office", the minister said, but he also pointed out the problem with human resources at the Prosecutor's Office. With regard to the judgment of the District Court of Ljubljana in 2014, where the main accused were found not guilty of drug trafficking in the Balkan Warrior campaign, the former Minister stressed that the whole course of events negatively surprised him. Nevertheless, in 2014 the Chamber of the High Court has not taken a decision in the Patria case. All of this has prompted the competent bodies to address the public with several messages:

- Press release of the Judicial Council of 30/4/2014 in which it responded to a statement by Janez Janša, given at the press conference of 29/4/2014:[2]

"The rules intended to ensure the independence of the judiciary are in no way intended to also protect the inviolability of judges, but are aimed at protecting citizens against the abuse of the state power. However, the best way for judges to protect the moral strength and the integrity of the Slovenian judiciary is to withstand the pressure of political decision-makers and the media and to maintain personal uprightness and commitment to justice and law in every single decision-making."

- **The statement given by the presidents of the Slovenian courts on 5th May 2014 including the response to the complaints about the politically-motivated motivation of action of judges:[3]**

[1] www.politikis

[2] http://www.sodni-svet.si/

[3] http://www.sodisce.si/

"Regardless of the normal effort and performance, in addition to the internal factors, the external factors, including the consideration of the judiciary in public, are extremely important for the trust in the judiciary. The nature of the court of justice's work is to decide on controversial issues; they take decisions which dissatisfy at least one of the parties. Decisions that are taken in relation to its constitutional role in the society can be disruptive to the various stakeholders, or even contrary to the view of the majority."

- Roundtable: "What kind of justice do we need?"[1]

In the discussion, the guests of the round table were answering to the question of how to explain the lack of confidence in the judiciary and how it could be recovered. Prof. Kerševan, PhD, claimed that the negative opinion of the judiciary is a result of the falling living standard, which reduces the confidence in the state institutions in general. The guests of the Round Table were unanimous that it is necessary to prepare reforms as soon as possible if we are to have an effective judiciary that enjoys the confidence of the citizens.

The Supreme Court of the Republic of Slovenia as well as the Slovenian Government have issued a covenant[2] by which they gave an undertaking to the citizens of the Republic of Slovenia with regard to the situation in the judiciary which was primarily focused on reducing the time to resolve cases while respecting the following principles:

- Each case will receive individual attention in the shortest time possible.
- Individual attention will be proportionate to the nature and complexity of individual cases.
- Each task will be performed at the lowest possible level of competences.
- Decisions will reflect procedural fairness.
- Judges will oversee the procedure.

In 2012, Slovenia was among the six EU member states which had problems in the field of justice, particularly with regard to the duration of court proceedings and the organization of the judiciary[3]. The judiciary has an important role in the society, it carries a special function. As the guarantor of justice and the fundamental values of the rule of law, the judiciary must enjoy public confidence if they are to be successful in carrying out their duties.

[1] http://www.adp.si
[2] http://www.mp.gov.si
[3] http://www.mladina.si/

THE CHANGES OF LEGISLATION

Strengthening of the rule of law was also one of the main guidelines in changing the relevant legislation in the field of judiciary. The Courts Act [1] (ZS) was adopted in 1994. Since then, it was amended six times, the most recent in July 2005 with the new ZS-E[2]. The proposed amendments to the law were necessary primarily for the implementation of the Joint National project: the elimination of the backlog – the so-called "Lukenda" project. The current regulation of some institutions does not allow the effective elimination of the backlog and the need to supplement the existing arrangements with the introduction of some new instruments that will contribute to the efficient work of the courts.

The main objectives and principles of the Act-Proposal and other relevant legislation were:

1. To supplement the efficiency records of the judges' work and the efficiency records of the courts with the number of the resolved and the unresolved cases which are designated as a judicial backlog, thereby providing a more objective determination of the number of judges in the courts, and thus a more even distribution of the workload of each court and, indirectly, more objective establishing of the criteria for the minimum expected range of the judge's work [3].

2. To strengthen the role of the President of the Court in the management of the court he takes the chair of. He is transferred the authority (previously in the domain of the personnel council) to appoint and relieve from duty the Head of the internal organizational unit, as well as the authority to determine the annual schedule of the judges' work (appointing judges to work in the specific legal areas)[4].

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[1] Official Gazette of RS, no. 100/05 - official consolidated text; ZS

[2] Official Gazette of RS, no. 27/05

[3] In the Courts Act (Official Gazette of RS, no. 100/05 - official consolidated text), the third paragraph of Article 13 is amended to read as follows: "Managers of personal and other protected data, who hold data that are necessary for a court determination or assessment of the facts related to the conduct of the proceedings or decision-making processes within the jurisdiction of the courts, are obliged, upon a judge's reasoned request, to provide the information requested, free of charge and within the shortest possible deadline. In a reasoned request, the judge specifies what information is required, the legal basis for their intervention, the purpose of the processing and the case number and, if necessary, the appropriate time limit within which the required information shall be submitted to the court".

[4] A new, seventh paragraph is added to the paragraph 28, which states as follows: "The records from the fourth and sixth paragraphs of this Article shall also include the information on the number of resolved and unresolved cases, which are defined as the court backlog". The fifth paragraph of Article 38 shall be amended to state as follows: "In the county court at the seat of the district court and the district court at the seat of the High Court, the Judicial Council, on the proposal of the Minister of Justice and after obtaining the

3. The introduction of the "flying cases" institute. In order to eliminate the backlog, this measure will enable more even workload placement to the courts of the same level. Upon a backlogged court proposal, the president of the directly superior court will be allowed to transfer the jurisdiction of a particular number of cases to another, less burdened court of the competent jurisdiction in the area, even without the consent of the parties to (Institute of the district and the district judge)[1].

4. Complying with the draft law amending the Law on the Judicial Service with regard to the determination of special judges to be appointed to the position of an inter-district judge. The draft law amending the Law on Judicial Service introduces the institution of the inter-district judge. Also, this proposed regulation provides a more even load on the district courts in the same area of the same High Court, thereby preventing the accumulation of backlogs in individual courts. Of course, the latter changes should be harmonized with other laws.

The proposed amendments in the Courts Act implement the recommendations of the GRECO (Group of States against Corruption), which operates under the Council of Europe.

CONCLUSION

The essence of the rule of law is the operation of all state bodies in accordance with the legal rules that define the content and manner of their decision-making. This gives individuals a certain security and creates trust in the society, which is a prerequisite for its successful development in all areas, including economic development. The fact is that the confidence in the rule of law in Slovenia is “pretty shaken”. In an effort to restore the confidence, the government amended the law on Courts and Judicial Service Act.

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opinion of the President of the High Court, shall determine special positions for the judges, who will replace the absent judges in the other courts within the territory of the same High Court of Justice, and who will resolve an extraordinary caseload and deal with matters in other justified cases (the inter-local and the inter-district judges).

[1] A new Article 105a is added after the Article 105, and it states as follows: The chairman of the directly joint superior court may, on the proposal of the President of the Court, which has a backlog of cases, decide that the jurisdiction, in order to solve a certain number of cases is transferred to another less congested court of the competent jurisdiction in their area. The president of the court shall decide on the transfer of power, determine the number and type of cases to be transferred, and the rules for the selection of cases. Under the provisions of the preceding paragraphs of this article, the jurisdiction for the cases for which the law provides the exclusive territorial jurisdiction, or if there is an agreement between the parties on the local jurisdiction, it cannot be transferred to another court.

By signing the commitment between the judiciary and the executive branch, good conditions for the efficient functioning of the courts were created. Legislative changes and signature commitments are already producing good results in terms of efficiency of the courts. If the backlog of cases cumulatively increased in the previous years, a remarkable progress has been made recently, since the backlog of cases in major cases in courts of general jurisdiction has been reduced by more than 30 percent[1]. As stated in the conclusion of one of the researches: "The vision of Slovenian judiciary is to ensure a fair, predictable, timely and cost-effective process that will be of good quality and accessible to all the parties of the proceedings, as the strengthening of the relationship with both the lay and professional public is one of the priorities of the judiciary"[2]. This also led the competent institutions during the preparation and the amendment of the relevant legislation, the process that primarily took into account two principles, namely the principle of transparency and the principle of court operation optimization.

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[1] http://www.vlada.si
[2] http://www.sodisce.si

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CRIMINAL JUSTICE AND CRIMINAL POLICY

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REFORM OF THE CRIMINAL PROCEDURAL LAW IN THE CZECH REPUBLIC - ONE OR MULTIPLE CRIMNAL PROCESSES

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INTRODUCTION

The Czech criminal procedure finds itself on a crossroad as there have been efforts to adopt a brand new code of criminal procedure, which should more or less dramatically reshape almost all important traits of the current criminal process. There have been many debates lately as to how far shall the planned changes go to divert Czech criminal procedures from its historical foundations and what principles it should be build on. Such a time always renders opportunity to analyze which positive innovations can be introduced to a legal order and which of its traditional features and institutes shall be preserved.

One of the considered substantive changes in the nature of the Czech criminal procedure is the broadening of the adaptation of the criminal process to certain generically specified cases based upon some of their certain commonly shared marks. The following paper will be focused on this aspect of the currently considered new criminal procedure legislation, as it raises many questions regarding the very conception of the criminal procedure and the purposes it serves.

CONTEXTUAL REMARKS

For a better understanding of the upcoming thoughts, I find it useful to introduce the settings in which the ongoing considerations on the new legislation take place. Therefore a brief historical excursus and a description of the current state of the Czech criminal procedure follow.

Historical Excursus

There are three key lines that draw the historical context of the Czech criminal procedure. Firstly, Czech legal order belongs to the continental legal culture, more precisely to its Austro-German sphere of influence. Therefore since the brink of the complex codifications era (late period of the 18th century), the criminal procedure laws effective on the territory of today's Czech Republic have always been inquisitorial in their nature with a strong position of the state. Following this fact was also the legality principle[1] and the principle of officiality (as to the initiation of the process) that has been typical for the Czech criminal procedure up till nowadays. Nevertheless, it must be said that in the second half of the 19th century up to approximately middle of the 20th century there were some alterations to the legality and officiality principle, as during this era some legal institutes that would allow certain influence of the individuals (especially the aggravated party) to the course of the process existed, e.g. the subsidiary private indictment or the direct private indictment (private prosecution) were present. As to the adaptation of the criminal procedure to generically specific attributes of certain cases, the division of the criminal law to general and military, including criminal procedure, was apparent. In the early 30s of the 20th century, new legislation was adopted to reflect the specifics of the criminal law of the juveniles and criminal procedure against them. Secondly, the Czech criminal procedure shares the legacy of the socialist era, which strengthened its inquisitorial nature by placing nearly all responsibility for the outcome of the process fully on the state institutions, especially the prosecution and the criminal courts. The aggravated party could only assert their right to compensation in the criminal process, but otherwise than their importance regarded the clues or pieces of evidence they could provide. In principle, they had almost no chance to affect the course of the process from their procedural position. During this period, unification of the criminal law (criminal procedure included) was at a rise. Both military and juvenile criminal procedure regulation was incorporated in the general code of criminal procedure and meant merely few procedural modifications to such cases, but the parallel structure of military criminal courts and military criminal prosecution offices was maintained. Thirdly, after the fall of the socialist regime in the Velvet revolution, there have been many alterations and modifications to the "old" Code of criminal procedure of 1961,[2] e.g. to bolster the rights of the accused and their defense, to strip the prosecution of

[1] Miroslav Růžička, František Púry, Jana Zezulová "*Poškozený a adhezní řízení v České republice* (The Aggravated Person and the Adhesion Procedure in the Czech Republic)," (Prague: C. H. Beck, 2007), p. 67

[2] Act no. 141/1961 Coll., on the Judicial Criminal Procedure (Code of Criminal Procedure), as amended

the powers which could interfere with the fundamental rights of an accused and transfer them to the courts, but in its basic foundations it remained the same. It must be said that many elements of the Anglo-American adversarial model of criminal procedure have been adopted lately and that the Czech criminal procedure follows the general European trend and comes closer to the hybrid model[1] in certain aspects.

Overlook of the Current State

Regarding the adaptation of the criminal process to specific forms of criminality, so far several novelties have been introduced to the Czech legal order since the Velvet revolution. Besides the CCP, there are three other acts that regulate the criminal procedure now - these are the Juvenile Justice Act,[2] The Act of Criminal Liability of Legal Entities and Procedure against them,[3] and the Act of International Justice Cooperation in Criminal Matters.[4] On the other hand, military courts have been abolished and currently there are not any specifics in the procedure against military personnel in the CCP, except for the investigation body which conducts the preparatory procedure (which is the military police) and few other petty modifications, e.g. concerning the transport of the defendant, etc. As for the adaptation focused on the severity of the crime, three forms of the criminal procedure can be identified:

- standard criminal procedure based on the legality principle, modified inquisitorial conduct of evidence procedure where everything has to be proven without reasonable doubt and there is a sharp line between the preparatory procedure and the trial before the court, etc.;
- summary preparatory procedure resulting into simplified trial before court usually for minor crimes with simple evidence situation;
- extended preparatory procedure giving some alterations to the court trial for severe crimes.

As for the attitude of the defendant, two particular forms of procedure exist, beside the standard "full" procedure in one of the aforementioned forms:

- consensual procedure aiming to entering into an agreement on guilt and punishment of the defendant with the prosecution;

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[1] Tyrone Kirchengast, "*The criminal trial in Law and Discourse,"* (Houndmills, Basingstoke: Palgrave Macmillian, 2010) pp. 137 - 138

[2] Act no. 218/2003 Coll., on Juvenile Criminal Justice, as amended.

[3] Act no. 418/2011 Coll., on Criminal Liability of Legal Entities and Procedure against them, as amended.

[4] Act no. 104/2013 Coll., on International Justice Cooperation in Criminal Matters, as amended

- diversions from the standard form of the procedure, which do not end with decision on guilt and punishment, but are rather a punishment by the procedure[1] on its own, where the defendants do not oppose their charge and are trying to cope with their crime positively and constructively.

As we can see, the Czech criminal procedure is no exception in the European if not global trend of developing several specific and non-colliding forms of modifying the criminal procedure with the goal of adjusting it to an individual case under different criteria. Later it will be explained, whether this current of development shall be even more supported in the eventual new CCP.

THEORETICAL BACKGROUND

Nevertheless, at this moment there have to be some theoretical remarks allowing us to understand the concept of adoption of the criminal procedure to specific criminality (or to be more precise, cases).

Needs of Adaptation

It goes without saying that some cases require different procedural instruments and techniques to achieve the desirable goal of each criminal process. On the contrary, the statement that the more "made to measure" the criminal process is, the better it is without any repercussions, would be very problematical. There can be numerous arguments challenging it:

- the need of legal certainty and for the foreseeability of the law in action is a value in itself which can hardly be satisfied if each case is handled individually up to extreme, it would also contradict the nature of law as a general normative system;
- the more complex the procedure is, the higher requirements have all those who participate in it to meet, which can be quite troublesome especially in the initial part of the procedure which is usually exerted by the police or police-like agencies, whose members have to be trained in much broader fields of specialization (interrogation, basics of forensic sciences, criminal substantive law, basics of interventional psychology when dealing with the victims, etc.) than to spend too much of their capacity to orient themselves perfectly in a too complex procedural system;
- the rules of procedure should be so simple that even the simplest accused should be able to fully execute their rights to effective

[1] Roland Miklau, Hans Valentin Schroll, "*Diversion : Ein anderen Umgang mit Straftaten*," (Vienna: Verlag Österreich, 1999), p. 31

defense - this objection cannot be easily disposed of based just on the fact that all of the accused have right to have them legally represented by a professional, because one of the important aspects of the adaptation is that it focuses also on trivial cases (either because the pettiness of the crime of the simplicity of the evidence situation), in which the stress is put on their informality and on the speed of their closing, usually implicating the absence of a profession defense counsel.

Criteria of Adaptation

There are multiple criteria of classification of the adaptation of the criminal procedure. It can be:

- **Seriousness of the crime involved**. On this criterion preferential treatment of minor or petty crimes is usually established. The trend is that usually less formal regulation of the process is set for less serious crimes and is usually limited by certain maximal level of prescribed punishment scale or by certain class of crimes (the less serious, e.g. *Vergehen* in Germany, *contravention* or *délit in France,* misdemeanor in the United Kingdom, etc.). The opposite model, in which procedure in some sort of most dangerous crimes contains some alterations, is also imaginable. In the CPP, the summary preparatory procedure (sec. 179a) along with the simplified court trial (sec. 314b) is an example of this adaptation. The aim of this regulation is usually to lower the cost and time needed for tackling such cases, at least in the Czech regulation the interests of the accused taken into account are minimal (they follow from the economization and time reduction, so the accused does not have to undergo a lengthy, stressful process). The interest of the accused and the aggravated person also plays a key role in the diversion as another means of adaptation dependant on the seriousness of the crime, but more dominant criterion is the attitude of the accused here.
- **Specifics of the accused**. Regulation pursuing this criterion allows covering the nature of some specific kinds of accused properly. Naturally, the individual nature in sense for e.g. one's temperament does not fall under this criterion, because it is focused on generic natures of usually legally defined kinds of perpetrators. A traditional example are the juveniles, who are usually normatively presumed to be in a need of special treatment in the course of the criminal procedure, which should be set to predominantly prevent the young offenders from further criminal career and to protect them from the stigmatization that usually comes with the fact of having a criminal process going against one. Other typical kind is the legal entities,

although here the difference is usually merely technical. Unlike in the criminal substantive law, in which the artificial nature of this kind of accused is of great importance for both conditions of criminal liability (especially in the matter of the subjective, mental element of crime and in the matter of criminally relevant acts of such entities) and its legal result (i.e. punishment and security measures), the criminal process against legal entities does not necessarily differ from that against the natural person with the exception of few rather technical details, such as who represents the legal entity physically at the court room or how to balance the right to remain silent of the responsible officials of the entity with the right to remain silent of the entity itself (these may collide where the criminal liability of the official is parallel and related to the one of the legal entity). In many countries, especially in the Anglo-American legal culture as well as in some post-soviet countries, separate military justice exists for crimes of military personnel alongside the "civil" criminal justice system. While the historical development has shown an abandonment of this duality in the past decades, it is discussable whether it has been for the best. It can be argued that military personnel in particular with its strong sense of military discipline, subordination and manifest distinction from the civilians, does not hold sufficient respect for the civilian judges. If for example a soldier is accused of disobedience of a direct order which he should have committed during a mission abroad in the heath of a battle, thousands of miles from their peaceful home, the difficulty of them being told by a civilian judge what they should or should not have done back there is apparent. On the other hand it could be countered that simply that every distinctive group of people (the medical personnel, law enforcement agents, long distance truck drivers, etc.) could lack the respect just the same, because every member of these groups can easily feel that their fate is being decided by someone who just does not understand "the trade" and its specifics.

- **Specifics of the victim.** Up to my knowledge, there is not a whole special form of a criminal procedure based on the victim (or it must be a true rarity), which would be regulated differently from a standard criminal procedure in substantial points. However, some specific kinds of victims have quite a powerful impact on the shape of the procedure and bring up certain considerable alterations to it. This concerns especially the cases of sexual offences, violence against minors, etc. in which the risk of secondary victimization is exceptionally high. This is a reason that certain restrains to the right of effective defense are legitimized, as for example the repetition of

the interrogation, conduct of interrogation by only one person (others, included the defense attorney, are allowed to ask their questions only indirectly through this person, who is usually a trained professional psychologist), concealing the victim's identity, prohibition of certain questions during the interrogation, etc.[1] Although these measures are without any doubts justified and correct, on the other hand they definitely mean a particular not insignificant alteration of the criminal procedure, which is based solely on the nature of the victim.

- **Specifics of the accused person's attitude towards the conducted crime**. This criterion regards the positive attitude of the accused person to the process and willing acceptance of responsibility for their deeds, which enables some kind of diversion from the standard criminal procedure. As mentioned before, it is usually reserved only for less serious crimes. Nature of this diversion is seen as evading the declaration of guilt and imposing of a punishment,[2] which is beneficial for the accused, if prescribed conditions are met. These conditions usually consist of satisfying the compensatory claims of the aggravated person, taking responsibility for the crime and willingness to be subjected to some kind of punitive treatment (community service, deprivation of the driver's license for some period, paying some sum in favor of some community beneficially fund, etc.). Other possibility can be accessible also to moderate or even very serious crimes and lies in the negotiation between the accused and the prosecution in the so called consensual criminal proceedings, known especially in the Anglo-American form of plea bargain. Outcome of this negotiation is usually an equivalent of a judicial decision and the boundaries of the negotiation's "maneuvering space" (as how far is the prosecution obliged to keep up to the facts of the case it already has if there is a suspicion that the crime might have been more severe, if this suspicion is hard to probe[3]) are given by each legal system that allows such a kind of procedure.

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[1] In the EU, these restrictions are regulated on the Union level by the Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA

[2] Hubert Hinterhofer, *"Diversion statt Strafe*: *Untersuchungen zur 1999 Strafprozessnovelle"* (Vienna: WUV-Univ. Verlag, 2000), p. 4

[3] So called "half-load" charge, see Richard L. Lippke, "The Ethic of Plea Bargaining," (Oxford: Oxford University Press, 2011), 192

Means of Adaptation

The means of adaptation were partially described in the previous subchapters. They present the instrumental aspect of adaptation in the way that they are the real expression of adaptation in the normative framework delimited by each of its kinds. In other words, they are the series of measures altering the regular course of a criminal procedure. They can:

- modify the standard (or extent) of the evidence process (for example if the accused pleads guilty, the court will not focus its attention to the matter of the quilt of the accused);
- the modus of a conduct of a particular procedural step (e.g. the restriction imposed on the interrogation of vulnerable victims);
- the institutional arrangement of the procedure (court of special jurisdiction for military personnel, for juveniles, etc.);
- or even the character of the procedure, defined by its result (the lack of declaration of guilt after the procedure was diverted).

ADAPTATION IN THE PLANNED NEW CRIMINAL CODE

According to the official document called "Principles and Bases of the New Code of Criminal Procedure"[1] made by the Commission for the New Code of Criminal Procedure, the official body that was entrusted with preparation of the new procedural regulation, almost all current expressions of adaptation would persist also in the new Code. Namely, the parallel existence of the Juvenile Justice Act, the Act of Criminal Liability of Legal Entities and Procedure against them and the Act of International Justice Cooperation in Criminal Matters, which are all *leges speciales* to the CCP, which renders a general regulation of the criminal procedure (which setting should be also persevered in the new CCP) should remain in existence. Also, the adaptation following the seriousness of the crimes involved is supposed to be upheld. Regarding this criterion, the only remarkable change is to be expected as the new CCP plans to abolish the extended preparatory procedure for the most serious crimes.[2] This planned change is not very surprising, as this form of preparatory procedure is redundant up to a certain point and not adequately theoretically or practically reasoned. The summary preparatory procedure and the simplified court trial as its counterpart should be remade to follow the goal of reducing the time needed for solution of

[1] Robert Malecký "Pavel Šámal zůstává garantem přípravy nového trestního řádu" Česká justice, January 28, 2015, http://www.ceska-justice.cz/2015/01/pavel-samal-zustava-garantem-pripravy-noveho-trestniho-radu/, direct link http://www.ceska-justice.cz/wp-content/uploads/2015/01/Trestn%C3%AD-%C5%99%C3%A1d-v%C3%BDchodiska-a-principy.pdf .

[2] Principles and Bases of the New Code of Criminal Procedure, p. 26

minor criminal cases.[1] The document mentions that current praxis with application of this shortened form of criminal procedure is often tainted also with a shortage of the rights of the accused, not only the time needed. However, it remains silent about how the new regulation intends to tackle this naturally *sequitur* of the conflict of the speed of trial and the rights of the accused. As the experience from the praxis shows, it is the rights of the accused what slows the advancement of the individual process the most, as the accused can exercise many of their right just to postpone the final verdict (challenging the verity of the evidence gathered by the investigators, having their own evidence requests, summoning witnesses that are hard to reach, etc.). Therefore, this legislative intention of the Commission, which is *prima facie* in an inner contradiction, raises an eyebrow, but of course it remains to be seen which particular legislative solution should be imbedded into the new CCP. However, the balance of its two goals - the speed and efficiency of the trial and securing sufficient rights of the accused at the same time - will be very fragile and very difficult to achieve.[2]

The main novelty within the scope of this topic is the planned introducing of acknowledgement of guilt into the new CCP. As mentioned above, the current CCP is familiar with the legal institute of guilt and the punishment agreement between the accused and the public prosecution, sanctioned by the court. This legal institute, inspired by the Anglo-American plea bargaining, is under the conditions of the current CCP supposed to simplify the process and allow the prosecution and the accused to settle the case more quickly, but it should not happen at the expense of the finding of the material (objective) truth about the facts of the case or at the expense of a just punishment, which are both basic fundaments of the traditional continental inquisition-based model of the criminal procedure.

Acknowledgement of guilt in the model proposed by the Commission stands quite close to its Anglo-American inspiration, as it is not supposed to be an instrument to facilitate the work of the law enforcement and the prosecution in cases with cooperating accused people, but to institutionally favor those who acknowledge their guilt to those who do not. Current thoughts of the Commission operate with consequent amendment of the Criminal Code so that the maximum level of prescribed punishment for a crime in question would be automatically lowered by one third.[3] This automatic reduction would be justified only by the accused cooperation and in contrast to diversions, there have not been proposed additional

[1] Principles and Bases of the New Code of Criminal Procedure, p. 28

[2] Peter Ramsay "Democratic Limits to Preventive Criminal Law," In *"Prevention and the Limits of the Criminal Law"* ed. Andrew Ashworth, Lucia Zedner, and Patrick Tomlin (Oxford: Oxford University Press, 2013), p. 227

[3] Principles and Bases of the New Code of Criminal Procedure, p. 29

reintegrating efforts condition to its application. Reduction of sentence should, in any form, be justified by true repentance of the accused[1] and follow a whole set of other measures imposed on the accused to reassure their reintegration,[2] but this is not secured by merely instrumental acknowledgement of one's guilt in prospect of lowering their sentence. This is a common concern even in the states of Anglo-American purely adversarial criminal process,[3] but as far as I know, even there it is seen as a necessary evil, that compensates the very formal nature of the process. In states with this tradition, the possibilities of simplified, so called "fast track" procedures are very limited even in the summary cases, so usually, there is no other choice than either plea bargain or undergo a strictly formal process in front of a jury.

In the continental tradition, multiple forms of "fast track" procedures have been developed in the past decades, so it is a question whether it is truly appropriate to let this necessary evil, whose necessity in countries of its origin is given by the absence of forms that we have. Personally I do not believe that introducing acknowledgement of guilt into the new CCP would be helpful in a country with very strict and long tradition of the inquisitorial nature of the process, deeply written in the institutional memory of the courts, public prosecution, defense lawyers and even the criminal population, although there is a reasonable opposition to this opinion.[4]

This form of adaptation is highly discussable, as it might discourage even the innocent accused from excising their rights to defense and out of sheer pragmatism acknowledge their guilt even when there is none. In my opinion, it openly creates a schism of once unified criminal procedure, because the procedure after the acknowledgement of guilt would be modified so heavily (automatic consequences in the sphere of criminal substantive law, radical reduction of proving the facts of the case regarding guilt, limited access to legal remedies of the accused, etc.) that it cannot be considered as the same as the standard criminal procedure.

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[1] Jeffrie G. Murphy, "Repentance, Mercy, and Communicative Punishment," In „*Crime, Punishment, and Responsibility: The Jurisprudence of Antony Duff* " ed. Rowan Cruft, Matthew H. Kramer, and Mark R. Reiff (Oxford: Oxford University Press, 2011), 32

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[3] John M. Scheb I, John M. Scheb II, "*Criminal Law and Procedure,"* seventh edition (Belmont, CA: Wadsworth, 2009), p. 538

[4] Richard L. Lippke, "The Ethic of Plea Bargaining," (Oxford: Oxford University Press, 2011), p. 237

CONCLUSION

In this paper, the topic of adaptation of the criminal procedure in general and in the prepared new CCP in the Czech Republic was discussed. After inevitable contextual remarks, the term of adaptation was explained in the first part of this paper and the most common criteria of adaptation were presented. On their ground, a short insight into the contemporary discussions about the content of the planned new CCP through the prism of the adaptation was made.

The general conclusion of this paper is that the adaptation will be continued, but some proposed legal institutes that suit this objective will cause a division of the criminal procedure because they will introduce a brand new kind of criminal procedure based on the acknowledgement of guilt of an accused, that has no place in our legal tradition.

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POSSIBLE IMPACT OF THE JUDGEMENT IN THE CASE MUSLIJA V. BOSNIA AND HERZEGOVINA ON THE REFORM OF THE MINOR OFFENCE LAW IN BOSNIA AND HERZEGOVINA WITH SPECIAL EMPHASIS ON DELICTS WITH VIOLENT CHARACTERISTICS

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Abstract

In this paper we analyze the judgment of the European court for human rights made in the case of Muslija vs. Bosnia and Herzegovina, in which Bosnia and Herzegovina is sentenced for violation of the article 4 of Protocol No. 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms which guarantees the application of the *ne bis in idem* principle. The authors provide special references on interpretation in case-law of the European Court for Human Rights when the sentence pronounced in a minor offense proceeding is considered as a criminal offense, when the offenses were the same (*idem*) and when there is dualism of the proceedings (*bis*). Since Bosnia and Herzegovina is obliged to analyze all laws which prescribe minor offenses and determine whether there are some similarities between the characteristics of minor offenses as well as criminal offenses, it is necessary to change the existing law which prescribes minor offenses on state and entity level, as well as to conduct harmonization with the criminal law, whenever it is determined that there are some similarities. In this manner the authors assess the existing state, with special reference on minor offenses and criminal offenses with violent characteristics in the law system of Republic of Srpska and suggest further measures for harmonization of our penal system with requirements from the

above judgment and the mentioned practice of the European court for human rights regarding the application of the principle *ne bis in idem*.

Key words: *ne bis in idem*, criminal and minor offenses law in Bosnia and Herzegovina, harmonization of penal system

JUDGMENT OF THE ECTHR IN THE CASE OF MUSLIJA V. BOSNIA AND HERZEGOVINA

The European Court of Human Rights (ECtHR)[1] in Strasbourg, in deciding on the applications of citizens of Bosnia and Herzegovina related to the violation of rights and guarantees from the European Convention on Human Rights (ECHR) *(formally the Convention for the Protection of Human Rights and Fundamental Freedoms)* and its protocols, has brought 27 judgments until September of 2014, each of which has its own social and, especially, legal impact in Bosnia and Herzegovina.[2] The judgment of the ECtHR in the case of *Muslija v. Bosnia and Herzegovina*, which became final on April 14th of 2014 in accordance with the Article 44 § 2 of the ECtHR, has caused great interest of the legal public. In the procedure which was initiated by the application No. 32042/11 of Adnan Muslija (citizen of Bosnia and Herzegovina) against Bosnia and Herzegovina, the Fourth Section of the ECtHR after some deliberation delivered a judgment on December 10th, 2013. In that judgment, the ECtHR ruled that there was an infringement of the applicant's right under the Article 4 of the Protocol No. 7 to the ECHR, because the authorities conducted both a minor offence proceeding and a criminal proceedings in relation to the same act of the applicant, which, in the view of the ECtHR, constituted a breach of the principle of *ne bis in idem*.[3] The court in the aforementioned judgment gave

[1] The European Court of Human Rights was established on November 1st, 1998 when Protocol No. 11 to the European Convention for the Protection of Human Rights and Fundamental Freedoms came into force.

[2] Available at http://pravosudje.ba/vstv/faces/vijesti.jsp?id=29384 on September 28th, 2014.

[3] Adnan Muslija was charged with a minor offence that he committed on February 12th, 2003 in the apartment of his wife in Kakanj. Adnan Muslija hit his wife in the head several times and then continued hitting various parts of her body in the presence of their under-aged children. In the decision delivered on August 16th, 2004, the Minor Offence Court ruled that the applicant was guilty of a minor offence against the public order prescribed in Article 3 § 1 of the Law on Public Peace and Order of the Zenica-Doboj Canton. The applicant was fined with 150 BAM. On November 19th, 2004, the Cantonal Minor Offence Court confirmed the lower court's decision and it became final. On January 8th, 2008, the Municipal Court convicted the applicant for the same act, qualified it as a grievous bodily harm from Article 177 §§ 1 and 2 of the Criminal Code of the Federation of Bosnia and Herzegovina from 1998 and sentenced the applicant to imprisonment in duration of three months. The judgment of the Municipal Court was confirmed by the Cantonal Court on April 7th, 2008. It was afterwards replaced with a fine of 9000 BAM on the request of the

its reasoning in relation to three issues, and those are: whether the penalty imposed in the minor offence procedure was criminal in nature, whether the offences for which the applicant was convicted were the same (*idem*) and whether there was a duplication of the proceedings (*bis*).

1) Whether the penalty imposed in the minor offence procedure is criminal in nature

While considering the criminal nature of the minor offence procedure, the ECtHR found that the applicant was found guilty on August 16th, 2004 in a procedure which was carried out in accordance with the Public Order Act from 2000 and that he was fined with 150 BAM. To answer the question whether this punishment was criminal in the sense of Article 4 of the Protocol No. 7 to the ECHR, ECtHR emphasizes that the legal qualification of the procedure in the national legislation can not be an exclusive criterion relevant for the application of the principle of *ne bis in idem*. The Article 4 of the Protocol No. 7 to the ECHR provides that *no one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.* For a long time, this rule was interpreted in the domestic and international legal public in such a way that it does not prohibit the simultaneous or successive minor offence proceedings and criminal procedures against the same person for the same act. The interpretation of this provision has been given by the ECtHR in many of the judgments it delivered and which are binding for the states which are members of the Council of Europe and which ratified he ECHR. The ECtHR accepted the view that the concepts of criminal procedure and punishment are to be interpreted autonomously and independently of their meaning in the national legislation and judicature. According to such autonomous interpretation, a procedure which is not qualified as a criminal procedure by the national legislation can activate the guarantees from the Article 4 of the Protocol No. 7. In the case-law of the ECtHR, for such interpretation there are three decisive criteria which are known as the "*Engel criteria*": qualification of the act in the national legislation, nature of the act and the severity of the penalty.[1] The second and

applicant. On June 4th, 2008, the applicant filed an application to the Constitutional Court of Bosnia and Herzegovina. The Constitutional Court held that the acts of the applicant for which he was punished where factually the same, but that they are different in their nature, because the applicant was convicted for a minor offence against public order in the minor offence procedure and for the grievous bodily harm in the criminal procedure.

[1] ECtHR, *Engel and others v. Netherlands*, application no. 5100/71, 5101/71, 5102/71, 5354/72 i 5370/72, judgment delivered on June 8th, 1976, available at

third criteria are alternative and not necessarily cumulative. This, however, does not exclude a cumulative approach where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge (§26 of the judgment in the *Muslija* case).

With regard to the first criterion - the legal qualification of the act in national law, it is clear that the act which is the subject of this application is a minor offence according to the Article 3 § 1 of The Law on Public Peace and Order from 2000, so we will not deal with it in more depth. Still, in the case-law of the ECtHR it had been concluded that certain offences are criminal in nature even though they are regarded under relevant domestic law as too trivial to be governed by criminal law and procedure (§58 of the judgment in the case of *Maresti v. Croatia*).[1]

With regard to the second criterion - the nature of the act, the ECtHR has established that the offence for which the applicant has been convicted and which is prescribed by the Public Order Act from 2000 is criminal in nature. The Court considered whether the prohibition of the act had the protection of human dignity and public order as its goal, which are regularly protected by criminal law; whether the provision is general in character (directed at all citizens) or special in character (directed at a certain group of citizens with a special status); what were the primary aims in establishing the offence in question. In the judgment it was concluded that the prohibition of the act served the purpose of protection of human dignity and public order, that the provision was general in character and that the primary aim in establishing the offence was punishment and deterrence. All of these are the criteria by which the Court found that the act was criminal in nature. Considering the fact that, according to the the case-law of the ECtHR, its is sufficient to find that the act is criminal in nature to conclude that the offence is criminal, the Court with the alternative application of the second and third criteria found that the offence in the case in question is a criminal offence (§ 30 of the judgment in the case of *Muslija v. Bosnia and Herzegovina*).

The criterion of the severity of the penalty is determined through the most severe penalty which is prescribed by the relevant domestic law and not through the actually imposed penalty. While the actually imposed penalty is relevant to some degree, in the relevant period Article 6 §1 of the Public Order Act from 2000 prescribed imprisonment in duration of 60 days as penalty, even though the applicant was sentenced with a fine of 150 BAM. Therefore, according to the case-law of the ECtHR, whenever the perpetrator of an offence can be sentenced with imprisonment, the offence is a criminal

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http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57479#{%22itemid%22:[%22001-57479%22]}

[1] ECtHR, *Maresti v. Croatia*, application no. 55759/07, judgment delivered on June 25th, 2009, available at http://www.mprh.hr/lgs.axd?t=16&id=858

offence. Still, the common characteristic of all systems of criminal law is that a fine is prescribed for some criminal offences and that imprisonment is prescribed for other criminal offences. In this case, the applicant was fined in the minor offence proceedings and was sentenced with imprisonment in the criminal proceedings.

2) Whether the offences for which the applicant was convicted were the same (idem)

For implementation of the *ne bis in idem* principle in successive cases there should be identity of the final judgment in the previous proceedings and indictment in the latter (consecutive) proceedings. We need to distinguish subjective identity which is characterized by determining the identity of the person (eadem persona) and objective identity (eadem rem) which is characterized by the factual description of the offense from which the legal features of the criminal offense are derived, time and place of committing the offense, object on which the offense is committed and the tool by which the offense is committed, as well as other circumstances which are necessary for determining the criminal offense. Identity of the offense exists if there is a same action or a same event from the past for which there is an ongoing trail in its crucial parts, so the identity of the indictment and the judgment is not changed if the circumstances in the judgment related to characteristics of the criminal offense are changed, but they are not crucial for changing of the subject of charges, that is if they do not affect important facts such as an action or an event and they do not change the identity of the offense (Sijercic-Colic at al., 2005: 707). In the Anglo-Saxon legal system (legal system of common law) by the principle double jeopardy is meant that, in the process of determining the identity of the offense, it should be determined whether the later indictment was ‘’identical’’ to the one for which there was an earlier process, i.e. if there are “substantially the same facts” (Ashworth and Redmayne, 2010: 364).

ECtHR, in its judiciary practice, has applied several different approaches in defining the identity of the offense. In the case *Zolotukhin v Russia*,[1] ECtHR, in pursuit to end the legal uncertainty created by long-standing various definitions of the identity of the offense, took the view that the article 4 of Protocol No. 7 must be understood as prohibition of the prosecution or trial of a second „offence” as far as it arises from identical facts or facts which are substantially the same.[2]

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[1] ECtHR *Zolotukhin v. Russia*, application no. 14939/03 dated 10 February 2009, available http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-91222#{%22itemid%22:[%22001-91222%22]}

[2] In Judiciary of ECtHR the criteria for determination of identity of offence (idem) evolved from “same conduct”, that is “identical facts” in the judgment *Gardinger v. Austria*, through

That warranty is applied when procedure is being initiated after an earlier acquittal or conviction becomes res iudicata. So, for deciding whether there are similarities of the offenses (idem) as one of the fundamental portions of principle *ne bis in idem*, the legal qualification of the offense, for which a person is charged is unimportant, as well as the type of protected rights, but what is crucial is the identity of the facts. The most important is that the same person in two procedures is being charged for identical facts or facts which are substantially the same.[1]

In the case *Muslija v. Bosnia and Herzegovina* ECtHR held that applicant was found guilty for the same act against the same victim in the same time in the minor offense proceeding as well as in criminal proceeding. ECtHR ruled in this Decision that the Constitutional Court of Bosnia and Herzegovina rejected Adnan Muslija's appellation on 11.01.2011, applying the practice which existed before the Decision in Zolotukhin's case. After that, the view of the Constitutional Court evolved when on 30.03.2012. in the case number AP 133/09, which is almost identical to the case *Muslija v. Bosnia and Herzegovina*, decided that there was violation of the ne bis in idem principle[2]. Given that Minor offenses Court found Muslija guilty for, inter alia, punching M.P. in the face and body, so it is conclusively established that the physical attack is, in fact, a minor offense, and because in the criminal proceeding the applicant was also found guilty for inter alia physical attacking and punching M.P., the ECtHR decided that relevant facts in these two cases must be considered as identical within the meaning of Article 4 of the Protocol no. 7.[3]

"same essential elements" in the judgment *Fisher v. Austria*, to "material identity of the offence" that is "identical facts or facts which are substantially the same" in the Zolotukhin v. Russia Judgment

[1] Paragraph 48-57 *Zolotukhin v. Russia* Judgment.

[2] The Constitutional Court of BH on an appeal by Nuris Selimović in the case No. AP 133/09 found there was a breach of article 4 paragraph 1 Protocol 7 to the ECHR and has revoked the judgment of the cantonal court in Zenica. With the above mentioned judgment the appellant's appeal was rejected and the judgment of the municipal court was confirmed by which the appellant was found guilty for the commitment of the criminal offence of minor injury from article 173 paragraph 1 in connection with the article 54 of the Criminal Law Act of the Federation of Bosnia and Herzegovina and due to that he was sentenced to a single penalty of three months in prison which will not be executed provided that he does not commit another criminal offence for a one year period. The appellant claimed that the ne bis in idem principle had been breached, because earlier, he was found responsible for the same incident by decision of the municipal court dating from 21.03.2008. He was found responsible for violation of the public order, participation in a fight and especially impertinent behaviour, prescribed by the article 3 paragraph 1 items 2 and 3 of The Law on Public Peace and Order for which he was admonished and fined with 200 BAM

[3] Compare with paragraph 63 of the *Maresti v. Croatia* judgment.

3. Whether there was a duplication of proceedings (bis)

One of the basic presumptions of the principle of ne bis in idem is that a criminal proceeding is finished with final judgment whether acquittal or conviction. In paragraph 36 of the Judgment in the case *Muslija v. Bosnia and Herzegovina* it is mentioned that the cause of the article 4 of Protocol no 7 is to prohibit the repetition of the proceedings which have been concluded by a "final" decision, that is the decision on merits which is res iudicata. Respecting res iudicata is important condition for the exercise of legal certainty and legitimacy of the legal system and state (Vervaele, 2005: 861). Unlike common law states, where ne bis in idem principle is also known as prohibition of double jeopardy, in continental legal systems this principle, beside the fact that it is basic human right, represents a guarantee for protection of the authority of the final judgment, but also the authority of the court which brought that judgment, as well as function of the sanction for some authorities in criminal proceedings (Ivičević–Karas, 2009). This is the case when it is irrevocable, that is to say when no further ordinary remedies are available, or when the parties have exhausted such remedies or have permitted the time-limit to expire without availing themselves of them (§ 36 Judgment *Muslija v. BH* and Judgment in case *Sergey Zolotukhin v. Russia* §§ 107 and 108).

ECtHR in the Judgment in the case *Muslija v. BH* decided that the Minor Offense Court delivered its decision on 16 August 2004 and it became final on 19 October 2004. Given that the criminal proceeding started on 18 September 2003 we can conclude that both proceedings were conducted concurrently. When the Zenica Cantonal Minor Offences Court upheld that decision, it became final and required the force of *res iudicata.* According to ECtHR, the Municipal Court should have terminated the criminal proceedings, and furthermore when deciding on the applicant's appeal the Constitutional Court failed to bring its case-law in line with this Court's approach taken in the *Zolotukhin* case (§ 36 of Judgment *Muslija v. BH* and Judgment *Sergey Zolotukhin v. Russia* § 115).

2. DISTINCTION BETWEEN CRIMINAL OFFENCES AND MINOR OFFENCES

When the aforementioned Judgment become final, for Bosnia and Herzegovina some obligations were created, such as taking measures on fixing the violation of applicant's right (individual measures), and on the other hand taking measures for prevention of any similar violation in future proceedings (general measures). Implementation of individual measures from aforementioned judgment is not a problem for the judiciary in Bosnia

and Herzegovina, while implementation of general measures might cause some difficulties, especially if we know how complex Bosnia and Herzegovina and its judiciary system are.

The Constitution of Bosnia and Herzegovina is a part of the General Framework Agreement for Peace in Bosnia and Herzegovina (agreed on 21 November 1995 in Daytona and signed on 14 December 1995 in Paris), which in Article 2 in the Catalogue of Rights provides the Right to a Fair Trail in civil and criminal proceedings, and other rights related to criminal proceedings. In order to ensure the highest international standards, the Constitution of BH provides that the rights and freedoms defined in ECHR and its Protocols will have direct implementation in Bosnia and Herzegovina, and that it has priority over all other legislation. The Constitution of Bosnia and Herzegovina provides that, among other agreements on human rights in Bosnia and Herzegovina, it will also implement the *International* Covenant on *Civil* and *Political Rights* (ICCPR). In this way it is indisputable that ECHR and ICCPR are incorporated in the legal system of BH, which was important for practice of the Constitutional Court of Bosnia and Herzegovina. Given that the framers of the Constitutions, for protection and implementation of the right on fair trial in criminal proceedings indicated the court, further formulation and development are left to Acts on criminal proceedings which are in effect in Bosnia and Herzegovina. Criminal Procedure Code of BH in Article 4 proclaims principle *ne bis in idem* in such a way that it is prescribed that no one shall be prosecuted again for an offense for which he was already prosecuted and that proceeding has been concluded by a final decision. Same is prescribed in Criminal Procedure Code of Republic of Srpska, Criminal Procedure Code of Federation of Bosnia and Herzegovina and Criminal Procedure Code of Brock District of BH.

The Law on Minor Offenses of Bosnia and Herzegovina does not ban duplication of proceeding, but in article 16 paragraph 2 it is prescribed that mutatis mutandis "Basic principles" of Criminal Proceeding Act in BH are implemented, which means implementation of Article 4 (*ne bis in idem*). However, Law on Minor Offences of Republican Srpska in the article 8 expressly provides that no one can be prosecuted in minor offence proceeding nor can be sentenced if there has been a final decision, except in case prescribed by this Act. The Legislator in Republic of Srpska prescribed in paragraph 3 and 4 of the same Article that proceeding cannot be initiated, and if it is already initiated it cannot continue, if there is indictment for the perpetrator of the offence or final judgment for criminal offence which include features of the minor offence. In this way, it is unequivocally prohibited simultaneous and consecutive conduction of a criminal and minor offence proceeding, which is in accordance with the judgment in case

Muslija v. Bosnia and Herzegovina. As we can see, in Bosnia and Herzegovina there exist different and uneven regulation of the distinction of minor offences and criminal offences and which we can observe in different areas such as delicts with violent characteristics, traffic delicts, delicts from the drug abuse area and other delicts (customs, tax etc.)

3. DELICTS WITH VIOLENT FEATURES

The issue of differentiating minor offences and criminal offences is quite significant in the field of delicts with violent features. For the purpose of better understanding we will tabulate the criminal offences with violent features proscribed by the Criminal Code of Republika Srpska which can cause simultaneous and consecutive proceedings with committed minor offences.

Table 1: Review of some the criminal offences proscribed by the Criminal Code of Republika Srpska

CRIMINAL OFFENCES AGAINST LIFE AND BODY	CRIMINAL OFFENCES AGAINST CIVIL RIGHTS AND LIBERTIES	CRIMINAL OFFENCES AGAINST MARRIAGE AND FAMILLY	CRIMINAL OFFENCES AGAINST PUBLIC ORDER
Murder (Regular, qualified or privileged, art 148-152.)	Coercion (Art 164.)	Neglect and abuse of a minor (Art 207.)	Violent behavior (Art 385.)
Minor injury (Art 155.)	Abuse (Art 168.)	Violence in the family (Art 208.)	Preventing an official in the performance of official acts (Art 387.)
Major injury (Art 156.)	Security threats (Art 169.)		Assaulting an authorized person in the performance of tasks of security, detection and apprehension of offenders (Art 387a.)
Participation in a fight (Art 157.)			Assaulting an official in the performance of official acts (Art 388.)
Endangering with a dangerous weapon in fight and brawl (Art 158.)			

On the other hand the Law on Public Peace and Order, in chapter III prescribes minor offences which as acts of commission predict behaviors which at same time have features of one or more criminal offences. On this occasion we will list the following minor offences exemplary:

- Brawling, screaming and indecent behavior (art 7)
- Insulting (art 8)
- Endangering the safeness by threatening with an attack on life and body (art 11)
- Fighting and physical attack (art 12)
- Unauthorized use of weapons (art 16)
- Preventing a state authority in performance of public duty (art 24)

Besides that, numerous acts such as the Law on Protection From Domestic Violence of Republika Srpska, the Law on Public Gatherings of Republika Srpska, the Law on Weapons and Ammunition of Republika Srpska, the *Law* on *Prevention* of *Violence at Sports* and others prescribe minor offences which do not have existent criteria by which we can differentiate those minor offences from criminal offences. Even when such criteria do exist, its application leads to different interpretations, as well as application in practice. That is the reason why reforming of legislative frame is needed, even though there is explicit prohibition of subsequent launch and leading of minor offence proceedings against the perpetrator if there is a confirmed indictment or a final judgment due to commitment of a criminal offence which encompasses features of a minor offence (art 8 of the Law on Minor Offenses of Republika Srpska). Hypothetically speaking it is possible to conduct a minor offence proceeding against a minor offence perpetrator and fine him or her for public order violation for fight participation and noise making, and with a strict application of the material identity of the offence, based on the identity of facts, art 4 of the Human Rights Convention can be applied, and a criminal proceeding cannot be launched nor lead for a commitment of an attempted murder against the same perpetrator.

Because of such ban on double trial it is certain that in such case it is not possible to achieve protection of human life and bodily integrity, which is achieved by sanctioning the perpetrator on the charge of murder, and by sentencing him or her to a minor offence sanction “only” protection of peace, tranquility and the physical integrity of the citizen can be achieved. Given that the Convention recognizes as absolute and non-derogable right only the right to a victim’s life (art 2 of the Convention) and the right to inviolability of bodily and soul integrity (art 3 of the Convention), it is justified to ask the question to what extent are the requirements that each individual, based on articles 2 and 3 of Convention expects from the state at this case fulfilled,

when they are victims of an assault on their lives as well as their soul and bodily integrity, and the perpetrator is only fined.

CONCLUSION

The ECtHR judgment in the case of *Muslija v. Bosnia and Herzegovina* for the violation of the *ne bis in idem* principle established there was a systematic breaching of the ECHR in Bosnia and Herzegovina. Having in consideration that according to the conditions from article 44 paragraph 2 of the ECHR the judgment became final on 14th of April 2014, from that date certain obligations about taking individual measures to remove the infringements of the established rights of the applicants, as well as general measures to prevent future similar human rights infringements according to article 4 protocol 7 to the ECHR in situations analog to the present case, incurred for Bosnia and Herzegovina as the respondent.

In terms of the individual measures there is no doubt about the implementation, while the situation is much more complicated with the implementation of the general measures, which ultimately impose the obligation of reforming the entire minor offence law system. It is certain that, in the purpose of implementation of the general measures it would be most suitable based on the model of Republic of Croatia, to urgently adopt recommendations for operating of the prosecutors and authorized officials and subsequently to perform a systematic analysis of all minor offence and criminal regulation. Considering that in the judgment of *Muslija v. Bosnia and Herzegovina*, as well as in other numerous judgments, criminal prosecution or trial is forbidden for another "offence" if it arises from identical facts or facts that are substantially the same, in such analysis it would be necessary to identify minor offences and criminal offences in which substantial features of minor offences and criminal offences overlap. It is because the same canonic description of a criminal offence and a minor offence has the same factual description in the initial minor offence act (minor offence warrant or request for start of a minor offence proceeding), as well as in the initial criminal act (accusation), as a consequence. Only after a comprehensive research and analyses of the minor offence and criminal system it is possible to intervene with alteration of the minor offence laws and other regulation, i.e. to perform harmonization with the criminal laws.

However, due to the extremely complicated state structure of Bosnia and Herzegovina in which the criminal legislation is regulated both on state and entity level (including the Brčko District of BH), and the minor offence legislation is regulated on both state and entity level, as well as cantonal and municipal level, it is certain that implementation of such general measures will demand long – term activity with the possibility of facing numerous, maybe even insurmountable obstacles. In our opinion, a realistic assumption

for effective implementation of the general measures is intervention in a procedural sense by passing a mandatory instruction modeled by the Instruction for Cooperation of Prosecutors and Authorized Officials which will be applied in the whole of BH. The mentioned instruction would have an effect on all the other legislation implementing agencies (the Administration for Indirect Taxation, tax administrations, inspectorates, inspection services, communal police…). Only with such synergic operation of subjects on all levels effective implementation of obligations ordered by the judgment *Muslija v. Bosnia and Herzegovina* will be possible and at the same time the infringement of the ne bis in idem principle which occurs in the case of simultaneous initiation and leading of a criminal and a minor offence proceeding for substantially the same action will be avoided. Yet, this kind of instruction would have to have temporal character with the shortest application deadline possible because the decision between whether certain action is a minor offence or a criminal offence in every particular case is left in the jurisdiction of the prosecutor and member of the agency for law implementation, which does not guarantee that in identical situations each citizen is equally treated. That is why it is necessary to take measures with a permanent character and by that we mean interoperable action of the representatives of different levels of the legislative, executive and judicial authorities alike in Bosnia and Herzegovina and setup of the legislative frame in the form of editing the canonic descriptions of minor offences and their clear distinction and harmonization with criminal offences.

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COMPUTER RELATED CRIME – GENERAL LEGAL DEVELOPMENT IN SERBIA

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Abstract

The significance of information and communication technologies has created the need to establish worldwide measures and mechanisms for protection of the society and the individual against abuses in this area, through adopting appropriate legislative solutions and improving international cooperation. The result of these efforts, among other things, is the adoption of the Convention on Cybercrime by the Council of Europe which has established minimum standards that are necessary, in the opinion of the international community to meet the national legislation in order to effectively combat the abuse of high technology. Criminal Law solutions in this field in Serbia can be classified into two groups. The first group makes a substantive provision which stipulates that actions are socially unacceptable behaviour that violate or infringe certain protective structures; it is the Criminal Code. The second group consists of the Criminal Procedural Code and the Law on Electronic Communications (as well as certain by-laws) that establish a procedural framework, apart from the framework provided by the Convention and without procedural nature, which have provided mechanisms and powers of state agencies in the detection procedures, evidence collection, criminal prosecution and trial of offenders in cybercrime.

Significant concerns in this segment were created on the issue of organization of the judicial system of the state towards creating conditions for successful combat and combating new forms of criminal activity. Specifically, whether to opt for a comprehensive systemic change, or change a number of regulations in order to create an adequate legal framework, or be oriented towards a partial amendment of certain legal provisions in order to create conditions for the timely and adequate response to new forms of criminal behaviour, is the question each state has solved or is dealing with in accordance with their capacities. The first method is without a doubt very effective, but also very demanding, since it requires a high degree of political and social consciousness of the necessity of changes that should be followed, while the second method is more economical and less demanding method, as

it does not influence on the basis of the system, but can leave behind a series of unresolved issues such as the question of jurisdiction for certain crimes, the collision of new and the existing legislation, and so on. In accordance with the resources available, Serbia, with the aim of criminal law protection from the new forms of computer crime, opted for a different way of organizing its judicial system, oriented for partial changes of certain legal provisions and the adoption of new laws, establishing new state authorities for procedure in criminal cases in this area.

Key words: cyber law, EU, Serbia, cyber-crime

GENERAL LEGAL DEVELOPMENT

The significance of information and communication technologies has created the need to establish worldwide measures and mechanisms for protection of the society and the individual against abuses in this area, through adopting appropriate legislative solutions and improving international cooperation. The result of these efforts, among other things, is the adoption of the Convention on Cybercrime[1] of the Council of Europe, which has established minimum standards that are necessary, in the opinion of the international community to meet the national legislation in order to effectively combat the abuse of high technology. Criminal Law solutions in this field in Serbia can be classified into two groups. The first group makes a substantive provision which stipulates that actions are socially unacceptable behaviour that violate or infringe certain protective structures; it is the Criminal Code.[2] The provisions of this legal text were analysed primarily in the part relating to offenses against the security of computer data, as well as to crimes that are under the provisions of the Convention on Cybercrime grouped with computer offenses which - by their nature they are, although in the Criminal Code they are grouped into chapters that protect business operations, sexual freedom, copyright, intellectual property, and others. The second group consists of the Criminal Procedural Code[3] and the Law on Electronic Communications[4] (as well as certain by-laws) that establish a

[1] Convention on Cybercrime, Council of Europe, Budapest, 23. XI 2001.; European Treaty Series (ETS) - No. 185
<http://conventions.coe.int/Treaty/en/Treaties/Word/185.doc> (August 5th, 2010)

[2] Official gazette of the Republic of Serbia, No. 85/2005, 88/2005 - change, 107/2005 - change, 72/2009, 111/2009 and 121/2012

[3] Official gazette of the Republic of Serbia, No. 72/2011, 101/2011, 121/2012, 32/2013 and 45/2013

[4] Official gazette of the Republic of Serbia, No. 44/2010, 60/2013 – Constitutional Court Decision and 62/2014

procedural framework, but the framework provided by the Convention and without procedural nature, which have provided mechanisms and powers of the state agencies in the detection procedures, evidence collection, criminal prosecution and trial of offenders in cybercrime. Because of the limited space I have to concentrate here only on articles of the Criminal Code that deal with Content-Related Offences.

ETYMOLOGICAL ASPECT OF THE CRIMINAL CODE

According to the Criminal Code, provisions related to the field of computer crime are contained primarily in the general part of the Code, in Article 112, in the part related to the meaning of the term in the sense of criminal law. In this manner, it is prescribed by law what is considered to be a computer, computer data, computer network, computer program, computer viruses and computer system. So, a computer represents every electronic device on the basis of automatic processing and data exchange (paragraph 33, Article 112 of the Criminal Code). Computer data is any representation of facts, information or concepts in a form suitable for processing in a computer system, including an appropriate program based on which computer system performs its function (paragraph 17, Article 112 of the Criminal Code). A computer network is considered to be a collection of interconnected computers or computer systems that communicate by exchanging data (paragraph 18, Article 112 of the Criminal Code). A computer program shall be considered a furnished set of commands that are used to manage the operations of the computer, as well as to solve a specific task using a computer (paragraph 19, Article 112 of the Criminal Code). A computer virus is a computer program or other set of commands entered in a computer or computer network which is made of replicating itself and works on other programs or data to a computer or computer network by the addition of a program or a set of commands to one or several computer programs and data (paragraph 20, Article 112 of the Criminal Code). A computer system is any device or a group of interconnected or dependent devices of which one or more, according to a program, performs automatic processing of data (paragraph 34, Article 112 of the Criminal Code). This represents part of the definition of certain terms used in the Criminal Code and their significance in terms of the provisions of the Code, which are related to the field of computer crime.

CONTENT-RELATED OFFENCES

Display, acquisition and possession of pornographic material and a minor for pornography (Article 185 of the Criminal Code)

CETS 185 as a criminal offense "child pornography" (politically and ethically more correct term is material that depicts child abuse or exploitation of minors in pornography) criminalizes:

- production of "child pornography" (materials that exploit minors for pornographic purposes) for intended distributing through a computer system;
- offering or otherwise making available "child pornography" through a computer system;
- distribution or broadcasting of "child pornography" through a computer system;
- obtaining of "child pornography" to self or others, through a computer system;
- possession of "child pornography" on a computer system or on a medium for the transmission of computer data.

CETS 185 aims to assist the harmonization of the legal systems of the Member States and to influence on the understanding of the seriousness of this phenomenon on the part of all members. The Convention also contains some provisions that are broader than any comparable solutions in the national legislation. Thus, the age limit at which persons are considered children is set to 18, with the possibility that the state, by making a reservation on this Article of the Convention, can cut it to 16 years of age. Then, to criminalize the activities in which within the content appear persons for whom we can reasonably assume that they are younger than 18 years of age, or who present themselves as such, as well as other graphical content (drawings, cartoons, etc.) that can represent a person under the age of the prescribed limits in a pornographic context. The Convention leaves the possibility of a reservation for each member state, and for this we can say that it is very innovative.

In the Serbian legislation this crime belongs to Chapter XVIII of the Criminal Code – Criminal offenses against sexual freedom. This offense is done by a person who, to a minor: sells, shows, or publicly displays or otherwise makes available any text, pictures, audio-visual or other objects of pornographic content or shows pornographic presentations. Person shall be punished by a fine or imprisonment up to six months (paragraph 1 of Article 185 of the Criminal Code). If someone uses a minor to produce pictures, audio-visual or other objects of pornographic content or for pornographic performance, shall be punished with imprisonment from six months to five years (paragraph 2 of Article 185 of the Criminal Code). If the offense referred to in paragraphs 1 and 2 of this Article is committed against a child (younger than 14 years of age), the offender shall be punished for the offense

specified in paragraph 1 by imprisonment of six months up to three years, and for the offense referred to in paragraph 2 by imprisonment of one to eight years. Whoever obtains for him(her)self or another, possesses, sells, shows, publicly exhibits or electronically or otherwise makes available pictures, audio-visual or other objects of pornographic content resulting from exploitation of a minor, shall be punished with imprisonment of three months to three years (paragraph 4 Article 185 of the Criminal Code). Items that are used for this work shall be seized.

By prescribing this act, the legislator intended to protect the physical, mental and sexual integrity of children. In Article 112 of the Criminal Code the concepts relevant to the analysis of this crime are defined. So, a child is a person below the age of fourteen (paragraph 8). A minor is a person who has attained the age of fourteen up to eighteen years of age (Section 9). A minor is a person who has not attained the age of eighteen (paragraph 10). In this segment, the Code contains an important omission, since it provides no definition of pornography. The distribution of pornographic material to the eighteenth century was not criminalized. The convention on the Protection of Children against Sexual Exploitation and Sexual Abuse in the Article 20 provides a definition and it is a part of our legal system because of its ratification.

It is governed by a number of alternative actions to commit the offense referred to in paragraph 1. The act can be carried out against the juvenile or the child, and to sell, display, publicly exhibit or make available in any other way, texts, images, audio-visual or other objects of pornographic material or display pornographic performances. The offenders act with intent. The act referred to in paragraph 2 consists in exploitation of a juvenile or a child to produce pictures, audio-visual or other objects of pornographic content or for pornographic performance, including abuse of a minor or a child, often not even aware of this situation or consequences. In terms of culpability of the offender it is required that he or she was acting with intent. The thing that is specific for the offense determined in paragraph 1 and paragraph 2 is that they can be committed against the juvenile or the child, which is a novelty in comparison to the previous legislation. If any of the actions were performed against a child, the legislator has foreseen them as severe forms of this act and with more severe punishment.

In paragraph 4, as part of the act, the following activities were prescribed: obtaining for self or another person, possession, sale, display, publicly display, as well as electronically or otherwise making available images, audio-visual or other objects of pornographic content generated by exploiting a minor. Another novelty is the inclusion in the act of committing the two essential activities, such as obtaining for self or another person and possession of the mentioned material. In the previous legal solutions, these

forms were not included in the concept of the offense, which was a significant omission given that the different ways of obtaining, especially online downloading of such material at the same time makes it available for other users. The same can be said for mere possession, which in many ways may become available to a wider range of people. The term of the object of attack in this form is the part of a minor, which means that it can only be a person who has not attained the age of eighteen. In terms of culpability of the offender, and in this form of work, intent is required. It is important to emphasize the fact that in the case of this offense it comes to minors, which requires special attention in the treatment, taking into account their age, specifically psychophysical state and the process of development and maturation, whether it comes as a juvenile offender or such person as a witness or damaged. Another problem can arise in cases that would be paradox, in which the perpetrators and victims are minors who are in a relationship, due to specific, low motives. Particularly interesting is the case of the so-called sexting. In such cases, account must be taken of the purpose of punishing such conduct as re-socialization terms of initiating legal proceedings and imposing sanctions to two minors with all implications to their personalities. It is within the framework of solving the crimes that have connotations present in this criminal act where international police cooperation is of a great importance. We will notice the recent increase in collaborative activities in these crime areas.

Sexual exploitation of children does not constitute an ordinary crime, but a serious violation of the fundamental human rights and freedoms from the application of physical and psychological violence as the main methods of criminals disrupting harmonious and undisturbed growth and development of personality, because the victims are helpless and thus easily subjected to various forms of psychological manipulation. Combating "child pornography" on the Internet is a major challenge for the police and the judiciary, especially in transitional countries such as Serbia, because criminals constantly improve the ways of committing the offense in order to further develop, providing faster and easier access to pornographic content with the greatest possible anonymity of clients. From the results shown it can be concluded that the various forms of abuse of children and minors in the area of "child pornography" can be found in all countries, and this is one of the most common forms of misuse of computer technology for such purposes. In addition to repressive measures, provided for in Article 185 of the Criminal Code, a social response should primarily be focused on preventive activities, because this segment requires high quality education of children, juveniles and adults about safe use of the Internet, prompt notification of all phenomena of positive and negative connotations in this sphere, exploring the threats posed to the Internet, especially to the parents

whose children have access to a global computer network, and adequate social attitudes to criminal behaviour in this area.

As far as the labour process and the method of the persons whose victims are minors and children it has its peculiarities. Judicial council chaired by a judge who has acquired special knowledge in the field of children's rights and criminal protection of minors, adult perpetrators stand trial following criminal offenses prescribed by the Criminal Code, if the injured party in the criminal proceedings is a minor: display of pornographic material and abusing children for pornography (Article 185).[1] The public prosecutor who has acquired special knowledge in the field of children's rights and criminal protection of minors initiates proceedings against adult perpetrators of other criminal offenses prescribed by the Criminal Code, in accordance with the provisions of this part of the law, if it was deems as necessary to specially protect the juveniles as victims in the Criminal Procedural Code. The criminal proceeding against the accused for offenses described is carried out under the provisions of the Code of Criminal Procedure. The investigation is conducted by the investigating judge who has gained expertise in the area of children's rights and criminal protection of minors. In the investigation of criminal offenses against underage persons, specialist officers of the Interior participate; they had previously acquired special knowledge in the field of children's rights and criminal protection of minors when certain actions are entrusted to these agencies.

When conducting the trial for crimes committed against minors, the public prosecutor, the investigating judge and the judges in the judicial council will treat the injured taking into account their age, personality traits, education and living circumstances, especially trying to avoid the potential adverse consequences proceeding on his or her personality and development. Hearing of minors shall be conducted with the help of a psychologist, counsellor or other professionals.

If the witness is examined as a minor who is injured or damaged by the criminal act referred to in Article 150 of the law, the test may be carried out twice, and exceptionally repeatedly if necessary to achieve the purpose of the criminal proceedings. In the case of a minor it is examined more than two times, the judge is obliged to pay special care to protect the personality and development of minors. If, due to the characteristics of the offense and the personality traits of a minor, deemed as necessary, the judge will order that

[1] Beside this criminal act there are more crimes in this group: aggravated murder (article 114), instigation to suicide and helping in committing suicide (article 119) aggravated injury (article 121); Kidnapping (article 134); Rape (article 178); sexual intercourse with a disabled person (article 179); sexual intercourse with a child (article 180); sexual intercourse with an abuse of power (article 181); forbidden sexual acts (article 182); pimping and facilitating of sexual intercourse (article 183); and many others.

the minor is heard using technical means for transferring image and sound, and the hearing to be conducted without the presence of the parties and other participants in the proceedings, in room where the witness is located, so that the parties and persons entitled to receive them, ask questions through the judge, psychologist, counsellor, social worker, or other professional advisors. Minors as damaged witnesses may be questioned also in his or her apartment or room, or an authorized institution or organization, and qualified for testing of minors. When examining a witness - injured party, the authorities may order the implementation of measures of witness hearing through using a video link. When a minor is heard in the above-mentioned cases, in the trial the record of his or her testimony will be read, or a recording of the hearing will be played.

The minor as damaged must have a legal representative at the first hearing. In the event that a minor does not have an attorney, one will be appointed by a decision from the list of lawyers who have acquired special knowledge in the field of child rights and criminal protection of minors set by the court president. Representation costs are borne by the budget of the Court. Criminal proceedings for offenses under Article 150 of the JMC are urgent.

Forcing a minor to witness sexual acts (Article 185a)

The law also stipulated the basic form as follows: "Whoever induces a minor to attend rape, sexual intercourse or an equal act or other sexual acts, it is prescribed prison from six months to five years and a fine." Paragraph 2 defines a severe form: if the offense was committed by force or threats, or against the child, the imprisonment is from one to eight years. The perpetrator of this crime can be any person, but by the nature of things, a special circumstance carries weight when it comes to a person who is in congenial relations with a minor. The plot of the offense is a single act of attending by minor of such act. A special case here is related to the situation of "indirect presence" when using broadband Internet connection such activity displayed a juvenile or child. To prove these offenses, due attention must be directed to the existence of evidence of sexual acts to which the juvenile was present, as well as traces of which can be related to its monitoring of such material. Such traces in the case of audio-visual record will remain on juvenile’s computer and servers, through which have been shown, when it comes to the high-tech crime. For this reason it is very important to conduct the investigation by absolutely respecting the rules *lege artis*, and also browse and search of computers and the information stored in them. The question of specifying actions of minors in a given case must also be determined.

Utilization of computer networks or other means of communication to commit offenses against sexual freedom of a minor (Article 185.b Criminal Code)

Since computer networks are often misused for the purpose of performing or concealment of crimes against sexual freedom of minors, the Criminal Code in Chapter XVIII, in Section 185b has regulated the criminal act of computer network or other means of communication for execution of offenses against sexual freedom of minors. The act has a basic and a more severe form. The basic form is done by a person with the intent to commit a criminal offense under Article 178, Paragraph 4 (the crime of rape - if the offense is committed against a child); Article 179, Paragraph 3 (the offense of sexual intercourse with a disabled person – if the offense is committed against a child); Article 180 c, 1 and 2 (the offense of sexual intercourse with a child – if it was done to the promise of a child (paragraph 1) and if it is due to the threat of serious bodily injury to a child, or if the offense is committed by more than one person or the offense resulted in the pregnancy (paragraph 2)); Article 181 c, 2 and 3 (the offense of Sexual Intercourse by Abuse of Power – if the act was executed by a teacher, educator, guardian, adoptive parent, stepfather, stepmother, or other person who abuses his position or authority commits an incest against a minor entrusted to him for the sake of learning, parenting, custody or care (paragraph 2) if the offense is committed against a child (paragraph 3)); Article 182, § 1 (the crime of unlawful sexual act – if in the above mentioned situations other sexual acts were performed); Article 183, Paragraph 2 (the offense of procuring and facilitating sexual intercourse - if it allows sexual intercourse, an act equal or other sexual acts with a minor); Article 184, Paragraph 3 (the offense Solicitation of Prostitution – if the specified offense was execute against a minor); Article 185, paragraph 2 (the offense of displaying, obtaining and possessing pornographic material and a minor for pornography) and Article 185a (incitement of minors to witness sexual acts) of the Code, using a computer network or other means of communication with a minor to set a meeting and show up at the place of the meeting. For this form of criminal act it is prescribed that the perpetrators could be sentenced by imprisonment of six months to five years, provided that the offender is punished and fined. A severe form of criminal act is when the previously described basic form of same offenses is done against a child, and then the offender is punished with imprisonment of one to eight years.

The plot of the offense consists in arranging a meeting with a minor, or the child which is a severe form of the act in question, and the appearance of the place of the appointment. The formulation of Article 185.b shows that the action of committing the crime is determined cumulative, because its existence is necessary for the execution of both actions by the offender: 1)

arranging the meeting and 2) appearance at the agreed place. The offender can be any person who acts with direct intent, where it is necessary to determine the intention of performing by the Code enumerated offenses. It is obvious that the intention of the legislator was sanctioned of committing any form of criminal behaviour in relation to sexual freedom of minors and children, where the possibilities of computer technologies provide a significant contribution. That is why this article of the Code covers every intention of carrying out criminal acts against sexual freedom, if it is directed against a child or a minor when the offender in furtherance of a criminal offense uses computer technology.

CONCLUSION

A significant concern in this segment was created on the issue of the organization of the judicial system of the state towards creating conditions for successful combat and combat against new forms of criminal activity. Specifically, whether to opt for a comprehensive systemic change, or change a number of regulations in order to create an adequate legal framework, or be oriented towards a partial amendment of certain legal provisions in order to create conditions for the timely and adequate response to new forms of criminal behaviour, is the question each state has solved or is dealing with in accordance with their capacities. The first method is without a doubt very effective, but also very demanding, since it requires a high degree of political and social consciousness of the necessity of changes that should be followed, while the second method is a more economical and less demanding method, as it does not impinge on the basis of the system, but it can leave behind a series of unresolved issues, such as the question of jurisdiction for certain crimes, the collision of new and existing legislation, and many others. In accordance with the resources available, Serbia, with the aim of criminal law protection of the new forms of computer crime, opted for a different way of organizing its judicial system, oriented for partial changes of certain legal provisions and the adoption of new laws, establishing new state authorities for procedure in criminal cases in this area.

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CRIMINAL POLICY OF THE RUSSIAN FEDERATION

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1. INTRODUCTION

It is clear that an effective fight against crime is not possible without proper criminal policy of the state. The **criminal policy** as a **purposeful systemic activity aimed at limiting crime** includes several mandatory units: *conceptual, legislative and law enforcement* and (as a result) preventative.

Conceptual part must clearly articulate goals of criminal policy, the direction of its implementation, forms and methods of its development.

Legislative part includes laws aimed at fighting crime.

Law enforcement part of criminal policy implements fighting crime in practice.

All these parts are interconnected. The shortcomings of one of these parts cause problems in other parts. As a result, problems with the effectiveness of the criminal policy can occur.

This article focuses on the current development and shortcomings of the Russian criminal policy.

2. The elements of the criminal policy of Russia.

2.1 The conceptual part of the Russian criminal policy.

The optimization of criminal policy involves the creation of its ideal model, which includes a successful international experience in the field of combating crime and criminalization in the context of globalization, which should take into account national specificities of crime situation and provide for their own sovereignty. The main grounds for modeling of successful criminal policy are international agreements (in which Russia takes part) at various levels (the UN Convention, the Council of Europe, SCO and others). For example, the Agreement between the Governments of the Member States of the Shanghai Cooperation Organization on Cooperation in the Field of International Information Security, which specifies threats such as information war, information terrorism, cyber crime and formulates such definitions [1].

The other grounds for modeling of effective criminal policy are model laws and recommendations to improve legislation and enforcement activities of the participants in international alliances. The development of model laws is very productive within the framework of the CIS. For example, the Model Law "Fundamentals of legislation on anti-corruption policy", which sets out the aims and principles of anti-corruption policy, its priorities, legal and organizational framework, measures to prevent and combat corruption offenses; defined anti-corruption expertise of legal acts and implementation of anti-corruption policy, anti-corruption programs and formulated anti-corruption standards priority areas of anti-corruption policies [2].

Other grounds for modeling the optimal criminal policy are state doctrines and concepts which ensure various aspects of national security and the development of social policy. For example, the Concept of Public Security in the Russian Federation in the field of enhancing international cooperation in law enforcement provides development cooperation between the Russian Federation and foreign states and international organizations in the areas of extradition, legal assistance in civil, administrative and criminal cases, as well as tracing, freezing, seizing and return of property obtained by illegal means; strengthening of interaction forces to ensure public safety with the special services, law enforcement agencies of foreign countries and international organizations in the fight against illicit trafficking in narcotic drugs and psychotropic substances, terrorism, extremism and anti-corruption and transnational organized crime, including the exchange of intelligence and technical information , special technical and other means [3].

Thus, at conceptual level Russia proclaims fight against organized crime, terrorism, extremism, drug trafficking, crimes against sexual inviolability of minors, etc. However, there are some problems. All these Acts do not always complement each other. For example, human trafficking: the understanding of key terms, such as "human trafficking", "child trafficking" and "exploitation", is different on international (international instruments adopted within the framework of the UN - Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, adopted in New York City November 15, 2000 Resolution 55/25 at the 62nd plenary meeting of the 55th session of the UN General Assembly), regional (Model Law "On Combating Trafficking in Human Beings", adopted on April 3, 2008 at the thirtieth plenary session of the Inter parliamentary Assembly of States - participants of the CIS, Decree № 30-11) [4] and local level (in the Russian legislation — Criminal Code). In addition, these Acts at the same time use completely different terms such as "human trafficking" and "sale of children", "trade of children", or "trade

of humans". This situation creates confusion and allows these Acts to be considered merely as a kind of "esoteric" texts, which in principle are not able to influence the legislation, but in which each Party can find a few phrases for their legislation and which in the future will be invoked as an argument for the compatibility of domestic legislation with international law.

Besides, we should pay attention to one more fundamental flaw: *the justification of economic crimes on the ideological basis.*

According to the academician Vladmir Kudryavtsev, social policy, focused on people and their needs and interests and bridging the gap between the rich and the poor, the return of people's confidence in the future - is the first and main focus of the strategy to combat crime [5]. Throughout the world, the protest against anti-social policy of priority protection of the interests of rich people is gaining strength. As Slavoj Zizek wrote, our politicians and "experts" keep telling us that we are living in difficult times of budget deficits and debts, when all we need to do is divide the total load and accept a lower standard of living - all except the richest [6]. In our opinion, it is organized economic crime supported by governments that creates a wide range of global threats and threats to national security. That is why the criminal policy should be focused on fighting against white-collar criminals.

Unfortunately, in 2010 was adopted the **Concept of modernization of the criminal law in the economic sphere**, which proclaimed that the modern socio-economic condition of the country is characterized by phenomena such as unacceptably low level of protection of property rights, discrimination of business and social marginalization stratum of entrepreneurs.

In this case, the objectives of modernization of criminal law have been named:

- Formulation of criminal prohibitions in economic activity only in the form of real offenses precluding prosecution without the occurrence of the harm caused by the act;
- Introduction of procedures for criminal cases related to business activities, exclusively at the request of the victim.

Interestingly, the authors used the term "victim" although it is known that the economic crime does not always have a victim in its usual sense.

We believe that the concept has fulfilled the criminal order: a theoretical justification of economic crimes. We shall speak later about the consequences of the adoption of this concept.

Conceptual part of the criminal policy should be based on criminological research. In this regard, if the government is interested in optimizing their criminal policy it should develop criminology and ensure its high prestige. By the Order of the Ministry of Education and Science of the

Russian Federation dated May 4, 2010, № 464, Federal State Educational Standard of Higher Professional Education in the direction of preparation Jurisprudence (qualification-degree Bachelor's) was approved. However, in its basic part discipline criminology was not included. Therefore, Russian lawyers should not study criminology. The exclusion of criminology from the educational standard of higher education is illogical. This decision means rejection of the search strategy of optimal responses to the challenges of the modern world. In the context of the ongoing information revolution, it naturally leads to systematic incompetent management decisions and increased social tension in society.

2.2. ***The legislative part of the Russian criminal policy***.

Noteworthy is a dangerous trend of liberalization of criminal responsibility for white-collar crime. For example in 2011 the Criminal Code of Russian Federation was added by article 76.1. "Exemption from criminal liability in cases of crimes in the sphere of economic activity". This article (its first part) establishes that the person who has committed tax evasion shall be exempt from criminal liability if the damage caused to the budgetary system of the Russian Federation as a result of the crime is refunded in full. The second part of this article provides an exemption for other 20 economic crimes (such as "market manipulation", "fraudulent bankruptcy", "illegal enterprise", etc.) in case of compensation for criminal damage.

In other words, it is possible to commit these crimes and not bear any responsibility for them. The biggest risk in this case - is to compensate the damage caused by crime.

In addition, confiscation as a form of punishment was abolished.

President of the Constitutional Court of the Russian Federation Valery Zorkin calls it "anti-legal normativity" and argues that it leads to merging of corrupt businesses and a substantial part of the state bureaucracy, which deeply affects the judicial and legal system. "Anti-legal normativity" without receiving adequate resistance in the form of legal assessment and judicial sanctions, leads a significant number of "successful" Russians to a sense of impunity [7].

The most important feature of a constructive and effective criminal policy is its stability. Optimization of criminal policy is not possible in terms of its permanent reform. Unfortunately, the criminal political system of Russia has been undergoing continuous reform for two decades. The Criminal Code of the Russian Federation is modifying constantly. In this case, the analysis of these changes can not establish the existence of conceptual framework adopted amendments. Interestingly, those changes of the Criminal Code have satisfied neither conservatives nor modernizers.

In terms of reforming the criminal law, policy in Russia used postmodern thinking, which is characterized by the concept of the rhizome, Gilles Deleuze formulated. This offers a completely new way of thinking, being, action, in fact, there is no center, no fulcrum of the ontology [8]. Philosopher Peter Grechko wrote that rhizome metapattern in history is too uncertain, or, to be exact, uncertainty is its essence. History here is likened to a blind kitten, which pokes into every corner of its possible development [9]. It is in this way of thinking and action that the policy of reforming in the Russian legislation is carried out, in particular the reform of criminal law. For example, in 2011 smuggling, except smuggling of narcotic drugs and psychotropic substances, was legalized. To date, the Criminal Code is supplemented by three new articles providing liability for smuggling (Article 200.1-smuggling of cash and (or) monetary instruments; Article 200.2-smuggling of alcohol and (or) tobacco products; Article 226.1-smuggling of toxic, poisonous, explosive, radioactive substances, radiation sources, nuclear materials, firearms or its main parts, explosives, ammunition, weapons of mass destruction, their means of delivery, other weapons, other military equipment, as well as the materials and equipment that can be used to create weapons of mass destruction and their means of delivery, other weapons, other military equipment, as well as strategic goods and resources or cultural values or the most valuable wild animals and aquatic biological resources). The same thing happened with criminal liability for a slander (verbal delicts). Verbal delicts were decriminalized in 2011, and in 2012 were returned to the Criminal Code.

2.3. The law enforcement part of the Russian criminal policy.

The result of the liberalization of criminal liability for economic crimes has been a sharp decline in the volume recorded white-collar crimes.

Table 1: Volume of recorded economic crime (Source: statistics from the Ministry of the Russian Federation, URL:http//:www.mvd.ru)

Category of EC	2005	2009	2011	2012	2013	2014	
Total	73251	82911	57162	40496	34405	27388	26737
Fraudulent bankruptcy	749	548	701	529	474	426	313
Smuggling	2288	4706	3123	2796	129	194	210
Money laundering	7461	8791	1762	704	611	582	774
Counterfeiting	44108	45521	38572	26948	24073	16824	20525

This can be explained by several factors:

1. Law enforcement authorities do not have time to orientate themselves how to apply the new law, but at the same time the legislator is introducing new and new changes to the Code. This situation creates uncertainty and inability in law enforcement.

2. The biggest problem of our law enforcement is the elimination of the special services involved in the fight against crime. For example, since July 1 2003, by decree of the President of the Russian Federation special service dedicated to the fight against tax crimes has been abolished – the Federal Tax Police Service. In 2008 the Office for Combating Organized Crime was abolished as well. As a result of such abolishment valuable law enforcement officers, who had extensive experience, were fired.

Accordingly, the new law enforcement officers, without proper experience and not knowing how to implement the new law, began *to simulate fight against crime.*

Thus, the actions of the person previously qualified for a criminal offence of money laundering, if this person bought anything in a store from the money which he had received from the sale of drugs (even one bottle of beer) would have been considered as money laundering. Now this understanding of money laundering practice is abolished in the Russian Federation, not only because it is a wrong qualification of the crime, but because it is a *fake* practice (simulation of law enforcement bodies), which only creates an illusion of combating economic crime.

2.4. The influence of the decisions of the Constitutional Court on criminal policy.

In such a situation the decisions of the Constitutional Court of the Russian Federation become very important instruments for balance of the criminal policy in Russia. A very good example here is the decision of the Constitutional Court, issued December 11, 2014 (№ 32-P), which declared that article 159.4 "Fraud in business" is unconstitutional, because this article has set for fraud in business disproportionately of its public danger short term punishment [10], while the punishment for conventional fraud was really strict.

The value of constitutional justice for criminal policy is connected with its influence on criminal law, criminal procedure, penal law and law enforcement activity. Complaints concerning the constitutionality of criminal, criminal procedure, and penitentiary legislation present annually one third of all complaints to the Constitutional Court of the Russian Federation (32.4% on average for 2001 – 2014.).

Decisions of the Constitutional Court of the Russian Federation play a stabilizing role in criminal policy. In particular, corrective action of these decisions on the controversial law enforcement practices should be noted.

For example, the application of Article 10 of the Criminal Code "Retroactivity of criminal law" is an extremely important question

Not by chance from 620 decisions brought by the Constitutional Court from January to July 2014, 57 were linked to retroactive use of criminal law (interestingly, for the entire 2012 such decisions were made just in 20 out of 763, for 2013-51 out of 713. That means that the number of such complaints is growing, which indicates that the criminal law is not in stability).

The question of the correct application of retroactivity of criminal law in a general sense was solved in the Decision of 20 April 2006 № 4-P [11]. However, changes in the criminal law put before the courts the problem of reducing of punishment convicted. Accordingly, the new decisions of the Court are taking on this issue.

3. CONCLUSION

Optimization of criminal policy involves the creation of its ideal model. However, this optimization should be based not only on Acts of different levels, but also on the idea of social justice. It is necessary to abandon the excuses of white-collar crime. It is also necessary to provide stability of the criminal policy. Provision of the high prestige of linking Criminology and criminal law in the scientific, educational and practical aspects is also an important task.

At this stage in order to optimize the criminal policy it is quite necessary to pay special attention to constitutional justice. The Constitutional Court, taking decisions, takes a balanced position, (avoiding liberal or repressive approaches) and seeks, guided by the Constitution, to find the optimal solution to specific criminal-political problems.

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SANCTIONS FOR SPECTATOR VIOLENCE – IMPOSING A SENTENCE OF PROHIBITION OF ENTERING ON SPORTS, CULTURE AND OTHER SOCIAL EVENTS

Tereza Konečná

Abstract

A lot of people like going to sport events. I also sometimes go to a sport event to support my favourite team. Very often we can see families with small children at a stadium. However, people are worried about their safety. Some groups of fans go there to fight and destroy stadium equipment. Our joy of sport disappears and the organizers, the police and the courts have a lot of work with these people. It is a problem of modern society but I have to ask if we were not returning to prehistoric times. In this article I am going to focus on some solutions and procedures to improve the situation at sport events.

Key words

Spectator violence, sentence of prohibition of entering on sports, culture and other social events, Law of sport support, detention, necessary defence, Probation and Mediation Service

Introduction

Punishments are almost as old as mankind. However, there has been a huge development and everything has been changing. Nowadays, there is a problem with the total number of prisoners-prisons are overcrowded. In the Czech republic, there is a typical, but not sufficient solution-the President issues a general pardon. Suddenly we have suffcient space. But for how long? In 2013 the now former president Václav Klaus issued a general pardon and more than 7,000 people were released from prison (punishment was forgiven to more than 100,000 offenders–suspended sentence, house arrest and community service). But it is not a good provision, because there has been an increase of crime rate and these people have come back to prison in more than 40 % of the cases.[1] Aggressive behaviour of visitors on sport

[1]*January general pardon of president Klaus concerned over 111 000 people.* Parlamentnilisty.cz [online]. [cit. 16. 1. 2015]. Available: http://www.parlamentnilisty.cz/arena/monitor/Lednova-amnestie-prezidenta-Klause-se-tykala-111-263-osob-298326.

events and other actions is very common today. This problematic behaviour is, unfortunately, typical at football stadiums (not so often in connection with ice–hockey matches). People usually commit disturbances, somebody else´s property damage and violent offences. But people behave inappropriately also at culture events, for example sometimes we can see violent behaviour at balls. As a punishment, sentence of no entry could be imposed in these cases.

In the past, there were a lot of military conflicts in Europe. It was an opportunity for men to vent their anger on enemies. Today, in time of peace, they no longer have these occasions. There are a lot of ways how to replace fighting – sport, martial arts, military service. But some people break the rules and fight like in the past. People (it is not accurate to say fans because they have different aim-to support their favourite teams) come to stadiums to provoke skirmish and fight one another. There are a lot of people and in their subconsciousness we can find something wrong. At stadiums they lose their individuality and rational control and they are controled by their emotions. Mostly, it is not sporadic behaviour and they behave violently repeatedly. It is a kind of entertainment. Disturbing the peace, fights, wilful damage and bodily harm are often.[1]

I consider imposing of alternative punishments to be a better solution to avoid overcrowded prisons. Repression has not been the most important aim of punishment, there has been also an emphasis on restitution of relations and return to the state before commited crime. Alternative punishments have been more frequent. Not only in the Czech republic, but in many foreign countries we try to remedy the situation and use some of the variety of options. Financial and personal resources are not enough, so we seek new possibilities how to make criminal procedure faster and more effective. We need to make solution and there are a lot of eventualities. We can employ more people in state authorities, abandon criminal prosecution in same cases or not prosecute some of current criminal action. Personally, I agree with using some simpler forms of criminal process: thanks to them we can impress the offender and remedy the situation. We can use diversions, which are available to fulfill these considerations. It is necessary to enact well arranged and effective legislation which ensures justice, efficiency and speed in mutual agreement. It is important to adjust in the future.

However, the intentions of the legislator are sometimes counterproductive because in practice we can use many and many provisions. The relation and connection between them is not clearly defined.

1MEZNÍKOVÁ, Marie. *Psychology of human behaviour in extraordinary situations.* Conference paper – 8th year of The red cock konference. České Budějovice. 2005. [cit. 19. 2. 2015]. Available: www.hzscr.cz/soubor/referat-06-doc.aspx.

Judges (public prosecutors) are not completely familiar with the use of all provisions, they do not know which of them are of use. They usually use a chosen provision repeatedly because they have practical experience with it. Many and many options of provisions from which we can choose in case of minor offences is not a proper solution. Legal certainty in action of public service is not secured, it makes a mess of use. It is more than obvious that the adoption of new provisions in both substantial and procedural criminal law is not a good idea. I would rather make improvements to current legislation, deterimine relations between provisions and perhaps restrict or cancel some of them (conditional suspension of the criminal prosecution has been used quite common, unlike legal settlement, which is not so advantageous for the offender). One precisely adjusted provision can be understood as a better way than two unclear possibilities which are guaranteed by legislation. On the other hand, some provisions and their use are absolutely necessary and I welcome the decision to try to improve the situation and adopt them (such as sentence of prohibition of entering).

In this paper I would like to focus on a quite new kind of punishment, which was adopted to solve a group of problems. Particularly in connection with actions of football hooligans, Penal Code adjusted a new type of criminal sanction. Since 1. 1. 2010 there is a possibility to impose a sentence of prohibition of entering on sports, culture and other social events. I am going to give you insight into Czech legislation, as well as mention possibilities of promoters and document practical knowledge and connected problems.

Czech legislation excursion

2a) Criminal sanctions

A sentence of prohibition of entering on sports, culture and other social events (briefly „SPE“) can be imposed to the offender in case of intentional crime. There has to be an essential connection with his attendance on particular action. This sentence can be imposed as a separate sentence, alternatively with another punishment. The action of the offender has to be judged first-subsequantly we can think about this type of punishment. This sentence can be imposed for quite a long time, the limitation of action can last up to 10 years.[1] Unlawful conduct can be commited at a particular event or there has to be continuity to it (e. g. traveling to it). Penal Code Commentary states that if fans of competing clubs make a deal to take part in a street fight the next day, it is able to see a connection with the sport event

[1] Section 76 and 77 of Penal Code.

and this sentence can be imposed.[1] In condemnatory sentence, it is necessary to state specific actions, where a person must not come in the future. If there is an important reason, it can be set in general. Subsequently, this person has to come to the police station at the prescribed time (e. g. a fan of football club AC Sparta Praha has to come to the police station at the time when his favourite club plays a match).

Significant role at this sanction plays the Probation and Mediation Service. This institution was implemented to Czech legal regulation by Act number 257/2000 Collection and today it plays an important role in our society. Probation and Mediation Service cooperates with the offender and it can inflict a specific programme on offender. This programme can include a social training and psychological consultancy. Everything depends on the adapted probation plan (it is a complex of liabilities, which have to be done or which are forbidden).[2] This type of sanction had been also used as a part of restrictive provisions, with conditional sentence and abandonment of punishment, before it was adopted by special provision. During the probationary period the person had to observe rules, othervise more strict punishment had to be executed. Then there was a shift. Today it is a special type of sanction, not only one of possible restrictive provisions.[3] All types of actions, which are prohibited, have to be precisely expressed. At time these actions are being held, the offender has to report to the police.

But a sentence of prohibition of entering on sports, culture and other social events is not an efficient provision in all cases. Some perpetrators of this unlawful conduct need aggression in their lives and they can cause problems somewhere else. In these cases it is necessary to impose more strict punishment, such as prison sentence. Another problematic situation can also come, when the perpetrator sometimes breaches the ban and he does not come to the police station although he has this liability. In this case this person can be convicted for obstruction of official decision, according to Section 337 article 1 letter d) of Penal Code. In this case a prison sentence can be imposed (up to 3 years).

On the other hand, in some cases the perpetrator behaves (after the breach of law) according to regulations and cooperates with the Police and

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[1] ŠÁMAL, Pavel. *Penal Code I. § 1 – 139. Commentary*. 1. edition. Praha: C. H. Beck, 2009, p. 848.

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the Prosecutor. It can be considered as a mitigating circumstance and it can have an influence on the rest of the punishment – conditional abandonment of it. Half of the punishment has to be executed. It is also possible to set a probationary period.

The first sentence of prohibition of entering on sports, culture and other social events, which came into force, was placed in June 2010 by the District Court in Příbram. A fan of FC Slavia Praha threw a petard on the football field, near to the goalkeeper of the competing team. The punishment was imposed quite high – he could not come to the football stadion two and a half years, at the time of matches of FC Slavia Praha he had to come to the police station in the place of his residence.[1]

The sentence of prohibition of entering on sports, culture and other social events can influence the life of the offender for a long time. This person is not able to travel abroad, because there is a liability to come to the police station. The Czech legislators expect that electronic monitoring devices would be used instead of the act of reporting to the police station. But there is a problem, because this type of device has not been put into practice yet. It is a big practical problem. Competitive tendering has not been administered succesfully and we have not chosen the company which would be authorized to produce these devices. Because of it, electronic monitoring devices can not be used, not only in case of sentence of prohibition of entering on sports, culture and other social events, but also for the sentence of house arrest. Officers from Probation and Mediation Service have to control these offenders at random choice.

Czech Constitutional Court has not made decisions about this sanction yet. Supreme Court has dealt with the sentence of prohibition twice. The first time it was a complaint for breach of law by the Ministry of justice (according to section 266 of Penal Code) –the complaint was rejected. The offender was found guilty of violence against an official (section 325 of Penal Code). As a sentence this person had to performe a sentence of public service (150 hours) and a SEP was also imposed (all sport events for one year). The Ministry of justice made a complaint, because 2 types of sanctions were imposed and they thought that imposing the less affecting sentence was sufficient. The Supreme Court rejected this complaint, because there was a possibility to impose two sanctions together and in this case it was justifiable. A possibility to impose sentence of prohibition widely (for all sports events) was appropriate, because the offender had been punished repeteadly for this breach of law and experts opinion showed that this person

[1]*The first football troublemaker got a sanction of prohibition of entering on sports.* Idnes.cz. Published: 13. 6. 2010. [cit. 2. 2. 2015]. Available: http://zpravy.idnes.cz/prvni-fotbalovy-vytrznik-dostal-zakaz-vstupu-na-stadion-pmk-/krimi.aspx?c=A100613_204155_krimi_mad.

was dangerous – especially when he drank alcohol (it was his typical behaviour in sport events). This person could be dangerous in all cases and the environment itself also negatively influenced his behaviour.[1] It was a good decision which could positively influence the life of this person and wold force him to behave in a different way. On the other hand, if this person behaved unlawfully, this sanction would be imposed for longer time.

The second case was decided last year, the accused had managed to be heard by the Supreme Court – the appeal was refused. The offender had commited a defamation of nation, race, etnical or other social groups (section 355 of Penal Code) – he chanted racist slogans during an ice–hockey match. His appeal had no legal reason, so it was refused.[2]

Nowadays, there are discusions in our society whether this type of sanction has been used adequately. The number of people, to whom the SEP was imposed, has been about 50 per year. Ministry of justice has expressed that this sanction should be imposed more often, because our society has no more redundant expenses with it. Czech Union of Justice has not been favourable with this provision because this punishment has fulfilled its purpose, it is not suitable to impose it more often because problems from sports events would be moved to another place. Moreover, electronic monitoring devices have not been implemented yet. Criminal prosecution is not frequent, sometimes illegal behaviour is considered as only offence, not crime. A passing reference – considerations of tightening this sanction (a prohibition of entry for the rest of one's life) have been proposed .[3]

2b) Administrative sanctions

It is important to mention administrative sanctions used in case of illegal behaviour with smaller social harmful effects (in the offence law, there are offences against public order and offences against civil coexistence).[4]

In the past, there was no legal regulation suitable for imposing sanctions to promoters of events in case they had not adopted measures to

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[1] Resolution of Supreme Court, 6 Tz 57/2011 from 29. 11. 2011. Supreme Court [online]. [cit. 4. 2. 2015].

Available:http://www.nsoud.cz/Judikatura/judikatura_ns.nsf/WebSearch/75538E6D4ACA11E7C1257A4E0068B7BF?openDocument&Highlight=0,z%C3%A1kaz,vstupu,na,sptovn%C3%AD.

[2] Resolution of Supreme Court, 7 Tdo 532/2014 from 7. 5. 2014. In: ASPI [legal information system]. WoltersKluwer CZ [cit. 4. 2. 2015].

[3] KODĚRA, P. *Courts do not use sentence of prohibition of entering for football hooligans sufficiently.* Ihned.cz. Adopted by Probation and Mediation Service [online]. Published: 1. 4. 2014. [cit. 12. 2. 2015]. Available: https://www.pmscr.cz/aktuality/soudy-nevyuzivaji-naplno-zakazy-vstupu-na-stadion-pro-fotbalove-chuligany.

[4] See section 47 and section 49 of Offence Act.

secure the situation at the stadium (or had not been responsive to an upcoming situation). Some sanctions could be imposed on the basis of the decision of Czechmoravian football association (according to internal legislation). There was no act for these issues. Special act came into force in 30. 3. 2001 (offences and administrative offences have been set in it).[1] Owner or place operator (liable person) can commit one of three types of offences:

Visiting rules are a very important preventive instrument, it contains information about forbidden behaviour and forbidden things list. Liable person sometimes does not issue it or forgets to publish it. The basis is in the civil law, the owner is able to use all his rights but the provisions must not be discriminatory.[2] President of Czech Football Association Miroslav Pelta would like to put chip cards into practice to identify people (previous registration is necessary).[3] These cards have not been introduced yet, it will be expensive but expenses could be divided between municipalities, region, state and football clubs.

For the Czech republic it is typical that fans of a team destroy property and threaten safety of people. It is necessary to impose sanctions on these people and also on the liable person. The liable person has to restore the peaceful situation, alternatively finish the match and ask the police for help. Last year there was a very problematic match played between FC Baník Ostrava and AC Sparta Praha. There was a total damage more than 3.5 millions Czech crowns (approximately 120 000 Euro). The liable person did not manage to prevent this situation: 31 people were taken into custody.[4]

The third type of offence is not common. In case of the above mentioned situation liable person must not organize events for specified period of time (up to 1 year). In case this ban is breached and a match is organized, high fine has to follow.[5]

Solution to violence

There are two possibilities how to approach to violence during the match. There could be more policemen or the organizer could be the only

1Act 115/2001 Coll., Support of Sport Act from 28. 2. 2001. In: ASPI [legal information system]. WoltersKluwer CZ [cit. 2. 2. 2015].

2 See section 1012 of Civil Code.

3*Pelta and Chládek want registration of fans and police presence at stadiums.* Tyden.cz [online]. Published: 24. 3. 2014. Available: http://www.tyden.cz/rubriky/domaci/pelta-s-chladkem-chteji-registraci-fanousku-i-policii-na-stadionu_302069.html#.VNMSFlJASJA.

4*Ministry of the Interior iniciated administrative procedure with FC Baník Ostrava.* MVCR.cz. [cit. 19. 2. 2015]. Available: http://www.mvcr.cz/clanek/ministerstvo-vnitra-zahajilo-spravni-rizeni-s-fc-banik-ostrava.aspx.

5 See section 7d of Act 115/2001 Coll., Support of Sport Act from 28. 2. 2001. In: ASPI [legal information system]. WoltersKluwer CZ [cit. 2. 2. 2015].

person who takes care of maintaining order. According to section 76 of Penal Code, everybody can impose limitation on personal freedom in case of commiting crime or immediately after it. Thanks to this regulative, I suppose that the organizer should be able to ensure safety at these places alone. The aim of the detention could be to ascertain one´s identity, prevent somebody from escaping or detention for ensuring evidence. Then it is indispensable to „transfer" these people to the Police. Reaction of promoters must not be disproportionate to the way of attack. Promoters have to react in compliance with regulation of necessary defense.[1] Reaction could be little more intensive than the unlawful action of spectators. The evaluation follows subsequently, so promotors have to be careful. For instance, typical indispensable reaction would be the use of violence and the death of people as a consequance of destroying equipment (such as seats) by spectators. Ministry of the Interior prepared handbook for promotors of these events. This handbook contains operating procedures, which should be used in case of problematic situation at sports centres.[2]

Moreover, a restored agreement between the Czech Football Association and the Police, which concernss cooperation during football matches, was signed in 2013.[3] This agreement clarified the relationship between promoters and police. Which match is considered as a high risk one depends on a police decision. According to this decision, promoters have to take measures. At stadiums, there has to be sufficient number of cameras, number of entries and emergency exits and adequate number of workers of security service. Promoters are responsible for smooth running of action, in case of big problems, they have to ask police for help. But it means that organization provisions have not been sufficient and subsequently an administrative sanction can be imposed to the promoter.[4]

In the Czech republic, it is typical that towns (supported by the Ministry of the Interior) have projects to influence spectators and to eliminate spectators violence. „We fan sports, we fan fairly" was a project held in Ostrava, the aim of which was to understand habits and behaviour of fans and to be able to react promptly to defective behaviour. Project „Positive fans" held in Liberec was very successful. It was based on

[1] See section 29 of Penal Code, section 2 paragraph 2 of Offences Act.

[2] *Safety during sports matches*. Handbook for football clubs. Published by Ministry of the Interior, Department of security, 2008. [cit. 3. 2. 2015]. Available: file:///C:/Users/user/Downloads/Manual-pro-fotbalove-kluby.pdf.

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activities with young fans between 10 and 20 years (because they are considered as high risk group in the future – next generation of hooligans). This project comprised leisure time activities, by means of which they should understand problems that rise from unlawful conduct.[1]

Conclusion

Since 1st January 2010 in the Czech Republic, there is a possibility to impose a new special kind of criminal sanction. We can use this sanction in connection with illegal behaviour, especially connected with sport events. I have dealt with practical exemples of it and how it works. I have also focused on judicial decisions. Organizers bear some responsibility for problems at sport events. I have mentioned liabilities of organizers and possibilities how to solve some problematic situations. In spite of having a new sanction, the situation is not satisfactory. In our society there are debates about imposing this new sanction more often or being more strict. It is possible that there will be more changes in a short period of time. One of the problems, which should be solved in short time, are electronic monitoring devices and their putting into practice.

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ON THE PATH OF THE BUSINESS OF SMUGGLING MIGRANTS: MACEDONIAN CASE

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Abstract

The beginning of the Arab spring and the permanent war conflicts since December 2010 made the Republic of Macedonia one of the mostly "visited" countries by illegal migrants. Using the help of the criminal groups, illegal migrants are travelling through the Macedonian territory and making efforts to get to the European Union. The increased numbers of cases of smuggling migrants is one of the many indicators showing that the Macedonian path is one of the most often used on the way to the "promised" European Union. The paper makes an overview of the most important phenomenological characteristics of this crime in the Republic of Macedonia.

Key words: *criminal groups, illegal migrants, organized crime, Republic of Macedonia, smuggling of migrants.*

INTRODUCTION

Migration is one of the biggest moving forces of human development and progress. People, today, are in movement as result of many reasons, such as better economic possibilities, better education for their children, searching for family, protection, adventure, etc. Also, migration is the main reason for language proliferation, mixing of cultures, cousins and ideas. Today, global

migration is one of the most important products of globalization, but exploitation of it by organized crime groups is its dark side.

The term migration (latin migrare - moving) is used to explain different kinds of mobility. In the Dictionary of the International Organization for Migration (IOM), the term migration is used to determine the movement of people or groups of people through borders of a country and on its territory, regardless of the distance which is passed, the reasons, and the circumstances in which it is happening. With such a definition, every movement of people is defined, including the one of fugitives, displaced persons, economic migrants, and people who move because of family merging.[1] Although migration brings good perspectives to the migrants and the countries, however, in conditions where destination countries are the ones that close their borders to migrants, most of them cannot legally migrate. The global motivation for migration is still wider than the limited possibilities to go through someone's borders. But, because of severe border controls, illegal migrants are using services of the organized crime network and move through borders illegally.

The different cases of smuggler's modus operandi and their everyday actions, especially the last one of a father and a daughter[2], inspire a need of analysis of the phenomenology of smuggling of migrants. The main thesis claims that the smuggling of migrants in the Republic of Macedonia overtakes a small percentage of the total number of criminal acts yearly, but knowing it is an organized crime act its number is a high one for a country like ours. Although we are on the border with EU on the south and just a country from them in the north, preventive measures that have been undertaken should and must give results. The paper gives a short overview of the phenomenological characteristics of smuggling of migrants in the Republic of Macedonia and the situation with this phenomenon at this moment. We will use secondary data from the Ministry of Internal Affairs and the State Statistical Office.

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[1] Sasa Mijalkovic., Milan Zarkovic. *Illegal Migration and Human Trafficking* (Belgrade: KPA, 2012) p. 15

[2] A father and a daughter from Gostivar, together with one person from Sveti Nikole organized smuggling of Syrian migrants, as telegraf.mk has learnt. The regional border affairs center Sever has filed a criminal charge to the Public Prosecution Office for organized crime and corruption in Skopje against the 41-year-old father and the 21-year-old daughter from Gostiver, but residents of Gevgelija, and against the 42-year-old man from Sveti Nikole for reasonable doubts for 'organizing a group and inciting people smuggling, smuggling of migrants and smuggling of a minor'. - See more at: http://www.independent.mk/articles/16343/Macedonia+Father+and+Daughter+Smuggled+Syrian+Migrants#sthash.dwlur63t.dpuf

THE CONCEPT OF MIGRATION AND SMUGGLING OF MIGRANTS

1994 was the year when the United Nations on its third session of the Prevention of crime and criminal activity admitted "increased activity of transnational criminal organizations which are making their profits with illegal smuggling of migrants and trading with people's lives and dignity." Even more, the problem of smuggling of migrants from Mexico and Cuba to the USA or from the ex - Eastern block to the Western European Countries, increased the number of calls from national and international bodies addressing the problem. For example, although it is not a direct indicator, the number of illegal migrants in the USA is about 8.5 million people and in Europe that number is about 3 million migrants. In Europe, Spain, Italy and Greece is the highest per capita of undocumented and smuggled migrants. Unfortunately, because of the nature of undocumented and smuggled migration, we cannot virtually directly quantify or verify the exact number of smuggled migrants.

The estimated income of smuggling operations worldwide is around 9.5 billion American dollars. Knowing this, even the UN asked for international cooperation for solving this problem, somewhere in the early 1990s of the XX century. The Ad Hoc Committee which worked on elaboration of the Convention against the transnational organized crime sent proposals of the optional Protocols for smuggling of migrants and trafficking in human beings in January 1999. The Convention was adopted by the General Assembly on its Millennium Meeting in November 2000. It was opened for signatures in December 2000, in Palermo, Sicily, Italy. It represents a legally binding document of the UN in the area of crime (organized crime). It should have been signed by 40 countries before it entered into force. The Protocols contain 4 elements which distinguish the similar criminal acts. Those are:

- Smuggled people are traveling voluntarily; trafficked are starting their trips voluntarily or are victims of deceit or are kidnapped;
- Trafficked people are used or exploited on longer term;
- There is an interdependence between trafficking in human beings and organized crime groups;
- Trafficked people are used for further goals in the network (recruitment for criminal goals).

There is no argument that deceit is used and that victims are trafficked through promises for better life. The situation becomes worse when an individual, as an illegal migrant, accepts a position of home attendant and is paid less than the citizens of that country. In some cases victims are voluntarily cooperating, for example, a woman is smuggled in

another country and she knows she will work as a prostitute, because her income is higher in the country of destination than the one in the origin country. However, when a woman cannot keep the earned money, but is forced to "buy" her own freedom and passport, she is exploited and becomes a victim of trafficking in human beings.

The Convention against transnational organized crime and its two Protocols marked the beginning of an era of international suppression of organized crime, and trafficking in human beings and smuggling of migrants, as two crimes which existed through years, changing its form, but not losing its core. The Protocol to prevent, suppress, and punish trafficking in human beings, especially women and children and the Protocol against smuggling of migrants by land, sea, and air, are the documents which imposed the obligation of incrimination of these two criminal acts. The Protocol for smuggling of migrants, in article 3, paragraph 1, defines smuggling of migrants as *the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.*[1] The Article 6, paragraph 1, contains the obligation for member states *which shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit:*

- The smuggling of migrants;
- When committed for the purpose of enabling the smuggling of migrants: (i) Producing a fraudulent travel or identity document; (ii) Procuring, providing or possessing such a document;
- Enabling a person who is not a national or a permanent resident to remain in the State concerned without complying with the – 4 – necessary requirements for legally remaining in the State by the means mentioned in subparagraph (b) of this paragraph or any other illegal means.[2]

The Protocol does not incriminate the illegal migrants because they are object of smuggling, but incriminates the act of those who are profiting by the organization of acts which are defined as criminal in the Protocol. Similar to the Protocol for trafficking in human beings, the Protocol for smuggling of migrants contains a special reference for protection of human rights of the illegal migrants. Here, migrants are not defined as victims, but as objects of crimes.[3] At the same time the goal of this international

[1] Article 3 from the Protocol against smuggling of migrants by land, sea and air

[2] Article 3 from the Protocol against smuggling of migrants by land, sea and air

[3] International Organization for Migrations, *Comparative analysis of the international instruments and Macedonian legislation for combat against human trafficking and illegal migration* (IOM: Skopje, 2007) p. 15

document is to prevent from smuggling of migrants, as well as to give the member countries a possibility to accuse migrants for illegal entry, because most of the member countries have incriminated illegal entry, use or possession of falsified documents or illegal stay. In other words, when we speak about smuggling of migrants, we speak about (semi) organized illegal immigrations. Connected to this we must say that smuggling of migrants is crossing several state borders, i.e. illegal crossing of border with severe measures of security. Because of those measures, smuggling of migrants occurs in organized forms. At the same time we should know that where migrations and border controls are threatened by organized crime, an efficient legal mechanism for defense of human rights, stability, and adequate management of the country, should be developed.[1]

The essentiality of smuggling of migrants is to cross border on illegal way. But, in some cases it can be made with legal crossing of borders. Those are cases of people entering the territory with tourist visas, and continuing their stay illegally after their visa expires. Smuggling over official border crossing is not a rare phenomenon. Mostly, people have the documents necessary for border crossing. Such crossing can be with falsified passports, hiding people in special parts of the vehicles, bribing of officials at the borders, with deception, coercion.

SMUGGLING OF MIGRANTS IN THE REPUBLIC OF MACEDONIA

The first step towards establishing modern border control was transferring the competence for border security from the Army to the Ministry of Interior. Integrated border management was introduced implying close cooperation among all national authorities involved in border management (including the Ministry of Interior, Ministry of Foreign Affairs, Customs Administration, Financial Police, etc.).[2]

The main obligations for member states given in the Protocol for smuggling of migrants are:

- to incriminate "smuggling of migrants", use of fake falsified passports or personal documents (used for smuggling) and helping smuggled migrants to illegally stay in the country;
- to encourage international cooperation for suppression of smuggling of migrants;

[1] Sasa Mijalkovic., Milan Zarkovic. *Illegal Migration and Human Trafficking* (Belgrade: KPA, 2012) p. 26

[2] http://www.analyticamk.org/images/stories/files/2014/Police_Cooperation_in_the_field_of_illegal_migration_and_human_smuggling.pdf

- to adopt legal and other measures which are needed for facilitated severe punishment for criminals who are endangering or will probably endanger the life or security of migrants; or will exploit migrants;
- exchanging of relevant information regarding the routes, modus operandi and identity of organized criminal groups which are smuggling migrants, also exchanging of legal experiences and practical use of methods, and exchange of scientific and technical experiences useful for the legal organs;
- to strengthen border control which is needed for suppression and prevention of smuggling of migrants, without limiting the free movement of people.[1]

In 2004, the Republic of Macedonia incriminated the smuggling of migrants. The legal solution is contained in the article 418 - b in the Macedonian Criminal Code:

(1) One who, using force or serious threat that will attack the life or body, with kidnapping, fraud, out of greed, with misuse of his / her official position or using of the powerlessness of other illegally transfers migrants through the state border, as well as one that produces, purchases or owns fake passport with such intention, shall be sentenced with imprisonment of at least four years.

(2) One that engages, transports, transfers, buys, sells, hides or accepts migrants shall be sentenced with imprisonment of one to five years.

(3) If during the commitment of the crimes stipulated in the paragraphs 1 and 2 the life or the health of a migrant is endangered, or the migrant is treated especially humiliating or cruelly, or he / she is prevented to use the rights he / she has according to the international law, the stipulator shall be sentenced with imprisonment of at least eight years.

(4) If the crime stipulated in the paragraphs 1 and 2 is committed with a minor, shall be sentenced with imprisonment of at least eight years.

(5) If the crime referred to in paragraphs (1), (2), (3) and (4) of this article is committed by an official person while performing his / her duties, he / she shall be sentenced to imprisonment of at least ten years.

(6) The means and the vehicles used for committing the crime shall be confiscated.[2]

The legal control of smuggling of migrants is filled through the use of a situation, then with using of acts of recruitment, transfer and harboring of

[1] UNODC, Human trafficking and smuggling of migrants: Instructions for International Collaboration, p. 13

[2] Article 418 - b from the Criminal Code of the Republic of Macedonia, Official Gazette of the Republic of Macedonia

migrants. Connected with article 418 - b is article 418 - c (Organizing a group and abetment in performing crimes of trafficking in human beings and smuggling of migrants).[1]

The irregular migration trends in the Western Balkans region underwent rapid changes following the introduction of visa-free travel within the European Union. In just four years, the region transitioned from being largely a source country for irregular migration to mostly a transit area of irregular migrants from Greece. In 2012, nationals from the Western Balkans were increasingly found abusing various forms of legal travel, detected either during border checks or while already in the European Union. The misuse of international protection provisions in the Member States and the Schengen Associated Countries was by far the most prevalent. In 2012 there were almost 33 000 asylum applications submitted by citizens of the five newly visa-exempt Western Balkan countries (Albania, Bosnia and Herzegovina, Montenegro, Serbia, and the Former Yugoslav Republic of Macedonia), or 53% more than in 2011. The number was the highest since the introduction of visa–free travel in the region and accounted for 12% of the total number of asylum applications in the European Union. Other abuses of legal travel channels were linked to overstay in the European Union. More precisely, there were roughly a fifth more detections of nationals of the Western Balkans illegally staying in the Member States countries – this group included mainly Kosovars, Serbs and Albanians. The latter group was also the most commonly detected nationality using document fraud to illegally enter the European Union / the Schengen area from a third country in 2012. Almost one fifth of all detections were linked to the Albanian nationality, largely using counterfeit entry / exit stamps intended to hide overstay.[2]

The year 2013 witnessed an unprecedented increase in the migratory flow at the Hungarian - Serbian border. During this period, almost 20 000 migrants illegally crossed the Hungarian - Serbian border section and nearly all of them applied for asylum after crossing. The nationalities reflected the dual typology of this route and included residents of Kosovo, Serbian nationals but also Pakistani, Afghan, Algerian, or Moroccan nationals as well as sub-Saharan Africans, many of whom had been living in Greece prior to

[1] The one who organizes a group, gang or other association for performing the crimes from Articles 418 – a, and 418 – b, shall be punished with imprisonment of at least eight years. The one who becomes a member of the group, gang or other association from paragraph (1), or in some other way helps the group, the gang or the association, shall be punished with imprisonment of at least one year. The member of the group from paragraph (1), who informs against the group before it commits the crime shall be released from punishment. The one who invokes, abets, or supports the perpetration of the crimes from Articles 418 – a, and 418 – b, shall be punished with imprisonment of one to ten years.

[2] http://frontex.europa.eu/trends-and-routes/western-balkan-route/

travel. Among the many reasons for this sudden increase was the change in Hungarian legislation on migration and asylum introduced in January 2013 allowing those migrants who submitted an asylum claim to be transferred to open centers, which many of them left soon after. The numbers of migrants apprehended at the Hungarian - Serbian border peaked in June, with an average of 130 migrants crossing the Serbian-Hungarian border in an irregular manner each day. In July 2013, the Hungarian authorities further amended asylum legislation to allow for the detention of asylum seekers in those cases where abuse of the system was suspected and strengthened their border control capacity. These measures contributed to a dramatic decrease of the migratory flow on this border area in the second half of the year.[1]

Detections of illegal border crossing reached their peak in 2014. While the secondary flow of migrants who entered the European Union via Turkey continued on this route, the year 2014 was marked by unprecedented numbers of Kosovars crossing the Serbian - Hungarian border illegally. Unlike other Western Balkans citizens, Kosovo nationals have not been granted a visa free regime to the European Union and therefore opted for illegally entering in Hungary where they requested asylum. As a consequence, the Hungarian authorities accommodated them in open refugee centers from which they absconded to proceed to other European Union countries, particularly Austria and Germany, where they also applied for asylum.[2]

Table 1: Volume and dynamics of smuggling in migrants and number of its perpetrators in the Republic of Macedonia (2004 - 2013)

Year	Smuggling of migrants (418 - b)	Perpetrators
2004	21	28
2005	35	61
2006	23	54
2007	32	64
2008	36	96
2009	26	53
2010	27	58
2011	27	44
2012	40	70
2013	52	98

Source: Ministry of Internal Affairs of the Republic of Macedonia

Analyzing the number of crimes through years, there is an increased level in 2005, 2007, 2008, 2012 and 2013. In 2007, 85 Macedonian citizens have been reported, 2 were Swedish and Albanian, and 1 Moldavian and Turkish citizens. They were smuggling migrants to the Macedonian - Greek

[1] http://frontex.europa.eu/trends-and-routes/western-balkan-route/
[2] Ibid

border. The 2 Swedish smugglers were smuggling migrants from Kosovo to Greece through the territory of Macedonia. In 2008 smugglers organized smuggling of 173 migrants from Serbia (the region of Kumanovo) and Albania (Ohrid Lake or Struga region), to EU destinations (Greece or other European countries). Migrants for those services had to pay from 600 to 1500 euro.

In 2009 through the KANIS action of the SECI Center, a smuggling group was reported. 12 Macedonian citizens (1 police officer) and 1 Serbian citizen for a longer period have smuggled migrants from China, through Serbia, Macedonia and Greece to the Western European countries. Also, in December 2009, Afghanistan migrants were found in a special compartment of truck on the border crossing named Bogorodica. Those migrants were taken from the Greek port Patra. In 2010 organized crime groups were transporting migrants from the Greek and Albanian border to the Western EU countries. Also, in this year for the first time migrants were originating from countries affected by the Arab Spring. Also, in 2011 and 2012, Macedonia is still a transit country for illegal migrants coming from countries of the Middle East and North Africa. 2013 and 2014 are years when migrants are originating mostly from Syria, and in many cases, especially in 2014, migrants were victims of railway accidents (in cases when they were not using the services of smugglers).

Table 2: Number of discovered illegal immigrants in the Republic of Macedonia (from 2001 to 2013)

	Total	Illegal immigrants discovered on the border line	Illegal immigrants discovered in the territory of the country
2001	12660	3033	9627
2002	1192	684	508
2003	1185	477	708
2004	1608	732	876
2005	2358	1632	726
2006	4234	1866	2368
2007	2402	1919	483
2008	1.448	1080	368
2009	1415	1111	304
2010	1103	766	337
2011	469	209	260
2012	682	251	431
2013	1132	586	546

Source: Ministry of Internal Affairs of the Republic of Macedonia

According to the Ministry of Internal Affairs, the number of detected illegal crossings of the Macedonian border was 1415 in 2009, 1103 in 2010, 469 in 2011, 682 in 2012 and 1132 in 2013. Although the statistics show that

illegal migration reached its peak in 2009 when there were 1415 illegal border crossings, this number can be attributed to the Albanian citizens representing more than 80% of the total number of illegal migrants. The nature of their irregular migration was seasonal, as most of them were going to Greece for temporary work. When Albania joined the visa-free travel regime, the number of illegal border crossings by Albanian citizens significantly dropped from 1155 in 2009 to 328 in 2012. On the other hand, there is a significant increase in the number of migrants coming from regions that have not been noted before in such big waves, primarily from countries of Western and Northern Africa, South-Central and Western Asia and the Middle East. In addition, there were also citizens of Serbia, Kosovo, Greece, the United Kingdom, China, etc.

The regions of Asia or Africa are most common countries of origin where migrants come from. It is obvious that it is increasing – while in 2010 there were only 53 illegal crossings by these nationalities, the number doubled in 2011 so there were 105 people crossing the border illegally. In 2012 again the number increased by over 100% reaching a total of 225 people. Worryingly, 193 people attempted to cross the Macedonian border in an illegal way during the first quarter of 2013. Usually, the Afghans constitute the most frequent nationality attempting to cross the border illegally, but there are also people from Somalia, Morocco, Palestine, etc. At the beginning of 2013, first illegal migrants from Syria were noted – 42 in the period from January to March, but this number is expected to increase due to the present insecurity in Syria. According to UNHCR, a total of 2 million Syrian refugees have been recorded. While most of them are hosted in the neighboring countries waiting for international support, there are also people that want to get to the EU. Therefore, bigger waves of Syrian refugees are expected in the territories of the Western Balkan countries in the near future.[1] However, the numbers at the regional level are more worrying than the national ones. According to the FRONTEX Western Balkans Annual Risk Analysis for 2013, it is shown that the region of Western Balkans is becoming more and more important as a transit area for secondary movements – in 2012 there were 8065 people from Afghanistan (compared with 2498 in 2010), 5033 from Pakistan (202), 3029 citizens of Algeria (217), 2000 from Somalia (375), etc.[2]

The increased migration flow did not come as a surprise. The National strategy for combating trafficking of people and illegal migration for 2009 to 2012 finds that "the financial crisis and political instability in the region of Asia and the Middle East might have a significant influence in the

[1] http://www.analyticamk.org/images/stories/files/report/14055_illagal_migration.pdf
[2] http://frontex.europa.eu/assets/Publications/Risk_Analysis/WB_ARA_2013.pdf

trends of human trafficking in the countries of South-East Europe."[1] The same predictions can be found in the MARRI Migration paper 2012 which notes that although the number of migrants from the Asian and the African countries was not that high in 2010, there are indications that their number will grow.[2]

As in the past years, the major part of the detected illegal migrants - foreign citizens in 2013 were coming from Albania - 400, mostly coming from economic reasons and residing and working illegally in the Republic of Macedonia during the season of agricultural and constructional works, however, the percentage of the detected is decreased in terms of the previous year - 36,83% (54,30%). On the other hand, there is a substantial increase in the number of detected illegal migrants from the Near and Middle East, as well as from North Africa. To be expected, the major part of the illegal crossings of the state border were registered in the part toward Greece - 551 (48,67%), afterwards toward Albania - 192 (16,96%), Serbia - 140 (12,37%), Bulgaria - 134 (11,84%) and Kosovo 115 (10,16%).[3] To be expected, the major part of the illegal crossings of the state border were registered in the part toward Greece - 551 (48,67%), then toward Albania - 192 (16,96%), Serbia - 140 (12,37%), Bulgaria - 134 (11,84%) and Kosovo - 115 (10,16%). Compared to the last year, in 2013 there is a decrease in the number of registered illegal crossings in the part of the state border towards Kosovo (-36%) and Serbia (-10%), while the number was significantly increased in the part of the state border towards Greece (232%) and especially to Bulgaria, where the total number of registered crossings was 134 illegal crossings in comparison to only 4 cases in 2012.[4]

CONCLUSION

Smuggling of migrants in Macedonia is not a dominant part of the criminal acts, but because of the fact that it is directly connected to organized crime groups it has an important influence on the criminal map. Illegal migration is very often connected to smuggling and trafficking in human beings. Human smuggling is a form of serious and organized crime. The

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1 http://www.nacionalnakomisija.gov.mk/sites/default/files/prikachyvanja/nap-mak_2009-2012.pdf

2 http://www.marri-rc.org/upload/Documents/MARRI%20Main%20Documents/MARRI%20MP2012%20red.pdf

3 http://www.nacionalnakomisija.gov.mk/sites/default/files/prikachyvanja/national_rapporteur_2013.pdf

4 Ibid

track record shows that organized criminal groups go beyond borders and include citizens of many countries that organize, facilitate and carry out the transportation of migrants from their country of origin to the final destination. The smuggling of migrants is committed by individuals and organized criminal groups. The Modus Operandi of the organized criminal groups includes smuggling on land, usage of vehicles and fast transition through the Macedonian territory.

Preventive measures against smuggling of migrants should include better coordination and cooperation between the institutions on central level with those on local level (this kind of cooperation will help with identification of migrants); compliance of the national legislative with international documents; better process of the migrant's identification; wider international cooperation; usage of proactive investigation; and of course more severe border controls.

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14. United Nations. *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children,* supplementing the United Nations Convention against Transnational Organized Crime, 2000;

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RADBRUCH FORMULA RIGHTS AS BASIS FOR UNDERSTANDING FAIR TRIAL

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Abstract

The famous German theorist, Gustav Radbruch, has successfully refreshed the area of European legal thought with original ideas on how to resolve the problems, which seemed to us at first glance almost insoluble. Tripartite structure of the relationship between justice, legal certainty and legal expediency established the formula of the damping of the tension between principles; if their relationship is inadequate from the standpoint of harmony, it appears as a large load for positive legal orders. The paper Radbruch's model for solving these relationships separately record the term "unjust law" as acceptable (and perhaps the only) way to reconcile natural and positive law in the states of revolutionary and transitional processes that can occasionally find state-legal orders. The historical experience of major criminal trials after the Second World War, and after breaking of the undemocratic regime before the end of the twentieth century, are a striking testimony to the attractiveness of a legal formula which is dedicated to the theme of this paper. Putting them in a logical connection with the principle of a fair trial, the formula appears in the function parameter for credible in content and valuable assessment of the quality of the principle of a fair trial. That is why he performed a functional analysis of the relevant legal regulations in the field of human rights and freedoms in the modern European states, as well as analysis of the European documents devoted to this area. On the other hand, the author seemed interesting to systematize the basics of understanding of the principles of a fair trial, which is based precisely on the idea of the German theoretician. In this regard, it is important to handle primarily relevant jurisprudence of the German federal judiciary, in the same direction moving the attention regarding the jurisprudence of other individual European, national legal orders. To be intellectually rounded, hypothetical architecture work is particularly pronounced an attitude of understanding of European standards for fair trial

in the context of Radbruch's ideological messages. Final reasoning highlights the vitality of this part of the contemporary European legal theory from the previous century. Final conclusions point out to the important warning about the real importance of the indicated legal approaches, especially bearing in mind the cautionary principle which led positive law to the collapse of the border point in its existence.
Keywords: Radbruch, "unjust law", fair trial, Human Rights, guilt.

INTRODUCTION

As in this work we focused on the discussion of Radbruch's contribution to establishing relevant European legal standards in the area of standardizing and protection of human law, it is necessary to look back at the basic details of his personality and work, with which he refined the contemporary legal moment. Especially for the reason that on the social science field, one has to keep in mind the influence of social and political circumstances of the time in which the observed scientist lives and works. The turbulent social circumstances in which he was born and later lived and worked Gustav Radbruch directly influenced his intellectual work. Gustav Radbruch was born in the family of protestants in the rough times of German coalition, the rise of "The Second German Reich" and the famous Bismarck's social and work legislation. The making of unique Germany, Bismarck administered with resolute logic, "the strength of blood and steel" and Radbruch's adolescence passed in complex occurrences of the so-called steel epoch and making of the "German iron system". Not even later as a notable German lawyer, university professor and "imperial minister" he lived in noble social and political circumstances. In the Hitler years, through his own family and professional experience, Radbruch suffered tough years of Nazi saturnalia over law and justice, barbarian disturbance of elementary human law, private possession and legal assurance. (Stjepanov 2012, 93) Although, according to written testaments, he was more into artistic thoughts, under the influence of his father he turned towards legal science. After he graduated his studies, he specialized in criminal law in which he formulated his doctoral thesis "the Theory of Adequate Causation". At the very beginning of his scientific carrier, he had problems with the election on his way to a full time professor, because of which in search for scientific peace he changed several faculties, and after that there was the First World War. Beside the fact that he was a university professor, he was sent to the front line where among all war adversities he was wounded. After he came back, he moved by previous matters, he drew into politics, through which he tried to contribute to legal regulations of the post-war Germany. In his political work, he developed at short notice and after a short period of time

he became the representative of the people and later even the Minister of Justice. His work generated the project of criminal law, which points to innovation and affinity towards contemporary solutions, among which there was a suggestion of death sentence abolition and preconception of the set of more humane acts in criminal legislation. This stream in normative work can take us closer to the very personality of Gustav Redbruch. However, the suggested solutions "fail together with the Weimar Republic". During the Third Reich, at the period of the so-called "Nazi Germany", Radbruch, marked as the supporter of the ideas opposite to national-socialist was moved from teaching, and also suffered other consequences of Nazi "saturnalia over law and justice", which according to the author's opinion further strengthened his desire to analyze the statutes of the state system in the scientific field. A more quiet life period of Radbruch awaits after the end of the war, he gains the recognition for his scientific work, he was chosen as a dean of the Faculty of Law in Heidelberg, and he was also declared a member of the Berlin Academy of Sciences. The lifetime of Gustav Radbruch, marked by the discontinuity of the state and law systems, wars and political negotiations influenced his legal views, so during the study and commenting on his written work it is possible to analyze chronologically.

RADBRUCH'S FORMULA

Radbruch before and after the World War II

Analyzing the postulates of other authors who worked on Gustav Radbruch's written legacy, it is characteristic that he is assorted into the anti-positivist group. But reading his most important and according to doctor Stevan Vracar most important work "The Philosophy of Law", it can be seen that positivistic attitudes influenced in that part of his scientific path. By the use of the chronological analysis in studying Radbruch's works the border between the positivism and anti-positivism in his work can be seen.

The Philosophy of Law mentioned above (first time published in 1916 and then in 1922 and 1932), has in its particular parts diametrically opposed attitudes when compared to later texts ("5 Minutes of the Philosophy of Law" 1945, "Unjust Law and Supreme Legal Right" 1949, "The Justice and Beneficence" 1949). In the tenth part of the "philosophy" which deals with the validity of law, analyzing the relation between the law certainty and justice, Radbruch says: "However unjustly the law is made by its content – it seems that it always, by its own existence fulfills one purpose, the purpose of law certainty".

Opposite to that, in the text named "Legal Right and Supreme Legal Right" anti-positivism dominates. In this work he thinks that national-socialism, that is Nazism, succeeded to win soldiers on one hand, and

lawyers on the other, with two negative principles "command is command" and "law is law". Further on, like in the "Philosophy of Law", analyzing the importance of law he notices: "…positivism is not at all capable of explaining the validity of law by its own strength…" Many examples which appeared under the influence of the state power abuse in the Nazi time, Radbruch uses for "disarmament" of the strict positivistic principles, in that way deviating from a number of earlier postulates presented in the "Philosophy of Law".

If the parallel between previously described events in the life of the author and his scientific thought is drawn, immediate influence can be easily noticed. On the one hand there is the period after the end of the World War I and the hope in the "Weimar recovery", while on the other there is the end of the World War II and confrontation with Hitler's legacy. These matters demanded scientific and legal discussion, in which in the nature of his position the analyzed author was involved. The atrocities of the Second World War as well as the repercussions Radbruh had as the declared opponent of the dominating Nazi regime had influenced deeply, as we have seen, on his work. It is necessary to notice in this part that in the legal theory the biggest influence was from the texts published after the Second World War. Maybe the consciousness of the transience of life, which was brought by the Great War, influenced on Radbruch to leave his most prolific written thought at the very end of his life. At that time his theory of unjust law and supreme legal right was formulated, which as it can be seen later, served as the guiding in the solution of complex court cases in the historical milestones in Germany.

Radbruch's Formula analysis

The positive-legal order of the Nazis is not only created by reform of the judicial system in a short period of time. Here there has been no revolution but, with the gradual changes in all spheres of social life, made order of National-socialism. Creating a general atmosphere in which justice is a secondary element of general state interests, it was monitored by a comprehensive state intervention toward possible critics of such statements. Step by step, in the years of Nazi's empowering the state force, each segment of the society which could eventually jeopardize such an order was put under control. In a row in the service order are updated culture, newspapers, universities, as Slobodan Jovanovic says, analyzing establishing of a Nazi order "...for moral education of the people, after all, the army is much more important than the University... National-socialism does not immediately get that exaggeration of the internationalism... On the one hand, by the unity of command, on the other hand, by hypnotizing a mass through barracks, school and printing" (Jovanovic 1990, p. 398). In a legal order created in such

conditions, in which any form of public debate and criticism of the proposed legal solutions there has been little or no at all norms appropriate for the modern thought of the legal state. Faced with practical solutions which are reported to be due to actions of Nazi state order, Radbruch was forced to change his views which are formulated prior to his experience with the Nazis, and which are described in the previous parts.

Before and after the Second World War are the three immanent social values that Radbruch brings: justice, expediency, and legal safety (Molnar 1996, 18). However the relationship between these values is changed in accordance with the social circumstances and Radbruch's experience in them. In order to comprehend correctly the changes before and after the Second World War, it is necessary to explain these three values. Legal safety is recognized in the sense of the positive validity of law, i.e. by exclusion of the arbitrariness in application, and interpretation of the laws, finality is what is of the use for the state, and justice is considered an equal treatment of the equals. While in the pre-Nazi period legal security had a dominant role, the relationship was changed and justice was taking a central place after experience with 'horrendous horrors of coming back to life of the ideas of evil and state-duress of right' (Simic, Djordjevic, Matic 2010, 446). It is considered that Radbruch's thought before the Second World War had waived from the principle that the content of rights was at least and minimally fairly administered. Right should always have a unique value regardless of its content and that is the value of legal security. This position is considered to be typically relativistic and extremely positivistic (Molnar 1996, 18). An explanation for such a choice of explaining key terms can be found in dominant apprehensions of the time in which it was created. Theories of rights which represent extremely positivistic perspectives, i.e. normative viewpoint on key problems of theoretical approaches were dominant in scientific circles of that era. After experience with the Nazis, Radbruch changes his attitudes from the roots. It is said that 'legal security has a purpose only if it predicts equal treatment under the equals' (Molnar 1996, 19). Legal security has the task to mediate between the two other values, and its only value can be seen if it predicts equal treatment for the equals.

However, it is up to some measure the philosophical issue of the way it is possible to predict legal solutions, which in itself will contain the values and justice, on the one hand, and the values of legal security on the other. A response is situated in Radbruch's formula. 'The conflict between justice and legal security could be resolved in that way that positive right, which provides regulation and power, has the advantage, even when non-purposeful to the core, except in the case when positive law in so flagrant extent contradicts justice, that the law as 'incorrectly' right must deviate before

justice.' By this formula of his, it may be noted, Radbruch made a certain 'scale of the validity of law' (Perovic 2004, 41). As an ideal political curiosity in the first place is a fair right. However taking into account that this is an ideal assumption, and that due to conflicting interests it regulates, it is not always possible to predict the right in its perfect sense, in second place he predicted endurable unfair right. And while in the first two cases right as such has been applied and is valid, in the third case, when it comes to unbearably unfair right, and it will not be implemented, and as such will not be in effect.

When it comes to unbearably unfair right Radbruch also calls it a legal unright. In his work 'Legal unright and supreme law right' he focused on the analysis of the border between bearably unfair law which is valid and unbearably unfair law that as a legal unright is not valid. Although the sharp line cannot be drawn between these two categories of legislation, the difference between these two types of rights can be found in those basic human rights such as the right to live. When it comes to human rights, it should be borne in mind that this theory has been placed in the years before they adopted today better known conventions on human rights and citizen, which in a more detailed way to regulate human rights and freedoms, and among those, the Universal Declaration of Human Rights, too, adopted in 1948, so, two years after the publication of 'Legal unright and supreme law right'.

In this regard, it may be noted that in the area of human rights this formula was very important, and that in the years prior to the adoption of the most important document in this area it was started a discussion on matters of basic human rights, and above all, the right to live. Presentation of a particular theory would have been on the level of paraphrasing if it is not to be expressed a certain critical review. And so it is crucial, besides singling out the importance of Radbruch's work, and more about that will be shown in practical application of this theory, which we will later reveal, it is necessary to look back over possible deficiencies. In some parts this theory remains unfinished, especially under the challenging ways in which the courts get free of the laws that are considered legal unright. The best way, would be, that the legislature abolish regulation that would be considered legal unright, but again the question of retroactivity of the so abolished regulations is raised. In addition to the fact, that the formula is fashioned after experience with rough regime, we cannot overlook all the problems that the retroactive application of regulations brings with itself. Because 'as a significant risk for the underlying legal security retroactive effect of the regulations appears - fictive possibility that one regulation by its regulation of some relations gets in the past when that same relation may not even existed.' (Coric 2012, 588).

The problem of legal security also remains problematic. Although Radbruch with his comparisons and examples confidently kept the course of justice, in the relations between the three above mentioned values, we cannot overlook the importance that legal security has in the modern legal system. In additional grounds of critical work, in reviewing his work, an indicator of importance is practical application which offers a good method for testing the proposed solutions. So Radbruch's formula found its application in historically crucial moments of the German history. If we observe the most significant and the most discussed cases in which the guiding idea to the solution was a considered formula, we can observe two historical periods, a period after the end of the Second World War, and a period after the fall of the Berlin Wall.

Practical application

Upon completion of the rule of national-Socialists appeared the issue and the need to limit the Nazi heritage in all spheres of social life. It was sought toward removing those negativities which one such order brought with itself. Every aspect of a society should be re-examined, and so even legal system was created by issuing Nazi laws. Thus, for example, there was so-called Morgentauer's plan that Germany should be totally turned into an agricultural country, which failed after few years due to fear of possible fall under the influence of Russian communism and Marshall's plan was adopted (Suggested Post-Surrender Program for Germany, http://docs.fdrlibrary.marist.edu/psf/box31/t297a01.html).

In the process of legal repressing of the past, sets the question of what regulations and their consequences should be abolished in the purpose of implementation of this task. The German Constitutional Court, acting upon a judgment taken pursuant to Regulation from 1941, in 'unambiguous and direct way' applied the Radbruch's formula. Regulation from 1941 formerly stipulated the seizure of German citizenship and property to the Jews who left Nazi Germany territory during the Second World War. Courts, acting on the basis of such a regulation, have made a series of decisions, with which in accordance with the positive right, endangered the right of citizenship and the right to property. Keeping in mind Radbruch's formula, the constitutional court after the Second World War issued a judgment declaring the regulation futile and in that way created case law under which lower courts would act in similar cases. In an explanation of the decision in this case the Constitutional Court has even expanded the range of human rights which Radbruch had in mind when formulating his theory. By analyzing this decision it can be seen that here basic rights are recognized and the right to a nationality and the right to property, which is the result of the evolution of human rights in the years after the Second World War. The greatest importance of this decision

of the Constitutional Court was that it allowed to other courts to call on Radbruch's formula and in that way to resolve problems with the legal repression of the Nazi past.

Another case from the period after the Second World War regards the woman who informed on her husband. After coming back from the front, husband, mentally and physically sick from the war riots complained to his wife of the Nazi order. In confidential atmosphere of marital community, he relieved his soul, and spoke about the very bad leader order, Adolf Hitler. The woman abused this trust intensification and reported her husband to the competent authorities, who shortly after that was detained and then sentenced by a short procedure to death penalty. The true reason of the woman was not concern for the state order and empathy toward the leader, but that, in the absence of her husband she found a lover so she used the legal regulations and the situation in the country as a way to get rid of, then already, surplus partner. Nothing of what the wife had done was punishable under the positive-legal legislation of Germany of the time, but after the war, as well as in the first case, was raised the issue of wife's responsibilities when again in its treatment the court used Radbruch's formula.

It must not be understood that Radbruch's formula had its application only when there was a need to suppress the Nazi past. A newer German history shows us that the application of this formula is possible even many years after it was placed. Such case of a 'fresher' application of tail theory took place after the unification of Eastern and Western Germany. After receiving the appeal of a case that occurred while the two, then states, were divided, the Supreme Court acting on a complex case again used Radbruch's formula. At issue is the case with the Eastern German border guards who prevented an attempt of 'illegal crossing' by murdering a fugitive. After seven years, and after reunification, the issue of their responsibilities is raised and they were convicted by the Earth Court from Berlin. After it received an appeal, the Supreme Court in an explanation of its decision, by which it refused the appeal of border guards, used Radbruch's formula. Such a decision of the Supreme Court confirms the accuracy of the criminal proceedings towards the criminals who once acted with applicable law, and as such has caused serious discussions on the justifiability of such a solution. For us, still, this decision is important in the part, which shows that the formula which we observe had a realization in the long historical period, and so, in the key, crucial moments of German history.

Except for the historical aspect, we can observe the Radbruch's formula from contemporary perspectives of its practical implementation as well. And so, the practice of the European Court, except in the sense of an effective impact on the development of human rights and their protection, we can understand, as well as an inspiring research material for particular

justice, highlighted as a result of the standardization of the contemporary views on this topic. Searching for jurisprudent interpretation of justice, we come to the opportunities to verify the vitality of Radbruch's conceptual construction of rights, in which one of the basic parts belongs to justice itself.

For this purpose, firstly we show that the European Court of Human Rights retains respect according to national legislators, but to a certain limit, which may be measured by justice. In keeping its basic function of the protector of human rights determined by the convention, the court does not intrude to the right of the state authorities to create on their own solutions of interior legal procedures. This principle is objectively set as a norm by a clause of the 6th article of the European Convention, which requires that it is not enough on the rights of an individual to decide the court which is formed on the basis of the law of an internal legal order. Such a requirement is insufficient, because it represents a minimal formal requirement for ensuring a right to a fair trial. For, if it would be enough just the existence of the court, then the axiological essence of operative pressure of natural to positive right would be undervalued. However, the practice of the European Court has identified the possibility not to comply even such a minimum. Respectively, a case was reported in which the court was not established even on the basis of the law, but absolutely outside the legal framework. So, for example, in a case against Russia, the Court has found that there has been a violation of the right to a court formed on the basis of the law, because the court sentenced the applicant requests which were founded in contrary to internal legislation. (Posokhov against Russia, 2003) This legislation requires that lay judges shall be appointed by the competent authority in such a way as to draw by lot, but, after having been implemented to the European court investigation, it turned out that the competent authority had not even availed nor a list of lay judges who were appointed in the time when the applicant of the request was sentenced, let alone valid legal act on their appointment (See Mol, Harbi 2007, 73). In one case against Latvia, still, it was found that the court had not been formed on the basis of the law, because among the judges were two amateur lay judges whose previous decisions in the same case were overturned by the higher court. As in the Latvian laws such judges do not have the right to re-ness, in the same case it was found that there has been a violation of the right to a fair trial, because in this kind of internal rule national legislature was injured. On the basis of these examples it can be concluded that the European Court respects national legislators, but it insists on complying with positive-legal norms, which an internal lawmaker has brought. Because of that, there is a question of the tolerance of this autonomy of the interior lawmakers. Their will is respected, but obliges them, too. In any particular case the Court estimates circumstances of the

case in relation to objective norms of the national legal order, which are binding for the state power - and for the creator of the rights as well. A particular case is always a new challenge for the court to devise a solution, with which it will not allow national authorities to avoid obligations to respect human rights. In the background of such attempts of the states is their secret propensity to restrict freedoms of individuals and justice at stake. By accepting the European convention, states accept and recognize freedom of individuals, but it is to the European Court to warn by their action and prevent, stop, and disable further violations of provisions of the European Convention and human rights which are provided by them.

Did not Radbruch manage with the inability of the positive rights to respond to various challenges of the reality of social life, when they were found in tension according to basic ethical principles of human civilization? That is why it was necessary in the system of the European convention to be established a critical distrust toward absolutely autonomous capacities of the national legislators, when regulating problems of fair trial. In order to create adequate protection of individual rights within the scope of rights to a fair trial construction of evaluating national, positive rights with the formula of conditioning national lawmakers to address livelihood, when legal courts must comply with an obligation to be independent and impartial courts. On these characteristics of the national courts shall be decided in each concrete case, but based on established criteria, like the way of placing the judge, the term of office, the existence of a guarantee that protects from external pressure, but also the fact that if a judicial body makes an impression of independence.

European Court action in that way becomes a continuing activity of legal disablement of unright, by which infusing a subtract of natural to positive right. For, natural right with its universal justice appears in the role of corrective factor, but now through the form of the institutionalized international judiciary. Let us remind you that, Radbruch's awareness of the tension of the positive right and justice has resulted in, among other things, his formula of suppressing legal right by supreme law right. The very idea of the European convention is a result of a tremendous experience of the two world wars, just as the famous Radbruch for the same reasons redefined his initial idea of relations on the route from "legal security – purposefulness - justice". His message of emergency of priority positioning of justice in legal terms of unright has witnessed its institutional verification through the European Convention and the European Court as well. Such a mechanism of the human rights situation in the countries of the West European democracy model undoubtedly represents a project's success on an absolute inadmissibility and absolute overpower of legislatives. Obviously it became an insufficient state authority to limit only on the basis of the idea of power-

sharing in its organizational structure, which are accepted by creating a modern state. Without an intention to exaggerate Radbruch's contributions to civilization step out in the sphere of norming and the protection of human rights, it should nonetheless be said of some factographic details related to his theoretical and practical engagement. Here, above all, we think of the project of German criminal legislation, whose ideas inspiringly act, especially keeping in mind that we talk about the project generated in the thirties of the 20th century.

CONCLUSION

Having an intention to conclude in the right way, this part of the review of Radbruch's formula and its contribution to fair trial and justice, we can notice that its major importance is that it fights the terminal forms of legal conceptions, which lead to legally reduced solutions. Also, timelines which in the work of this scientist wear also the changes in accordance with socio-political circumstances show the flexibility as a model of progress in dynamic social phenomena. Exactly the task of lawyers, that in the analysis, setting, decision making and forming a legal formula and proposal, restarted harder toward equal treatment according to equal, which leads to no other way, but a way of justice and fairness, which Radbruch put in the center of his contemplations, and administration in his insistence toward good solutions of courts in their treatment of sensitive human freedoms and rights. An attainable level of European standardization and the protection of human rights and freedoms is the result of verligte European disposition efforts to establish functioning mechanisms for the effective viability of individualism and freedom, that undoubtedly much owes to Radbruch's ideal solutions aimed toward basic human rights which were later further elaborated by the above mechanisms.

The value of the theory perhaps best demonstrates its practical application, especially in such complex social relations which are regulated by the norms of the criminal law, and which by their nature can penetrate into the deepest parts of human rights and freedoms. This is a tail value theory and more, if it is known that a sensitive and complicated relations with battles and the problem of the resolution, which are conditional by their nature.

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CRIMINAL DIMENSION OF ORGANIZED CRIME IN THE CRIMINAL CODE OF BOSNIA AND HERZEGOVINA

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Abstract:

The fact is that collectively, the commission of criminal offenses experiences full expansion, within which the participation of several persons in the commitment of organized crime is particularly evident. Organized crime is the most dangerous form of crime, which is characterized by participation of several persons who, on the basis of a previous agreement, commit offenses, with the aim of obtaining tangible or intangible benefits. The Criminal Code of Bosnia and Herzegovina regulates this matter in a distinctive way. In addition to the definitions of general terms related to the participation of several persons in the realization of criminal acts, it is a model in which in a separate chapter (XXII), participation of several persons in realization of the crime is incriminated through the following criminal acts: Preparation of the offense, Agreement to commit an offense, Association for the purpose of criminal offenses and Organized crime. The author analyzes the provisions related to the criminal law dimension of organized crime in the Criminal Code of Bosnia and Herzegovina.

Keywords: organized crime, criminal offense, Criminal Code, Bosnia and Herzegovina

INTRODUCTION

The offense is generally realized by one person. It is a personal disregard (violation) of the legal provisions by which the most important legal goods in one society are protected. Thereby contemporary criminal legislations are governed, regularly starting a description of some of the crimes with "if..." i.e., in singular. The assumption that the crime is done by only one person, although it arises from majority of legal aspects of the crimes, alone it could never respond to the needs to protect society from various forms of criminal behavior. It seems that today even more it does not fully correspond to the needs of protection of the society against modern

forms of crime. Considering that, potential participation of several persons in its execution is an essential assumption of any legislator as well as identification of appropriate criminal law solutions. The reform of the criminal law legislation in Bosnia and Herzegovina in 2003 yielded a number of new legal solutions. Particular legal solution is present, among the rest, in terms of organized crime and exists in the Criminal Code of Bosnia and Herzegovina (in the following text: CC)[1].

This law regulates the matter of organized crime in a separate chapter titled Agreement, preparing, association and organized crime.[2]

INSTITUTIONAL DEFINITION OF ORGANIZED CRIME AS A PREREQUISITE TO LEGAL REGULATION

From the middle of the last century, efforts to define organized crime have been intensified. In the broadest context, it can be defined as the commission of one or more criminal offenses by two or more persons who have previously agreed, with the aim of acquiring material or some other benefit.[3] The aforementioned problems are primarily discussed in the United Nations (Convention on Transnational Organized Crime), as well as on the level of the European Union and by the Council of Europe (Recommendation of the key principles for the fight against organized crime). In addition, it is important to stress that it is discussed even on three congresses of the International Association of Criminal Law (AIDP).

The Convention on Transnational Organized Crime defines two forms of organized commission of criminal offenses. The word is about an article 2 of this Convention, which defines terms related to "co preparing" of crimes, and these are a group of organized crime and organized group. The first term determines "an organized group of three or more persons, which exists in a certain period of time and acts agreeably with the aim of committing one or more serious crimes or offenses in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit", while the second term means "organized group" as "a group that is not accidentally formed because of the direct commission of a crime and where the members do not need to have formally defined roles and where continuity of its membership or a developed structure is not

[1] Criminal Law of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina No. 37/03, 54/04, 61/04, 30/05, 53/06, 55/06, 32/07, 08/10, 47/10, 47/14)

[2] The chapter XXII of the Criminal Code of Bosnia and Herzegovina

[3] Levinson, D. (ed), *Encyclopedia of Crime and Punishment* (London – New Delhi: Sage Reference Publication, 2002), 1112. About this *s.* Albanese J.S, *Organized Crime in our Times,* (Anderson Publishing, 2004), p. 4

required".[1] Both terms denote a particular form of preparatory activities which consist in organizing for the execution of the concerned crimes. The levels of the organization are different, but the essence (purpose) of their existence is the same, both forms of "organization" are used to facilitate the commission of certain crimes. The "Group for Organized crime" represents a higher level of "organization" in order to realize a future crime. In fact, this kind of "co preparing" provided crimes consumes form of preparation called "organized group" and, under certain circumstances, as outlined in point a), it makes more complex and socially more dangerous form of "co preparing" crime or crimes. This follows from the formulation "... exists in a certain period of time ...", by which is a criminal will (subjective element), which is partly focused on the execution of the future crime, manifested in severe degree, with the existence of motives that are related to direct and indirect realization of material benefit. In contrast to the above mentioned, at the "organized group" it cannot be noticed the existence of these "qualifying" circumstances, which makes it a "milder" form of "co preparing" - this is induced by the formulation "... it does not need to have formally defined roles for its members, continuity membership or a developed structure". Optional character of this formulation suggests that the boundaries of the criminalization of association for criminal offenses in this Convention set rather "broad", which is due to the nature of the offenses to which it refers is justified. Optional character of this formulation suggests that the boundaries of the incrimination of association for commission of criminal offenses from this Convention are set quite "broad", which is justified due to the nature of the offenses to which it refers.[2] As to the International Association of Criminal Law, participation of several persons in the realization of the offense for the first time was discussed at the VII International Congress of Criminal Law, held in Athens in 1957, where the work of the first section of the Congress was devoted to, for that time, modern orientations related to the participation of several persons in the realization of the crime, although it was nowhere explicitly mentioned the term organized crime. On the other side, this was done at the XVI International Congress of Criminal Law, held in Budapest in 1999.[3] In work of the first section it was indicated that when legislations decide to criminalize behaviors inside organized crime groups, it must be clearly defined. This is seen through clear titles of incriminations, for example "Organized crime" or "Criminal group".[4] Finally, the XVIII International Congress of Criminal Law held in Istanbul in 2009 devoted the

[1] S. Article 2, paragraphs a) and c) of the Convention on Transnational Organized Crime
[2] De la Cuesta, J.L. (ed), *Resolutions of the Congresses of the International Association of Penal Law (1926 - 2004)* (Association Internationale de Droit Pénal, 2007), p. 36
[3] *Ibidem,* p. 140
[4] *Ibidem,* p. 144

third part of the Resolution of the first section to Punishment of association for the purpose of committing the crime and other behaviors as independent crimes. Punishment of such behaviors is justified only if among the members of organization exists a hierarchical relationship, if they are implemented in order to commit a serious criminal offense and if the risk of these behaviors transcends the danger of prepared criminal offense. Here, the needs that the law must precisely define the term of punishable association, differentiate persuader and organizer are expressed, respectively that for the punishment it is necessary objective and intentional contribution for achievement of a given purpose, with the awareness / knowledge about the criminal purpose of the association.[1]

ORGANIZED CRIME IN THE CRIMINAL CODE OF BOSNIA AND HERZEGOVINA

In the Criminal Code of Bosnia and Herzegovina the association for commission of criminal offenses is regulated both in general and in special section. Primarily, in provisions of the general part (Article 1) the legislator has explicitly defined the terms Group of people, organized group and Group for organized crime. It should be noted that the last two terms essentially correspond with the terms from the Convention on Transnational Organized Crime. Specifically, paragraph 19 of Article 1 defines organized group of people as a group that was formed for direct commission of criminal offenses and which does not need to have formally defined roles for its members, continuity of its membership or developed structure. At this form of association for commission of criminal offenses it is present differentiation in relation to the same provision of the Convention. Namely, in the Convention it is emphasized that this is a group which "is not accidentally formed" for commission of offenses, while this part is omitted in the provisions of the Criminal Code of Bosnia and Herzegovina.[2] In contrast to the above, Group for organized crime[3] (Article 1, paragraph 20) is defined

[1] Bojanić, I.: "XVIII Međunarodni XVIII Internationa Congress on Criminal Law: Main Challenges of globalization put in front of the criminal legislation, Istanbul, Turkey, 20 – 27. 8. 2009", *Croatian Yearbook on criminal law and practice*, No. 2 (2009): p. 977 – 978

[2] Criminal Code of Bosnia and Herzegovina (OG, No.37/03) contained in Article 1, paragraph 16 a solution identical to that one from Convention

[3] This form of association of several persons for committing the crime / -s in the Criminal Code of Bosnia and Herzegovina ("Official Gazette", No. 37/03) was provided under title organized group of criminals (Article 1, paragraph 17). The Criminal Code of the Republic of Srpska determines in Article 147 paragraph 13 on a slightly different and a more comprehensive manner the highest level of association of several persons to commit a criminal offense - a Criminal organization. It is an association of at least three persons, whose members have joined together to commit crimes. The activity of a higher level

identically as it is provided by the provisions of the Convention and that, as a group of three or more persons which exists in a certain period of time and acts agreeably with the aim of committing one or more criminal offenses for which, by law, it can be sentenced imprisonment over than three years or heavier punishment, and for the purpose of gaining material benefit.[1] As opposed to the aforementioned, a group of people is an association of at least three persons who are connected because of execution of criminal offenses, while each of them gives their share in commission of the offense (Article 1, paragraph 18). Finally, in this part of the Code it is provided the provision by which is determined a Terrorist group as a group of at least three persons, which is formed and operate in a certain period of time with the aim of committing any of the offenses of terrorism (Article 1, paragraph 21). The legislator has, in this case, separated and defined a terrorist group, likely guided by the fact that, on the one hand, the organized group is formed for the direct commission of the offense, by which a sort of previous stage is not covered, in terms of action "in a certain period of time," and that is, on the other hand, the existence of the Group for organized crime motivated with the commission of the crimes "in order to gain a material benefit".

However, the particularity of the legal solution of the legislator of Bosnia and Herzegovina in relation to the criminal codes of entities and Brcko District of Bosnia and Herzegovina is based on the fact that organized crime in the provisions of the special section is set aside in a separate chapter.[2] Criminal law dimension of organized crime in essence is manifested through two offenses: Association for the purpose of commission of criminal offenses (Article 249) and Organized crime (Article 250). Thus posited the zone of punishability, the legislator incriminated behaviors that are implemented in all stages of realization of crimes to which they are related.

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criminal organization is directed towards achieving and maintaining control over certain business or other activities, whereby it uses intimidation or violence to influence on others to join them or to obey. Criminal organization is characterized with a high degree of correlation between the members, internal organization based on relations of hierarchy and discipline and the division of labor, *s.* Criminal Code of the Republic of Srpska (*Official gazette of the Republic of Srpska*, No. 49/03, 108/04, 37/06, 70/06, 73/10 and 67/13).

[1] This provision was not originally limited to offenses by which it is gained a material benefit; in article 1, paragraph 17 Organized group of criminals existed with the aim of committing "one or more offenses ..." regardless to the fact if by their execution material benefit is gained.

[2] For example, in Criminal Code of Republic of Srpska these criminal offenses are placed in the field of criminal offenses against public order and peace: criminal association (Article 383), Agreement to commit a criminal offense (Article 384), while the incrimination of organized crime (Article 383a) was introduced in criminal law legislation of Republic of Srpska by the amendment to the Criminal Code of the Republic of Serbian ("Official Gazette of RS", No. 70/06).

When the question is about Agreement to commit criminal acts (Article 249), the legislator incriminated activities from the previous stages of realization of the crime. It is about activities of organizing a group of people or otherwise associating three or more persons to commit a criminal offense prescribed by the law of Bosnia and Herzegovina, under condition that for them it can be sentenced imprisonment of three years or heavier punishment, and that for such organization or association of individual (special) criminal offense did not predict a heavier punishment. At this incrimination legislator criminalized complexes of various activities pointed on linking more persons for the purpose of joint criminal actions.[1] Listed criminal actions are related on realization of the offenses for which they can be sentenced to imprisonment of three years or heavier punishment, by which the legislator moved forward the zone of punishability in terms of almost all crimes predicted by the law of Bosnia and Herzegovina, when the question is about activities of organizing or otherwise associating of several persons.[2]

However, although this is the case, it should be noted that the organizing or otherwise associating several persons is incrimination of subsidiary character; it applies only if at some incriminations it is not specifically incriminated association for the commission of that crime,[3] or if there is no separate offense with this content at the end of a certain chapter.[4] Within this incrimination it is also criminalized membership in a criminal association (Article 249, paragraph 2). It is about persons who knowingly

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[1] Babic, M. and associates, *Commentary of criminal / penalty laws of Bosnia and Herzegovina*. Sarajevo: Council of Europe, 2005), 800

[2] Convention on Transnational Organized Crime in Article 2 point a) stipulates that a group for organized crime acts in order to perform one or more serious crimes, while Article 2 point b) defines serious crime as "the act which constitutes an offense punishable with a maximum of four years of imprisonment or a heavier punishment". Accordingly, Criminal Code of Bosnia and Herzegovina is stricter in setting the limits of punishability of this crime, as well as of criminal offense of Organized Crime. This can be possibly justified by the fact that in Criminal Code of Bosnia and Herzegovina are not represented frames of punishment which for that specific minimum have four years, but for example "at least three", or "at least five" years. In connection with this, it may be more convenient solution to determine for the initial minimum frame of punishment limit of five years; on this way legislator would be "limited" on moderately serious and serious crimes.

[3] Thus, for example at the criminal offense of Trafficking with persons (Article 186, paragraph 5), where for the activities of "organizing or in any way of organizing a group of people for the purpose of committing the crime ... be punished with imprisonment of at least ten years or to life imprisonment."

[4] Thus for example in Article 170 (Establishment of association or procurement the means for commission of crimes from this Chapter of this Code) (the question is about Criminal offenses against the integrity of Bosnia and Herzegovina) and in Article 189a (organizing a group or association for the execution of crimes of trafficking and smuggling of migrants), for which it is sentenced imprisonment of at least three years.

and willingly access to criminal association which is in process of establishing or has been already established, with the condition that criminal objectives of organization are well known to them.[1] It should be noted that this (milder) form of offenses exists and if there is a formal membership in a criminal association, without implementing activities pointed at commission of the crimes.

Organized crime[2] (Article 250) represents a sort of continuation of Article 249. In this provision, the legislator criminalizes the commission of a criminal offense / -s by the criminal organization, as well as organizing of the same. Right at the beginning (Paragraph 1) it is punishing anyone who commits a criminal offense provided in the law of Bosnia and Herzegovina "as a member of a criminal organization", if it is not predicted a heavier punishment for particular offense. It is obvious that in this case the legislator incriminates continuation of activity of the member of criminal association. This person is no longer in the stage of preparation in terms of paragraph 2 of Article 249, but now is committing a criminal offense as a member of a criminal organization. The execution of the offense is punishable only in cases where for the particular criminal offense is not provided a more severe punishment. Paragraph 2 of this Article provides punishment for the commission of a crime within the criminal organization[3] for which they can be sentenced to an imprisonment of three years or more, under condition that for the commission of that crime is not prescribed a more severe punishment. Here it is evident the question of subsidiarity of mentioned legal provisions. In both cases mentioned provisions will not apply if there is a separate punishment for the commission of a crime within criminal organization. Here, it seems, the only difference is that in the first case the person can be punished by imprisonment of at least three, and in the second case of at least five years. By this approach, the legislator is literally more strictly punishing the execution of all crimes if the person who committed them did so as a member of a criminal organization. Thus, the term "member of the criminal organization" is to be considered as an obligatory qualifying circumstance for the offenses prescribed by the law of Bosnia and Herzegovina. From this arises a further question of concurrence committed underlying offense with a criminal offense under the paragraphs 1 and 2 of Article 250. Here is present

[1] Babic, M. and associates*, op. cit.,* p. 800

[2] The incrimination under this name can be found also in other contemporary criminal law legislations. See, e. c. Article 255 of the Criminal Code of Ukraine (Organizing of criminal organization), Article 129 of the Criminal Code of Germany (Establishment / organizing of criminal association), Article 328 of the Criminal Code of Croatia (Criminal association).

[3] Certain criminal law legislations include a specific provision which incriminates commission of a crime by the criminal association or incitement to commission of a crime by the criminal association. See, e.c. article 329 of the Criminal Code of Croatia.

the view that in such cases there is no real concurrence of crimes.[1] Stated results from the reason that by this would be wrongly approached to the double action of the same circumstance. In this regard, the court will penalize only for this offense.[2] Furthermore, in paragraph 3 of Article 250 is punished anyone who "organizes or in any manner takes the leadership over the criminal organization which by joint action commits or attempts to commit a criminal offense prescribed under the law of Bosnia and Herzegovina ...". It has already been presented that the legislator, in Article 249, also criminalizes "agreement to commit criminal offenses." Difference should be searched in the quality of the association that is formed; namely in paragraph 1 of Article 249 it is about "organizing a group of people or otherwise associating three or more people ...", while in paragraph 3 of Article 250 it is about "organizing or managing a criminal organization which with joint action commits or tries to commit offense". The degree of organization is in the first case at the level of "group of people" or "three or more persons," and in the second case at the level of "criminal organization".[3] Finally, in paragraph 4 of Article 250 it is criminalized only the membership in a criminal organization which by "joint action commits or attempts to commit a criminal offense...". It is about the punishment only because of belonging to the organization, although the person did not participate in the commission of a specific crime. Here should be placed a question of how to qualify cases in which a person becomes a member of the "criminal organization" and a criminal offense /-s for which it is established, have not been executed. Could in such constellations the paragraph 2 of Article 249 be applied? Just in this provision the legislator incriminated preparatory actions in the form of association to commit a crime, but not in the required quality of organizing or leadership over "criminal organization", but "organizing a group of people". In this regard, we should not give up from the possibility of applying this provision; because punishment under paragraph 4 of Article 250 exists only under the condition that someone from the members of the criminal organization commits a criminal offense. It

[1] Babic, M. and associates, *op. cit.,* p. 804

[2] Babic, M. and associates, *op. cit.,* p. 804

[3] In respect to this is one judgment of the Court of Bosnia and Herzegovina. The Court of Bosnia and Herzegovina issued a guilty verdicz in a case where the convicted person during the period from 27.02. to 12.04. 2010 "organized and guided an organized group" within the meaning of Article 1, paragraph 19 of the Criminal Code of Bosnia and Herzegovina, and then on 04/12/2014 realized (with others) activities of acquiring a larger quantity of the narcotic drug "for the purpose of gaining material benefit". The Court found that in this case the accused committed the criminal offense of Organized crime under Article 250, paragraph 3 of the Criminal Code of Bosnia and Herzegovina, in conjunction with Unauthorized traffic in narcotic drugs under Article 195, paragraph 1 of the Criminal Code of Bosnia and Herzegovina, s. verdict S1 2 K 002902 10 K (H-KRN-10/880).

would be, therefore, unexcused to waive the possibility of punishment for only belonging to a qualitatively more dangerous form of association to commit a crime - "criminal association" and punishing only belonging to "a group of people" for commission of crime.

And finally, it is necessary to emphasize the possibility of decriminalization of belonging to "a group of people" or "a criminal organization" in the case of detecting a group or criminal association before a criminal offense has been committed within or for them (Article 249, paragraph 3 and Article 250, paragraph 5). Here is, however, interesting the solution of the legislator according to which an organizer of the group of people or association can be released within the meaning of Article 249, but not in the sense of Article 250. It can be complained on this, too, because it is also criminally political reasonable to foresee the possibility of release from punishment in these cases.

CONCLUSIONS

It can be seen that the criminal legislation of Bosnia and Herzegovina is not unique in the legal regulation of associating more persons to commit a crime. In other words, the criminal law dimension of organized crime in the Criminal Code of Bosnia and Herzegovina is determined in a specific way. Besides, in the provisions of the general part, in accordance with the needs of harmonization with international legal standards, systematically, although fully inconsistent with the provisions of the Convention on Transnational Organized Crime the terms related to the participation of several persons in the realization of the crime are defined. However, a separate chapter with the range of incriminations from Preparing a crime to the Organized Crime greatly expands the zone of culpability, as on the previous stages of realization of the offense, as well as on persons who participate in the realization of the crime in different ways.

Furthermore, the expansion of culpability with respect to the underlying offenses is too extensive. Punishing of association for commission of criminal offenses for which an imprisonment of three years can be sentenced, unless in special provision it is not foreseen a more severe punishment, is a criminal law solution by which only a few offences predicted in the Criminal Code of Bosnia and Herzegovina are left outside the zone of culpability. It is commendable to note that these incriminations, opposed to the entity criminal law legislations and criminal law legislation of the Brcko District of Bosnia and Herzegovina, are separated in a special chapter. With this solution the legislator has emphasized the social danger of this constellation of offenses and, above all, their specificity. With regard to the fact that the Criminal Code of Bosnia and Herzegovina does not include

offenses against public order and peace, where these incriminations are traditionally placed, the legislator has chosen the only correct solution.

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EUROPEAN PERSPECTIVES AND CHALLENGES

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ADMISSION OF MACEDONIA TO UN AND THE MODE(S) FOR JURIDICAL AND POLITICAL REDRESS

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Abstract

Macedonia's admission to UN membership in April 1993 (General Assembly (GA) resolution 47/225 (1993), pursuant to the Security Council (SC) resolution 817 (1993) recommending such admission) came with two conditions in addition to those explicitly provided in Article 4(1) of the UN Charter, namely the candidate's acceptance of: (i) being provisionally referred to as the 'Former Yugoslav Republic of Macedonia' (for all purposes within the United Nations) and (ii) of negotiating with another country over its name. These impositions are part of the resolutions, which also recognised (explicitly in SC resolution 817) that the applicant fulfils the standard criteria of Article 4 (1) of the Charter required for admission. In a recent paper, we analysed the legal nature of the additional conditions imposed on Macedonia for its admission to UN membership in the context of the advisory opinion of the International Court of Justice (ICJ) given in 1948 regarding the conditions for admission of a state to the United Nations. The General Assembly subsequently accepted the ICJ's advisory. There, we concluded that the attachment of conditions (i) and (ii) to those specified in Article 4(1) of the Charter for the admission of Macedonia to UN membership is in violation of the Charter. In the present article, we shall examine the legal consequences of the irregular admission of Macedonia to

UN membership and the possible modes of judicial redress. Emphasis will be on the relationship between the rights of states as applicants or members of the UN as derived from the Charter, other general UN documents and UN legal practices on the one hand, and the duties of the UN relating to those rights (i.e. its adherence to the provisions of the Charter) on the other. The analysis in the following sections will show that the advisory jurisdiction of the ICJ provides an adequate framework for juridical redress of the problem.

Before analysing in more depth the illegal character and legal effects of the UN's breaches in the process of admitting Macedonia to membership and the means of re-instituting the proper legal status of Macedonia as a UN member, we shall give a brief account of the problem of legal responsibility of international organisations (in particular the United Nations) for their unlawful acts (or omissions). We shall give special attention to those acts that are committed in their relations with their member states and other international legal persons.

Key words: Macedonia, UN membership;

INTRODUCTION

Macedonia's admission to UN membership in April 1993 (General Assembly (GA) resolution 47/225 (1993),[1] pursuant to the Security Council (SC) resolution 817 (1993)[2] recommending such admission) came with two conditions in addition to those explicitly provided in Article 4(1) of the UN Charter, namely the candidate's acceptance of: (i) being provisionally referred to as the 'Former Yugoslav Republic of Macedonia' (for all purposes within the United Nations) and (ii) of negotiating with another country over its name.[3] These impositions are part of the resolutions, which also recognised (explicitly in SC resolution 817) that the applicant fulfils the standard criteria of Article 4(1) of the Charter required for admission. In a recent paper,[4] we analysed the legal nature of the additional conditions

[1] GA Res. 47/225, 8 April 1993 (hereinafter GA Res. 47/225 (1993)).

[2] SC Res. 817, 7 April 1993 (hereinafter SC Res. 817 (1993)).

[3] After a reference in the preamble to the SC recommendation for admission of the applicant to UN membership, GA Res. 47/225 (1993) states that the GA "[d]ecides to admit the State whose application is contained in document A/47/876-S/25147 [i.e. the Republic of Macedonia] to membership in the United Nations, this State being provisionally referred to for all purposes within the United Nations as 'the former Yugoslav Republic of Macedonia' pending settlement of the difference that has arisen over the name of the State." The imposed condition for negotiation with Greece over the name of the applicant is implied in the last part of the decision. Note that this condition imposes at the same time an obligation on the applicant when admitted to UN membership.

[4] I. Janev, 'Legal Aspects of the Use of a Provisional Name for Macedonia in the United Nations System', 93, American Journal of International Law, 1999, p. 155.

imposed on Macedonia for its admission to UN membership in the context of the advisory opinion of International Court of Justice (ICJ) given in 1948 regarding the conditions for admission of a state to the United Nations.[1] The General Assembly subsequently accepted the ICJ's advisory.[2] There we concluded that the attachment of conditions (i) and (ii) to those specified in Article 4(1) of the Charter for the admission of Macedonia to UN membership is in violation of the Charter. In the present article, we shall examine the legal consequences of the irregular admission of Macedonia to UN membership and the possible modes of judicial redress. Emphasis will be on the relationship between the rights of states as applicants or members of the UN as derived from the Charter, other general UN documents and UN legal practices on the one hand, and the duties of the UN relating to those rights (i.e. its adherence to the provisions of the Charter) on the other. The analysis in the following sections will show that the advisory jurisdiction of the ICJ provides an adequate framework for juridical redress of the problem.

Before analysing in more depth the illegal character and legal effects of the UN's breaches in the process of admitting Macedonia to membership and the means of re-instituting the proper legal status of Macedonia as a UN member, we shall give a brief account of the problem of the legal responsibility of the international organisations (in particular the United Nations) for their unlawful acts (or omissions). We shall give special attention to those acts that are committed in their relations with their member states and other international legal persons.

UNITED NATIONS' LEGAL RESPONSIBILITY FOR ACTS INVOLVING RELATIONS WITH MEMBER STATES

The question of the legal responsibility of international organisations for their illegal acts has been a subject of discussions among legal scholars since the forties and fifties.[3] The main interest has been on the legal effects of such acts and the possibilities of their judicial redress. In the absence of developed legal practice in the area of international institutional life, the past discussions on the subject were of a predominantly doctrinal character.[4] With

[1] *Admission of a State to the United Nations (Charter, Art. 4)*, ICJ Reports (1948), 57 (hereinafter, *Admission*).
[2] GA Res. 197 (III, A), 8 December 1948 (hereinafter GA Res. 197 (III, A) (1948)).
[3] R. Guggenheim, 'La Validité et la Nullité des Actes Juridiques Internationaux', 47 Hague *Recueil*, 1949, pp. 195-263; see also the volumes of *Annuaire de l'Institut de Droit International*, 44-I (1952), 45-II (1954), 47-I (1957), 47-II (1957).
[4] D.W. Bowett, *The Law of International Institutions*, 4th ed., 1982, pp. 362-365. For a more critical recent review of this issue, particularly regarding the acts of the Security Council, see Alvarez, 'Judging the Security Council', 90 *AJIL*, 1996, pp. 1-39, and references therein.

the lapse of time, accumulation of a considerable body of relevant legal practice has taken place during the last five decades, which, coupled with the development and consolidation of certain legal concepts of international law (such as the legal personality of international organisations, etc.), laid the foundations for the development of a fairly consistent theoretical framework for the treatment and redress of the illegal acts of international organizations.[8] An international organisation, as an international legal person, derives its powers (expressed or implied) from its constitutional source and is bound to act only within the limits and in accordance with the terms of the grant made to it by its members. The most obvious illegal acts that an organisation can commit in exercising its powers and functions are: breach of the constitutional provisions (e.g. by exceeding its powers), error in the interpretation of constitutional provisions, assertion of competence by an incompetent organ, improper exercise of a discretion on the basis of inaccurate or incomplete knowledge or for wrong reasons or motives, implementation of a decision adopted by a majority but inconsistent with the constitutional provisions, suspension or expulsion from the organisation in absence of proper justification, wrongful apportionment of expenses among the members, breach of the staff rules and regulations, etc.[1] Unless there are specific provisions in the constitutional instrument of the organisation (such as in the case of European Communities[2]), the effects of the illegal acts of the organisation are governed by the general principles and practice of international law.[3] The United Nations possess an international legal personality and the capacity to bring international claims,[4] but the Charter does not contain provisions that explicitly address the question of its responsibility for unlawful acts of its organs and the judicial redress of their consequences. The juridical responsibility of the UN for its own acts is, however, a correlative of its legal personality and the capacity to present international claims. In the well known *Reparation*[5] case, the ICJ, affirming the international legal personality of the United Nations, pointed out, "...the rights and duties of an entity such as the [UN] Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice,"[6] thereby affirming that this

[1] E. Lauterpacht, 'The Legal Effects of Illegal Acts of International Organizations', in *Cambridge Essays in International Law: Essays in honour of Lord McNair*, 1965, pp. 88-121 (see p. 89).
[2] See, e.g., H. Schermers, D. Waelbroeck, *Judicial Protection in the European Communities*, 4th ed., 1987.
[3] I. Brownlie, *Principles of Public International Law*, 4th ed., 1990, p. 701.
[4] Ibid., pp. 680-681, 688-690.
[5] *Reparation for Injuries suffered in the Service of the United Nations*, ICJ Reports (1949) 174 (hereinafter *Reparation*).
[6] Ibid., p. 180.

organisation has certain duties related to its purposes and functions. Although the ICJ may, according to Article 65(1) of its Statute, give an advisory opinion on any legal question at the request of the General Assembly and Security Council, and of any UN organ or specialised agency within the UN system upon authorisation by the General Assembly (Article 96 of the Charter), the Court still does not have any juridical control over the legal effects of the acts of the organisation. The advisory opinions of the Court have no binding power themselves, but may be (and normally are) accepted by the organs requesting them as they induce "moral consequences which are inherent in the dignity of the organ delivering [them]."[1] Exception to this rule is the *General Convention on the Privileges and Immunities of the United Nations* of 1946 which provides that the opinion given by the Court (upon the request of the organisation) regarding differences which could arise between the organisation and a signatory state shall be binding to the parties.[2]

In the advisory jurisdiction of the Court, there have been only a few cases involving UN-state relations. In the *Reparation* and *Mazilu*[3] cases the UN initiated and brought to the Court the request for an advisory opinion. In the *IMCO*[4] and *Certain expenses*[5]cases, the request for the Court's opinion was initiated by the member states (of the IMCO and the UN, respectively). For the purposes of our further discussions, we shall outline some of the characteristic features of these and two other cases. The *IMCO* case is illustrative in several respects. It is the first case in the history of international organisations, and of the Court itself, when the Court was requested to give its opinion on a question of breach of a constitutional document (the Convention for the establishment of IMCO) made by the plenary organ (the IMCO Assembly) of the organisation. Another feature of this case is that the question of legality of the committed act (the election of the Maritime Safety Committee at the first session of the IMCO Assembly in 1959) was put before the Court by the IMCO Assembly itself (authorised by the UN General Assembly for such an action) on request by two member states of the organisation (Liberia and Panama), who contended that in the course of the elections their constitutional rights were violated (namely, to be

[1] Judge Azevedo in *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First phase)*, ICJ Reports (1950) 80.

[2] *General Convention on the Privileges and Immunities of the United Nations*, 13 February 1946, Art. VIII, § 30.

[3] *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, ICJ Reports (1989) 177 [hereinafter *Mazilu* case].

[4] *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization*, ICJ Reports (1960) 145 [hereinafter *IMCO*].

[5] *Certain Expenses of the United Nations (Art. 17, paragraph 2, of the Charter)*, ICJ Reports (1962) 151 [hereinafter *Certain Expenses*].

automatically elected to Committee membership in accordance with the explicitly prescribed criteria in Article 28 of the IMCO Convention, which they fulfilled). What happened was that during the elections, most of the voting members of the organisation took as a basis for their vote additional criteria, not expressly provided for in Article 28 of the Convention, to which they attached a greater relevance than to those laid down explicitly in that article. The Court delivered the opinion "that the Maritime Safety Committee of the IMCO which was elected on January 15, 1959, [was] not constituted in accordance with the Constitution for the establishment of the Organization."[1] The IMCO Assembly accepted the opinion of the Court at its next session. The Assembly resolved that the previously elected Committee should be dissolved and decided "to constitute a new Maritime Safety Committee in accordance with Article 28 of the Convention as interpreted by the International Court of Justice and its Advisory Opinion."[2]

Without going into a more subtle analysis of the IMCO case,[3] we would like to point out that the character of the illegal act (breach of a procedural constitutional provision by the plenary organ of the organisation) in the IMCO case is identical to that of Macedonia's admission to UN membership. As we shall see later, the legal consequences in the Macedonia case are, however, much more complex. Nevertheless, the IMCO case may serve as a model for juridical redress of the Macedonia case as well. In the *Certain expenses*[4] case, the question put before the Court resulted from the largely divided views of the UN members regarding the constitutional basis of the expenditures authorised by a number of General Assembly resolutions for the operation of the UN Emergency Force (UNEF) in the Middle East and for UN operations in the Congo (UNOC). The division of the UN members in this case was essentially related to the question of the legality of the mentioned operations under the terms of the Charter, i.e. regarding the validity of the corresponding GA resolutions. The Court's opinion was given in the affirmative and was based on arguments that the decisions of the General Assembly are made in accordance with the mission of the United Nations (for the maintenance of world peace and security). This case illustrates that the decisions of the General Assembly that are of binding nature represent acts of the organisation. According to Article 18 of the Charter, such acts are of binding nature on the General Assembly and are related to the budget of the organisation and to the legal status of its members (e.g. admission, suspension and expulsion of members).

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[1] See above, fn. 18, p. 150.
[2] IMCO Assembly Resolution A. 21 (II), 6 April 1961.
[3] E. Lauterpacht, op. cit. (fn. 9), pp. 100-106.
[4] Above, fn. 19.

The earlier mentioned *Reparation* case[1] elucidates the legal relationship between the United Nations and its members. The question put before the Court at the General Assembly's request for an advisory opinion was whether the UN, as an organisation, had the capacity to bring an international claim against a state responsible (*de jure* or *de facto*) for injuries suffered by a UN agent in the performance of its duties with a view to obtaining reparation in respect to the damage caused (a) to the UN and (b) to the victim (or to persons entitled through it). In the derivation of its affirmative response to these questions, the Court first established that the UN possess the international legal personality necessary for discharging its functions and duties on the international plane, that the Charter defines the position of the member states in relation to the organisation (requiring their assistance in the discharge of the organisation's functions (Article 2(5)), acceptance to carry out its decisions (and those of the Security Council) and giving the organisation the necessary privileges and immunities on their territories (Articles 104, 105)), and that the rights and duties of the UN are closely related to its functions and purposes as specified or implied in the Charter. From the facts that (a) the question of the capacity of the UN to bring an international claim against a member state was put in the context of the legal liability of that state (to pay reparations), and that (b) the Court's opinion was given in the affirmative, it follows that the Charter is an international treaty to which the organisation effectively is a party and which, by defining the mutual rights and responsibilities of the parties, establishes a contractual relationship between them.[2] This is further reinforced by the fact that in deriving its opinion, the Court also invoked the General Convention on the Privileges and Immunities of the United Nations which, in an explicit way, establishes the rights, duties and mutual responsibilities between the signatories (the member states) and the UN, and even defines (Section 30 of Article VIII) the mode of judicial settlement of the disputes between the different parties (by an ICJ advisory opinion of binding character). It can be concluded that both the Charter and the Convention on Privileges and Immunities establish a relationship between the legal responsibility and the legal status of the international persons involved (the UN and its member states).

The *Mazilu* case[3] provides a typical example of when the legal status of the UN (as represented by one of its agents) was violated by a member state. In contrast to the *Reparation* and *Mazilu* cases, the *Effects of Awards*

[1] Above, fn. 13.
[2] The treaty character of the Charter has been also strongly emphasised by the Court in the *Admission* case (above, fn. 5).
[3] Above, fn. 17.

case[1] is an example of when the organisation was found liable for violating the legal status of its staff members. The question which the General Assembly put before the Court was whether there was any legal ground for refusing to affect a compensation award made by the UN Administrative Tribunal in favour of a UN staff member whose contract of service had been terminated without its assent. The Court's opinion was negative. This opinion was based on the arguments that a contract of service concluded between a staff member and the UN Secretary-General, acting on behalf of the organisation, engaged the UN's legal responsibility as a juridical person with respect to the other party, and that, in accordance with Article 10 of the Tribunal's Statute, the judgement of the Tribunal was binding on the parties, final and without appeal. This case illustrates that, when the organisation violates the legal status of its elements (including that of its staff members as defined by the contract of service), the organisation becomes responsible as a legal person. Since the UN Charter possesses also features of contractual character, through which it appears as a party, particularly in matters related to the legal status of its members, it can be concluded that the violation of any aspect of the legal status of either of them by the other leads to the legal responsibility of the former and involves the legal personalities of both parties. From the above briefly analysed cases on which the ICJ has given its opinion, several conclusions can be drawn:

- In discharging its constitutional functions, the UN has both rights and duties, expressed in or derived from the constitutional provisions, and has a legal responsibility for their lawful implementation
- The UN Charter, as a multilateral treaty, enables the UN with an international legal personality to carry out its duties and functions and, in the matters that involve relations between the UN (as a legal person) and its members, it acquires features of a contractual character (engaging the liability of the parties)
- Breaches of constitutional provisions by the plenary organ of the UN, related to the rights and legal status of its members, represent unlawful acts of the organisation (with respect to another international person), for which the organisation is legally responsible
- For the UN's violations of the constitutional provisions, particularly the rights related to the legal status of its member states, the advisory opinion of the ICJ may serve as an instrument for settlement of the disputes (as exemplified by the *IMCO* and *Effects of Award* cases).

[1] *Effects of Awards of Compensation made by the United Nations Administrative Tribunal*, ICJ Reports (1957) 47 (hereinafter *Effects of Awards*).

THE UNLAWFUL CHARACTER OF MACEDONIA'S ADMISSION TO UN MEMBERSHIP

As mentioned in the Introduction, GA resolution 47/225 (1993)[1] admitted Macedonia to UN membership subject to the acceptance of the following points: (i) Macedonia was to be referred to by the provisional name 'the Former Yugoslav Republic of Macedonia' for all purposes within the United Nations, and (ii) it was to negotiate with Greece over its name. These two conditions for Macedonia's admission to UN membership are additional with respect to those laid down explicitly in Article 4(1) of the Charter, which the recommending SC resolution 817(1993)[2] recognises to be fulfilled by the applicant. In characterising the legality of the imposition of the above two conditions on the applicant for effecting its admission to UN membership, three questions should be analysed:

- Are the conditions (i) and (ii) indeed additional to those laid down in Article 4(1) of the Charter, or are they only part of them, or contained in them?
- Do the conditions provided in Article 4(1) of the Charter form an exhaustive set of necessary and sufficient conditions for admission of a state to UN membership, or can this set be expanded by additional conditions?
- Are the UN political organs (the Security Council and the General Assembly) legally entitled to expand the admission criteria of Article 4(1) of the Charter on the basis of political considerations?

To analyse these questions we need to remember that Article 4(1) of the Charter provides: "Membership in the United Nations is open to all other [i.e. other than the original UN members] peace loving states which accept the obligations contained in the present Charter and, in the judgement of the Organisation, are able and willing to carry out these obligations." The conditions for admission to UN membership, as expressly provided in this Article, require that the applicant (1) be a state, (2) be peace-loving, (3) accepts the obligations of UN Charter, (4) be able to carry out these obligations and (5) be willing to do so. The applicant's fulfilment of these conditions is a prerequisite for recommending (by the Security Council) and effecting (by a decision of the General Assembly) the admission, i.e. they have to be satisfied, in the judgement of the organisation, prior to the act of admission. The SC resolution 817(1993), recommending the admission, recognised that Macedonia had fulfilled the above conditions at the time of its application for UN membership.

[1] Above, fn. 1.
[2] Above, fn. 2.

To identify the nature of the conditions (i) and (ii) SC resolution 817 (1993) and the GA resolution 47/225(1993) imposed on Macedonia, one should look first into their functional role, i.e. whether they determine the suitability of the applicant for membership. The conditions (i) and (ii), however, are imposed as requirements on the applicant at the moment of its admission to UN membership, and they transcend in time the act of admission. Such requirements do not serve the purpose of criteria that the applicant should fulfil before admission (like those in Article 4), but they are, rather, conditions that the applicant should accept to carry on and fulfil after its admission to membership. Macedonia's strong objection[1] to the inclusion of such conditions in SC resolution 817(1993) was completely ignored and admission to UN membership was subjected to their acceptance. The conditions for admission imposed on the state by the act of its admission and which transcend that act in time, cannot be evidently regarded as part of, or contained in, those enumerated in Article 4(1), the fulfilment of which is required prior to the act of admission. In absence of the institute of 'conditional admission' to UN membership, conditions (i) and (ii) must be regarded as conditions transcending their cause, i.e. as being additional to those contained in Article 4(1). The additional character of these conditions with respect to those laid down in Article 4(1) is also obvious from the fact that, as it has been mentioned earlier, SC Res. 817(1993) explicitly recognises that the applicant satisfies the conditions for admission prescribed in Article 4(1) and recommends admission. The very fact that the conditions (i) and (ii) transcend in time the act of admission indicates that their character is not legal, but rather of political nature. We shall discuss in more detail the legal consequences of these conditions somewhat later. At this point, we would like to emphasise that the imposition of additional conditions (i) and (ii) in SC Res. 817 (1993) creates an internal logical inconsistency in this resolution. Apparently, the motivation for imposing conditions (i) and (ii) on the admission of Macedonia to UN membership was the Security Council observation, "A difference has arisen over the name of the State, which needs to be resolved in the interest of the maintenance of peaceful and good-neighbourly relations in the region."[2] This provision implies that the applicant state is unwilling to carry out the obligation in Article 2(4) of the Charter that requires that the "[m]embers shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." On

[1] See UN SCOR, 48th Session, supplement April, May, June, p. 35, UN Doc. S/25541 (1993).
[2] Above, fn. 2, preamble.

the other hand, the recognition contained in SC Res. 817 (1993) that the applicant state fulfils the admission criteria of Article 4(1) means that the Security Council affirms that the applicant state is a peace-loving state, able and willing to carry out the obligations in the Charter (including Article 2(4)). Therefore, the two statements in SC Res. 817 (1993) are mutually contradictory. The questions (b) and (c) put forward at the beginning of this Section have been answered by the advisory opinion of the ICJ in the *Admission* case.[1] This opinion provides an interpretation of Article 4(1) of the Charter and has been accepted by the General Assembly.[2] The advisory opinion states that a "member of the United Nations that is called upon, by virtue of Article 4 of the Charter, to pronounce itself by vote, either in the Security Council or in the General Assembly, on admission of a state to membership in the Organisation, is not juridically entitled to make its consent dependent on conditions not expressly provided in paragraph 1 of that article."[3] This opinion of the Court was based on the arguments that the UN Charter is a multilateral treaty whose provisions impose obligations on its members, that Article 4 represents "a legal rule which, while it fixes the conditions for admission, determines also the reasons for which admission may be refused,"[4] that the enumeration of the conditions in Article 4(1) is exhaustive since, in the opposite, "[i]t would lead to conferring upon Members an indefinite and practically unlimited power of discretion in the imposition of new conditions"[5] (in which case Article 4(1) would cease to be a legal norm). The conclusion of the Court was that the conditions set forth in Article 4(1) are exhaustive: they are not only the necessary but also the sufficient conditions for admission to membership of the United Nations.[6] The Court specifically addressed the question of whether from the political character of the organs responsible for admission (the Security Council and the General Assembly, according to Article 4(2)) or for the maintenance of world peace and security (Security Council, according to Article 24 of the Charter), one can derive arguments which could invalidate the exhaustive character of the conditions enumerated in Article 4(1). The Court rejected this possibility and held, "[t]he political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers or criteria for its judgement."[7] Thus, according to the Court's opinion, the Charter limits the freedom of

[1] Above, fn. 5.
[2] Above, fn. 6.
[3] Above, fn. 5, p. 65.
[4] Ibid., p. 62.
[5] Ibid., p. 63.
[6] Ibid., p. 62.
[7] Ibid., p. 64.

political organs and no political considerations can be superimposed on, or added to the conditions prescribed in Article 4(1) that could prevent admission to membership.

The advisory opinion of the Court also emphasised the functional purpose of the conditions: they serve as criteria for admission and have to be fulfilled, in the judgement of the organisation, before the recommendation and the decision for admission.[1] Further, once the competent UN organs have recognised that these conditions had been fulfilled, the applicant acquires an (unconditional) right to UN membership.[2] This right follows from the openness to membership enshrined in Article 4(1) and from the universal character of the organisation. In the words of Judge Alvarez, "[t]he exercise of this right cannot be blocked by the imposition of other conditions not expressly provided for by the Charter, by international law or by convention, or on grounds of a political nature."[3]

As mentioned earlier, the General Assembly, by Resolution 197(III, A) of 1948 accepted the Court's interpretation of Article 4(1) of the Charter and recommended, "each member of the Security Council and of the General Assembly, in exercising its vote on the admission of a new Member, should act in accordance with the foregoing opinion of the International Court of Justice."[4] Moreover, in the parts C, D, E, F, G, H, I, of the same GA Resolution 197(III)[5] of 1948, the General Assembly has implemented the Court's interpretation of Article 4(1) of the Charter by requesting the Security Council to provide recommendations for admission of a number of states to UN membership, the delivery of which was blocked by certain Security Council members on the basis of arguments (of a political nature) not strictly related to the conditions set forth in Article 4(1).

In view of the Court's interpretation of Article 4 of the Charter as a legal norm (which should be observed also by the UN political organs) and the General Assembly's (GA Res. 197(III, A)) acceptance of this interpretation, it is obvious that the imposition of additional conditions on Macedonia for its admission to UN membership is in clear violation of Article 4(1) of the Charter. From the fact that the additional conditions transcend in time the act of admission (with no strictly specified time limit), it follows that their imposition did not serve the purpose of admission conditions (which should be fulfilled before the act of admission), but rather a specific political purpose. This indicates that the additional conditions imposed on Macedonia for its admission to UN membership have no legal

[1] Ibid., p. 65.
[2] Ibid.
[3] Ibid., p. 71.
[4] Above, fn. 6, p. 30.
[5] GA Res. 197 (III) (C, D, E, F, G, H, I), 8 December 1948.

character and, by their nature, are extraneous to those contained in Article 4(1).

The violation of Article 4(1) of the Charter by the General Assembly's Resolution 47/225(1993) is not a mere *ultra vires* act. The imposition of additional conditions on Macedonia for its admission to UN membership means denial of its right to admission once it had been recognised that it fulfilled the exhaustive conditions set forth in Article 4(1). This right is enshrined in the Article 4(1) itself ("Membership in the United Nations is open to all [other] peace-loving states....") and is implied by the principle of universality of the United Nations. For the UN itself, the principle of its universality and the provision for its openness to membership create a duty to admit an applicant to UN membership when it has been recognised that it fulfils the criteria set forth in Article 4(1). Thus, the imposition of additional conditions on a state that fulfils the prescribed admission conditions violates the right of that state to become a UN member and, at the same time, one of the fundamental principles of the UN. The UN's duty to admit to membership states that fulfil the conditions of Article 4(1) without imposing additional conditions has been recognised by the General Assembly in its Resolution 197(III, parts C, D, E, F, G, H, I), as mentioned earlier.

LEGAL IMPLICATIONS AND CONSEQUENCES OF THE IMPOSED ADMISSION CONDITIONS

We shall now turn to a more substantive analysis of the additional conditions imposed on Macedonia by the UN organs for its admission to UN membership. We need to remember at this point again that they include acceptance by the applicant (i) of "being provisionally referred to for all purposes within the United Nations as 'the former Yugoslav Republic of Macedonia' pending settlement of the difference that has arisen over the name of the state,"[1] and (ii) of negotiating with Greece over its name (implied in the second part of the above cited text common to both GA Res. 47/225(1993) and SC Res. 817(1993) and from the provision in the SC Res. 817 (1993) by which the Security Council "urges the parties to continue to co-operate with the Co-Chairmen of the Steering Committee of the International Conference on the Former Yugoslavia in order to arrive at a speedy settlement of the difference)."[2] The reason for imposing these conditions was given in the preamble of SC Res. 817(1993) in which the Security Council, after affirming that the applicant state fulfils the conditions

[1] Above, fns. 1 and 2.
[2] Above, fn. 2, paragraph 1.

of Article 4, observes, "a difference has arisen over the name of the State, which needs to be resolved in the interest of the maintenance of peaceful and good-neighbourly relations in the region."[1] This observation of the Security Council, which has generated the imposition of the mentioned additional conditions for the Macedonian admission to the UN membership, was apparently based on the Greek allegation that the name of the applicant implies territorial claims against Greece.[2] Without examining the legal basis of the Greek allegation (see later for details on this aspect), the Security Council, in accordance with its responsibility for the maintenance of world peace and security provided for in Article 24 of the Charter, has used the above political consideration as a sufficient basis for imposing the additional conditions on Macedonia for its admission to UN membership. We have already seen that this is not in accordance with the GA Resolution 197(III, A) and the Court's interpretation of Article 4(1). However, there are other, and perhaps even more important legal implications of the imposed additional conditions. They are related to the inherent right of states to determine their own legal identity, to the principles of sovereign equality of states[3] and the inviolability of their legal personality,[4] and to the legal status (including the representation) of the member states. By imposing conditions on Macedonia regarding its name, the Security Council and the General Assembly have essentially denied the right of Macedonia to choose its own name. The inherent right of a state to have a name can be derived from the necessity that a juridical personality must have a legal identity. In the absence of such an identity, the juridical person, such as the state, could – to a considerable degree, or even completely – loose its capacity to interact with other such juridical persons (conclude agreements, etc.) and independently enter into and conduct its external relations. The name of a state is, therefore, an essential element of its juridical personality and, consequently, of its statehood. The principles of sovereign equality of states and the inviolability of their juridical personality lead to the conclusion that the choice of a name is a basic, inherent right of the state. This right is not alienable, divisible or transferable, and it is a part of the right to self-determination (determination of one's own legal identity), i.e. it belongs to the domain of *jus cogens*. External interference with this basic right is inadmissible. If this were not true, i.e. if an external factor is allowed to take

[1] Above, fn. 2, preamble.
[2] See UN SCOR, 48th Session, supplement April, May, June, p. 36, UN Doc. S/25543 (1993).
[3] UN Charter, Art. 2(1).
[4] 'Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations', GA Res. 2625 (XXV), 24 October 1970.

part in the determination of the name of a state, under the assumption that the subject state has at least a non-vanishing influence on this determination, it can easily be imagined that the process of determination of the name of that state (e.g. via negotiations) may never end. The state may never acquire its name, which would create an extraordinary political and legal absurdity in the international arena. It is also fairly obvious that if such external interference with the choice of the name of a state would be allowed, even through a negotiation process, it might easily become a legally endorsed mechanism for interference in the internal and external affairs of the state, i.e. a mechanism for degradation of its political independence. From these reasons, the choice by a state of its own name must be considered an inherent right of the state, which belongs, *stricto sensu*, in its domestic jurisdiction. In exercising this right, the states have, therefore, a complete legal freedom.

The denial by the UN political organs of the inherent right of Macedonia to choose its name, implied by the additional conditions imposed for its admission to UN membership, is, therefore, in violation of Article 2 (paragraphs 1 and 7) of the Charter. The respect for the principles embedded in this article are equally applicable to the organisation as is to its members (e.g. Article 2(7) explicitly forbids the UN from intervening in matters which are essentially within the domestic jurisdiction of the states), and their violation by the UN directly involves its legal responsibility. The violation of Article 2(1) of the Charter and of the principle of inviolability of the legal personality of states in the process of Macedonia's admission to UN membership has immediate consequences for its legal status within the United Nations as a member. With respect to other UN member states, Macedonia is obliged to bear within the UN system an imposed, provisional name (reference) and to continue to negotiate with Greece over its name. These additional obligations on Macedonia as a UN member distinguish its position from that of the other UN members and define a discriminatory status. Membership, as a legal status, contains a standard set of rights and duties, which are equal for all UN members ("sovereign equality of the Members", Article 2(1)) and derogation or reduction of these membership rights and duties for particular states is inadmissible, particularly in areas which are related to, or involve, the legal personality of member states. It follows that the additional obligations imposed on Macedonia as a UN member are again in violation of Article 2(1) of the Charter.

The discriminatory status of Macedonia as a UN member manifests itself in a particularly clear manner in the area of representation. In all acts of representation within the UN system, and in the field of UN relations with other international subjects, the provisional and not the constitutional name of Macedonia is to be used. This is in violation of the right of states to non-discrimination in their representation in organisations of universal character

(i.e. the UN family of organisations) expressed in an unambiguous way in Article 83 of the Vienna convention on representation of states.[1] That article of the Convention provides, "[i]n the application of the provisions of the present Convention no discrimination shall be made as between states."[2] The right to equal representation of states in their relations with the organisations of universal character is only a derivative of the principles of sovereign equality of the states within the UN and inviolability of their juridical personality. The representation on a non-discriminatory basis, however, has a particular significance in the exercise of the legal personality of states in their relations with other states or organisations since it involves in a most direct and explicit way the legal identity of the states. Furthermore, there is another viewpoint from which the legal status of Macedonia in the United Nations could be looked at. It can be questioned whether a state admitted to UN membership under conditions (or obligations) that extend in time with no specified limit and which degrade its legal personality can be considered a full member (in the sense of the principle of sovereign equality of the members), despite the fact that the state possesses all other rights (and duties) provided by membership status, or, can such a state be considered rather, *de facto,* conditionally admitted to UN membership? Suppose that the negotiating process may extend indefinitely.

What would be the legal status of such a member carrying out a permanent obligation? Should it be expelled from the organisation's membership for not complying in an efficient way with the obligation (or for its obstruction)? Should the other negotiating party also be expelled from the organisation for the same reason (assuming that in the negotiations the parties have equal negotiating status)? But, expelling the state from UN membership for failing to fulfil the obligation imposed by the act of its admission would only prove that the state had been conditionally admitted to UN membership and that it had the legal status of a conditional member of the United Nations (a status which is not provided for by the Charter). If, to avoid this conclusion, expulsion from membership is not affected, then the UN tolerates a permanent factual non-compliance of one of its members with an obligation. It may also be possible that the obstruction of the settlement of the dispute is caused by the other negotiating party (e.g. by insisting to enter into matters from the domestic jurisdiction of the first party, or for other – for instance, political – reasons or motivations). The fulfilment of the imposed obligation could thus depend not solely on the good will of the party carrying the obligation, but also on the other party, i.e. on a factor,

[1] *Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character*, UN Doc. A/CONF. 67/16 (March 14, 1975). (See also 69 *AJIL*, 1975, p. 730.)
[2] Ibid., Article 83.

which is outside of its control. This introduces another component to the legal status of Macedonia in UN membership, which is related to its independence in carrying out its membership obligations.

By denial of the right of the state to free choice of its name, and by imposing on it a provisional name for use within the UN system (i.e. as an attribute to its membership), the UN has essentially suspended the legal identity of one of its members at the moment and by the act of its admission to membership.[1] The suspension of the legal identity of a member state by the act of admission defines a legal status for that state within the UN characterised by a derogated legal personality and reduced (contractual) capacity for conducting its international relations both within and outside the UN system. This specific status of Macedonia as a UN member is clearly different from that of all other member states and is in violation with Article 2(1) of the Charter.

All the above mentioned contradictions and inconsistencies regarding the legal status of Macedonia's UN membership have their origin in the violation of Articles 4(1) and 2(7) of the Charter by the Security Council and the General Assembly resolutions related to, respectively, the recommendation for and affecting on the admission of Macedonia to UN membership. We shall now reveal the source of these violations. As indicated earlier, the imposition of additional conditions in Security Council Resolution 817, recommending Macedonia for admission to UN membership, was based on concerns regarding "the maintenance of peaceful and good-neighbourly relations in the region,"[2] triggered by the Greek allegation that the applicant's name implies territorial claims[3] against Greece. Greece also advanced claims that the right of use of the name 'Macedonia' belongs, for historical reasons, only to Greece. There is, however, no legal basis for linking the conditions for admission of a state to UN membership, as specified explicitly in Article 4(1) of the Charter, with allegations based on assumptions regarding possible future (political) developments. Indeed, based on the principle of separability of domestic and international jurisdictions, the name of the state which is a subject of the domestic jurisdiction does not create international legal rights for the state that adopts the name, nor does it impose legal obligations on other states, which would be a negation of the basic idea and purposes of international law. Clearly, the name, *per se*, does not have an impact on the territorial

[1] In both SC Res. 817 (1993) and GA Res. 47/225 (1993) the name of applicant is not mentioned but the applicant is referred to as the state whose application is contained in document S/25147 (in the SC resolution), or in document A/47/876 - S/25147 (in the GA resolution). See also fn. 3.

[2] Above, fn. 2, preamble.

[3] Above, fn. 47.

rights of the states.[1] Furthermore, from the inherent right of a state to determine its legal identity, and from the principle that all states are juridically equal, it follows that all states have an equal legal freedom in the choice of their names. For this reason, the Greek claim that Greece has an exclusive right to the use of the name 'Macedonia' has "no basis in international law and practice."[2] Greek opposition to the admission of Macedonia to UN membership under its constitutional name is not only without legal basis, but also in violation of the international law by interfering in matters which are essentially within Macedonia's domestic jurisdiction.[3] Thus, by ignoring the principles of separability of domestic and international jurisdictions in the case of the Macedonian admission to UN membership, the Security Council has opened the door for violation of several articles of the UN Charter and for creation of an unusual membership legal status that is not instituted by the Charter and is for one UN member.

UN'S LEGAL RESPONSIBILITY AND POSSIBLE MODES OF REDRESS

In the preceding two sections of this study we have provided a number of arguments that clearly show the inclusion of the two additional conditions in SC Resolution 817 (1993) and GA Resolution 47/225(1993), related to Macedonia's admission to UN membership, violates the provisions of Articles 4(1), 2(1) and 2(7) of the Charter and constitutes an *ultra vires* act of these organs. Since the admission to membership, affected by a decision of the General Assembly, expresses the legal capacity of the UN to admit a state to membership, and since a state also has a legal capacity to become a UN member, it follows that the act of admission engages the legal personalities of both the UN and the applicant state, and that the admission is a legal act of the UN.[4] As argued in Section 3 above, the UN's responsibility related to the unlawful admission of Macedonia into membership derives from the right of the applicant to admission when it fulfils the prescribed criteria laid down in Article 4(1) of the Charter, and the UN's duty to admit

[1] The EC Arbitration Commission on Former Yugoslavia, when considering the question of recognition of Macedonia by the European Community, in its Opinion No. 6 (see 31 International Law Materials (1992) 1507, 1511) has not linked the name of the country to the Greek territorial rights.

[2] L. Henkin, et al., *International Law*: *Cases and Materials*, 3rd edn., 1993, p. 253.

[3] Above, fn. 49, p. 123.

[4] The ICJ advisory opinion given in the *Certain Expenses* case (above, fn. 19) affirms that, irrespectively of the distribution of powers among the organs of the UN, the acts of these organs with respect to a third party represent acts of the UN. The decisions of the General Assembly made in accordance with Art. 18(2) of the Charter, including the decisions on admission to membership, have a binding character.

such an applicant to membership, flowing from the openness of the organisation and its mission of universality.[1] In this context, the provisions contained in Article 4(1) should be interpreted as a legal norm of an international treaty that governs the admission to UN membership.[2] Observance of this legal norm is as compulsory for the UN as it is for the applicant state. The violation of Article 4(1) in the process of admission of Macedonia to UN membership constitutes, therefore, a breach of the Charter and violation of applicant's right to such membership, as guaranteed by the Charter. The specific content of violation of Article 4(1) is the UN political organs' extension of the admission criteria beyond those enumerated exhaustively in that article, i.e. an inappropriate and politically motivated interpretation of Article 4(1), contradicting the interpretation of that article given by the ICJ in the *Admission* case and accepted (in 1948) by the General Assembly. In this sense, the UN's breach of Article 4(1) of the Charter in the case of Macedonia's admission to membership is similar to the *IMCO* case[3] discussed in Section 2, in which the IMCO Assembly's breach of Article 28 of the IMCO Convention was committed similarly because of an inappropriate interpretation of the provisions of that article (resulting in additional criteria for election to the IMCO Maritime Safety Committee).

As argued in Section 4, the determination of the legal identity of a state is an inherent right of that state, falling strictly within its domestic jurisdiction. This right, being strongly correlated with the right to self-determination, belongs to the domain of *jus cogens*. On the other hand, legal identity is an essential element of the legal personality of a state, the inviolability of which has again the character of a *jus cogens* norm. The denial of the right of a state to determine its own name is, therefore, in violation with the norms of *jus cogens*, reflected in the provisions of Articles 1(2), 2(1) and 2(7) of the Charter and in the Declaration on Principles of International Law.[4] The UN, as any other subject of the international law, has a duty to respect these norms. Articles 2(7) specifically and expressly limit the UN's powers over matters relating to the strict internal jurisdiction of states. The breach of this article in the case of Macedonia's admission to UN membership, by interfering in the inherent right of this state to choose its

[1] The correlation between the right of a state, fulfilling the conditions laid down in Art. 4(1), to admission to UN membership and the UN's duty to admit such a state into membership was elaborated in detail in the ICJ advisory opinion given in the *Admission* case (above, fn. 5). Particularly clear form of this correlation was given in the concurring individual opinion of Judge Alvarez (ibid., p. 71).

[2] This interpretation of Article 4(1) was given by the ICJ in the *Admission* case (above, fn. 5, p. 62) and was accepted by the General Assembly (see above, fn. 6).

[3] Above, fn. 18.

[4] Above, fn. 49.

own name, is certainly an *ultra vires* act on the part of the UN. Since the basic principles embodied in the Charter are mutually interrelated and consistent with each other, breach of one principle (or legal norm) leads, usually, to violation of other principles (or norms). Thus, the violation of Article 2(7) leads also to violation of the principle enshrined in Article 2(1), as generalised by the Declaration on the Principles of the International Law ('sovereign equality of states'[1]), and *vice versa*. Furthermore, the violation of Articles 4(1) and 2(7) during the process of admission leads to a discriminatory legal status for Macedonia as a UN member, i.e. to violation of Article 2(1) of the Charter. (Indeed, *ex injuria jus non oritur*.) As we have argued in the preceding section, the breach of this article results effectively in suspension of the legal identity of the member state, inflicting thus grave damage on its legal personality (e.g. by reducing its contractual capacity, its capacities in the domains of legation and representation, etc), and on its external political and economic relations. The UN's responsibility for violating Article 2(1) derives from its duty to strictly observe this treaty provision (principle of the UN), and from its mission to promote legal justice and the rule of international law.[2]

The violations of Charter provisions contained in Articles 4(1), 2(1) and 2(7) may each serve as a sufficient legal basis (*ultra vires* acts) for requesting judicial redress, i.e. for removal of the conditions imposed on Macedonia during its admission to UN membership and its resulting discriminatory UN member status. On the substantive level, however, they are all closely interrelated (as argued above) since the violation of Articles 2(1) and 2(7) underlines the violation of Article 4(1). On the other hand, the breach of Article 4(1) (which implies violations of Articles 2(1) and 2(7)) appears to be the source of the problems related to the specific legal status of Macedonia in UN membership. Further, the breach of Article 4(1) appears to be most obvious, since the admission of Macedonia to UN membership has not followed (in its substantive part) the standard admission procedure. Moreover, and most importantly, this breach is in a direct discord with the General Assembly resolution 197 (III, A) regarding the interpretation of Article 4(1) given by the ICJ in the *Admission* case.[3]

As a mechanism for judicial redress of legal consequences generated by the violation of Article 4(1) in the General Assembly resolution 47/225 (1993) and Security Council resolution 817 (1993), the advisory jurisdiction of the ICJ appears to be the most appropriate in this case. The question of the legality of these resolutions in their parts related to the imposition of

[1] Ibid., p. 122.
[2] UN Charter, preamble.
[3] Above, fn. 5.

additional conditions on Macedonia regarding its name for its admission in UN membership (i.e. their compatibility with the provisions of Article 4(1) of the Charter) could be put before the Court by the General Assembly on request by Macedonia (possibly jointly with a group of member states that have already recognised Macedonia under its constitutional name). Since this question is of a purely legal nature, the General Assembly may request an advisory opinion from the Court (Article 96(1) of the Charter). The General Assembly cannot obstruct such a request for an advisory opinion because the requested opinion is related to the legality of its own act. Such an obstruction (based on whatever reasons) would essentially mean that the General Assembly, as a political organ, was imposing its own response to the question regarding the legality of its own act, or, imposing its own judgement in a case in which it is itself a party (representing the UN).[1] This would be incompatible with the basic legal principles of juridical equality and *bona fide*, and with the mission and the duty of the UN regarding respect for the international law.[2] Moreover, the *IMCO* case[3] provides an example in which the UN has not obstructed the request for a Court's advisory opinion regarding the compatibility of the IMCO plenary organ's decision with the provisions of its constitutional document. On the other hand, since the question regarding the legality of imposing additional conditions on Macedonia for its admission to UN membership is essentially a special case of the more general question (of the same character) already considered by the Court in the *Admission* case,[4] there cannot be any uncertainty about the Court's competence for its consideration. For the same reason, and from the obvious incompatibility of the additional conditions for Macedonia's admission to UN membership with the exhaustive character of the conditions set forth in Article 4(1) of the Charter, the Court's advisory opinion in this case cannot be different from its opinion already given in the *Admission* case. Similarly, the position of the General Assembly with respect to the Court's opinion in the Macedonian case cannot be different from its position[5] taken with respect to the Court's opinion in the *Admission* case. In fact, the

[1] As we argued earlier, in the act of admission of a state to UN membership the legal personalities of both the UN and the applicant state are involved.

[2] Above, fn. 64.

[3] Above, fn. 20.

[4] The question for which an advisory opinion of the Court was requested by the General Assembly had the form: '[i]s a Member of the United Nations which is called upon, in virtue of Article 4 of the Charter, to pronounce itself by its vote, either in the Security Council or in the General Assembly, on the admission of a State to membership in the United Nations, juridically entitled to make its consent to the admission dependent on conditions not expressly provided by paragraph 1 of the said Article?' (See GA Res. 113(II), 14 November 1947).

[5] Above, fn. 6.

Macedonian case is only a specific example of the general issue considered by the Court in the *Admission* case, created by the non-observance (or neglect) of the already adopted Court's interpretation of Article 4(1) of the Charter.[1]

The mode of redress via the advisory jurisdiction of the Court includes also the subtler problem of the legal consequences of the legally defective GA resolution 47/225 (1993). Apart from its preamble (referring to the recommendation of the Security Council for admitting the applicant to UN membership with additional conditions and to the application of the candidate), GA resolution 47/225 (1993) contains a decision which includes two parts: (a) to admit the applicant state to UN membership and (b) "this State being provisionally referred to for all purposes within the United Nations as 'the former Yugoslav Republic of Macedonia' pending settlement of the difference that has arisen over the name of the State."[2] Part (a) of the GA resolution reflects the Security Council's assessment that "the applicant fulfils the criteria for membership laid down in Article 4 of the Charter"[3] and follows the Security Council recommendation for admission of the applicant state to UN membership. Part (b) of the GA resolution contains the imposed additional conditions related to the name of the applicant (and future UN member) without the acceptance of which part (a) could not have been affected. Only part (b) of the GA resolution is *ultra vires* and only this part can be considered void. From the requirement of legality, the unlawful part (b) of the GA resolution should be considered as void *ab initio*. However, practical consideration (within the General Assembly, after the favourable Court's advisory opinion is received and presumably adopted) may render the determination that part (b) of the resolution is void *ex nunc*.[4] In either case, according to the principle of severability,[5] the invalidation of part (b) of the resolution should not affect the validity of part (a). Obviously, the invalidation of part (b) of GA Res. 47/225 (1993) can be done by a new GA resolution, which would also affirm the use of the constitutional name 'Macedonia' within the UN system.

Another basis for judicial redress in the Macedonian case via the advisory jurisdiction of the ICJ could be based on the violation of Article

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[1] Ibid.

[2] Above, fn. 1. The formulation of part (b) of GA Res. 47/225 (1993) is identical to the formulation given in the recommendation of Security Council resolution SC Res. 817 (1993). The SC resolution, however, somewhat expands on the character of the difference and on its settlement by negotiations (above, fn. 45).

[3] Above, fn. 2, preamble.

[4] Such a determination was given, for instance, by the IMCO Assembly when accepting and implementing the Court's advisory opinion (above, fn. 21).

[5] Above, fn. 9, p. 120.

2(1) of the Charter in GA Res. 47/225 (1993) by which the legal personality of the state is severely derogated (through suspension of its legal identity and imposing a discriminatory membership status). The question of derogation of legal personality of Macedonia by this GA resolution, in the context of Article 2(1), has an obvious legal character and is, therefore, a legitimate subject for the Court's advisory jurisdiction. Since some of the basic principles of international law are involved in the subject (related, e.g., to the inherent rights of states, inviolability of legal personality, equality of states, etc.), the Court cannot formulate its opinion in a manner inconsistent with those principles. Nor could the General Assembly ignore the Court's opinion based on such principles.

CONCLUSIONS

The presented detailed and logically consistent analysis of the legal aspects of SC Res. 817 (1993) and GA Res. 47/225 (1993), related to the admission of Macedonia to UN membership, and the legal effects of these resolutions on the membership status of Macedonia in the UN lead to the conclusion that these resolutions are in clear violation of the Charter. The imposed additional conditions for Macedonia's admission to the UN directly violate Article 4(1) and are contradictory to the accepted interpretation of this article as a legal norm. The denial of a sovereign state's right to free choice of its own legal identity (name) by these resolutions, and imposing an admission and membership condition on that state to negotiate over its own name with another state, violates Articles 2(1) and 2(7) of the Charter. The imposed admission and membership conditions on Macedonia define a discriminatory legal status of this state as a UN member, again in violation of Article 2(1). The legal responsibility of the United Nations for violation of the Charter's provisions derives from the UN's duty to respect the basic rights of states (either as applicants or UN members), which are protected by the principles of international law enshrined in the mentioned articles of the Charter. The character of these violations is of *ultra vires* type with respect to the legal norms of the Charter as a multilateral treaty. The violations of Articles 4(1), 2(1) and 2(7) involve the legal personalities of both the UN and Macedonia. This provides a basis for instituting judicial redress, based on the use of the advisory jurisdiction of ICJ, of the legal consequences resulting from the breach of constitutional provisions. The violation of Article 4(1) (imposition of additional admission conditions) has an obvious character in view of the explicit and extremely clear Court's interpretation of Article 4(1) in 1948, and its acceptance and legal implementation by the General Assembly the same year. In fact, from a legal point of view, the case of irregular admission of Macedonia to the UN is only a particular case of

the most general and already resolved *Admission* case,[1] and resolution by legal means should be regarded as the most logical and straightforward option.

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[1] Above, fn. 5.

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EU - NATO RELATIONS IN POST LISBON ERA

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Abstract

The definition of the relations between EU and NATO is an ongoing and sensitive issue. The EU insists that the continuing development of the Common Security and Defense Policy (CSDP) is essential to the Union's aspirations to be a global actor and a key strategic partner. Meanwhile, NATO's 2010 New Strategic Concept (NSC) underlined its ability to assume new challenges and thus enhance its relevance.

The present contribution aims to consider the extent to which the EU's Lisbon Treaty promotes partnership between the EU and NATO or whether it merely highlights existing incongruence. The analysis is based on the treaty text but also relies upon associated documents. Although there are many dimensions that could directly or indirectly influence EU - NATO relations, this analysis limits itself to two specific treaty-based aspects that are seen as of core importance to the future of mutual relations.

The first is the extent to which the Lisbon Treaty contributes to the formation of a compelling strategic direction for the EU and, by implication, what type of partner (or competitor) the EU may become. The second aspect considers two inter-related terms – collective, mutual defense and the solidarity clause: their meanings and linkages, and whether or not they should be construed as an emerging competitive element between the organizations. The conclusions argue that the Lisbon Treaty does little to actually change CSDP, or to fundamentally realign EU - NATO relations. Co-existence will remain the norm for the indefinite future.

Key words: EU, NATO, Lisbon Treaty, CSDP, collective, mutual defence, solidarity clause.

INTRODUCTION

The interest of the European nations in the collective security and defense dates back to the end of the Second World War. Both, NATO and the European Community (EC), now the European Union (EU), had their origins in the post-World War II efforts to bring to stability in Europe. NATO's original purpose was to provide collective defense through a mutual

security guarantee for the United States and its European allies to counterbalance potential threats from the Soviet Union. The purpose of the European Community was to provide political stability to its members through securing democracy and free markets. The establishment of the Western European Union (WEU) in 1948, the European Defense Community (EDC) incentive of 1954, the Fouchet Plan of 1961, and the European Political Cooperation which began in 1970 all represent efforts in that direction.[1] However, the Cold War and the establishment of the North Atlantic Treaty Organization (NATO) with the United States delayed plans for a more active European role in the security incentives until the 1990s. The end of the Cold War encouraged the EU to revisit the security chapter and resulted in the creation of a Common Foreign and Security Policy (CFSP) as a second pillar of the Maastricht Treaty of 1991. This period came to an end in St. Malo in December 1998, when the UK and France agreed on moving the EU to the forefront in security matters and on bringing an end to the short-lived WEU period. A European Security and Defense Policy (ESDP)[2], was accordingly launched at the Cologne European Council summit meeting in June 1999.

The CSDP is a major element of the broader CFSP of the European Union, covering defense and military. The CSDP is the successor of the European Security and Defense Identity (ESDI), under NATO, that was created as a European pillar within the North Atlantic Alliance in 1996, at the Berlin Summit, in order to allow European countries to act militarily when NATO wished not to, as well as alleviate US financial burden. If, throughout the Cold War, the defense of Europe was guaranteed by the transatlantic alliance, the collapse of the soviet bloc and the spread of unprecedented ethnic warfare in the Balkans and in several African countries, led the European members to make concrete steps to enhance their military capabilities. Ever since the establishment more than 15 years ago of the ESDP, the European Union has set itself the goal of being able to act across the whole spectrum of possible responses to a crisis situation, using both civilian and military means. It seems evident that in order for this to be possible it must have the necessary capabilities. The ESDP has aimed from

[1] See more: Nikodinovska, Snezana., "Mutual Foreign and Security Policy of the EU", *A Yearbook of the Police Academy,* Skopje, 2005 / 2006
Nikodinovska, Snezana. "Comon Foreign and Security Policy after the Lisbon Treaty" *NBP Journal of Crimanlistics and Law,* Academy of Criminalistic and Police Studies, Belgrade, No. 3 / 2010

[2] Since Lisbon, the European Security and Defense Policy (ESDP), has been re-named into the Common Security and Defense Policy (CSDP) as such, this title will be used unless a clear historical reference is being made to the pre-Lisbon ESDP.

the outset to provide the European Union with the necessary means to resolve crisis situations which has not proved to be an easy task.

Despite their different natures and approaches, NATO and the EU both deal with matters of security and conduct crisis-management operations. 22 of the 28 NATO member states are also members of the European Union. The question of cooperation and complementarity between the EU and NATO is therefore important.

A SHORT OVERVIEW ON CSPD DEVELOPMENTS

Although, for decades, there has been discussion within the EU about creating a common foreign, security and defense policy, it remained for a long time beyond the reach of the European integration process. Early attempts to incorporate a political dimension to the European Economic Community (EEC) failed in 1954 when an EDC was rejected by the French National Assembly. From that moment the D-word remained beyond use until St. Malo in 1998. Previous EU efforts to forge a defense arm foundered on member states' national sovereignty concerns and fears that an EU defense capability would undermine NATO and the transatlantic relationship.

However, U.S. hesitancy in the early 1990s to intervene in the Balkan conflicts, and the former UK Prime Minister Tony Blair's desire to be a leader in Europe, prompted him in December 1998 to reverse Britain's long-standing opposition to an EU defense arm. Blair joined the then-French President Jacques Chirac in pressing the EU to develop a defense identity outside of NATO. This new British engagement, along with deficiencies in the European defense capabilities exposed by NATO's 1999 Kosovo air campaign, gave momentum to the EU's European Security and Defense Policy (ESDP).[1] The Anglo-French Saint-Malo agreement of December 1998 was the true origin of what would later be the European Security and Defense Policy. The ESDP was formalized at the Cologne summit in June 1999 as an integral part of the Common Foreign and Security Policy. Its central objective is the development of civilian and military capacities necessary for the conduct of international crisis management operations. The main idea of the ESDP is well formulated in the conclusions of the European Council in Helsinki (1999): "The European Council underlines its determination to develop an autonomous capacity to take decisions and, where NATO as a whole is not engaged, to launch and conduct the EU-led

[1] For more information on Blair's decision to reverse the UK's traditional opposition to ESDP, see CRS Report to Congress, "*European Security: the Debate in NATO and European Union"*, April 25, 2000, by Karen Donfried and Paul Gallis. available at: http://fas.org/man/crs/crseu.htm (accessed on 5 January 2015).

military operations in response to international crises. This process will avoid unnecessary duplication and does not imply the creation of a European army".[1] EU leaders hope ESDP will provide a military backbone for the Union's evolving Common Foreign and Security Policy, a project aimed at furthering EU political integration and boosting the EU's weight in the world affairs. They also hope that ESDP will give the EU member states more options for dealing with future crises. The EU stresses that ESDP is neither aimed at usurping NATO's collective defense role nor at weakening the transatlantic alliance. But, while the build-up of military capabilities have been the most popular feature of ESDP and were arguably at the centre of the 1998 French - British St. Malo agreement, the formal enactment of ESDP during the 1999 German EU presidency and the subsequent summits in Helsinki (1999) and Feira (2000) specified ESDP's aims and carved out an institutional vision that was different from a conventional military alliance by focusing on 'comprehensive crisis management'. In essence, ESDP was envisaged as an instrument to undertake the full range of conflict prevention and crisis-management missions defined by the so-called "Petersberg tasks"[2] through a mixture of military and civilian means. While military capacities were seen as necessary for what the diplomatic jargon calls 'robust intervention', the focus on effective engagement in the pre- and post- conflict stages led to a build-up of a range of civilian instruments.

To fulfill the "Petersberg tasks", the member states of the EU needed to transform their militaries and to gain access to the military planning capabilities and forces of NATO to avoid unnecessary duplications. To meet these two requirements, the EU adopted the Helsinki Headline Goal of 1999 and the so called "Berlin Plus agreements" in 2002.[3] The Helsinki Headline Goal, later transferred into the Headline Goal 2010, set out a general capability requirement with the objective to hold a corps size force of 50,000 to 60,000 deployable within 60 days with the ability to sustain them for at

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[1] "Presidency Conclusions", Helsinki European Council, 10 and 11 December 1999, available at:
http://www.europarl.europa.eu/summits/hel1_en.htm, (accessed on 5 January 2015).

[2] These tasks were set out in the Petersberg Declaration adopted at the Ministerial Council of the Western European Union (WEU) in June 1992. The original 'Petersberg tasks' formed an integral part of the ESDP. They were explicitly included in the Treaty on the European Union (Article 17) and covered various actions associated with humanitarian and rescue tasks, peacekeeping and crisis management including peacemaking. The Treaty of Lisbon (Article 42 of the TEU) complements the range of missions which may be carried out in the name of the EU.

[3] See: EU - NATO: THE FRAMEWORK FOR PERMANENT RELATIONS AND BERLIN PLUS, available at:
http://www.consilium.europa.eu/uedocs/cmsUpload/03-11-11%20Berlin%20Plus%20press%20note%20BL.pdf, accessed on 5 January 2015

least one year. This force would not be a standing "EU army." Rather, troops and assets at appropriate readiness levels would be identified from existing national forces for use by the EU. In addition, the EU leaders at Helsinki welcomed efforts to restructure the European defense industries, which they viewed as a key to ensuring a European industrial and technological base strong enough to support ESDP military requirements. With regard to the EU's goal of more effective crisis management, CSDP also needed to include civilian capabilities and effective structures to lead operations following a comprehensive approach.

The decision to create the civilian component of the ESDP came at the Feira European Council in June 2000. The EU decided to establish a 5,000-strong civilian police force, and in June 2001, the EU set targets for developing deployable teams of experts in the four identified priority areas for ESDP Civilian Crisis Management (CCM): police, rule of law, Civilian Administration, and Civil Protection suggesting that capabilities in these four fields could be used in EU-led missions as well as in operations conducted by other 'lead agencies' such as the UN or the Organization for Security and Co-operation in Europe (OSCE). At the Nice European Council the WEU's operational role was transferred to the EU. Thus, the "Petersberg tasks", established by the WEU in June 1992, were incorporated into the TEU - Title V, Article 17.[1] Those tasks refer to humanitarian and rescue tasks, peacekeeping tasks and tasks of combat forces, including peacemaking. The Lisbon Treaty further broadens the scope of the "Petersberg tasks" and establishes that the EU may use civilian and military assets on missions outside the Union for peacekeeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter. These missions will encompass joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilization.[2]

In this respect, the military missions can be seen as short-term and the civilian missions as medium-term and long-term crisis management instruments. Until June 2013, as many as 30 operations within the ESDP framework were deployed to various conflict areas in the Western Balkans, South Caucasus, Middle East, Asia, and Africa. A significant proportion is constituted by civilian missions. This, together with the significant attention of the EU devoted to developing its civilian crisis management aspect makes the civilian component somewhat a trademark of the ESDP. On the other

[1]Consolidated version of the Treaty on European Union, available at: http://www.basiclaw.net/Appendices/eu_cons_treaty_en.pdf. (accessed on 5 January 2015).
[2] Article 42 of the TEU.

hand, on the institutional side, the EU has created new defense decision-making bodies to help directly and implement ESDP. The Political and Security Committee (PSC), the EU Military Committee (EUMC), and the EU Military Staff (EUMS) are the permanent political and military structures responsible for an autonomous, operational EU defence policy.

A SHORT BACKGROUND ON THE EU – NATO RELATIONS

The European Union and the North Atlantic Treaty Organization - to which 22 of the 28 Member States belong - are founded on common values and strategic interests, particularly in the fields of security, defense, and crisis management. The EU, at the beginning of this new era developed a framework of cooperation with NATO which aimed to increase its visibility and capabilities. Negotiations over the framework took almost three years and were finalized in December 2002. It comprised the following elements:

- "Berlin plus arrangements" for the use of NATO assets and capabilities by the EU
- Arrangements for a NATO - EU Strategic Partnership (EU - NATO Declaration on ESDP and exchange of letters between Secretary Generals)
- Arrangements regarding the involvement of non-EU European allies in the ESDP (Nice Implementation Document).[1]

This framework was based on a mutual understanding defined by the US Secretary of State Madeleine Albright in 1999 as the "3Ds". That is, the purpose was not to "Duplicate" NATO assets, not to "Discriminate" against non-EU NATO members, and not to "Decouple" the EU from the transatlantic security architecture. As such, the primacy of NATO was guaranteed, while the Europeans were allowed to assume more responsibilities. This was important as the Bosnian crisis of the 1990s had demonstrated the difficulties in mounting a concerted and institutionalized European response. Furthermore, the US was unwilling to remain the primary actor in the European security scene after the fall of the Berlin Wall and the dissolution of the Warsaw Pact. Thus, it was time for the European Allies to reorganize themselves. NATO began the transformation process from a military alliance, overwhelmingly concerned with defence, into a political / military alliance with a refurbished raison d'être of a retained commitment to defence but with a new added value as a provider of security

[1] EU-NATO: THE FRAMEWORK FOR PERMANENT RELATIONS AND BERLIN PLUS, available at:
http://www.consilium.europa.eu/uedocs/cmsUpload/03-11-11%20Berlin%20Plus%20press%20note%20BL.pdf accessed on 10 January 2015

as well. At the time, the European Union was primarily focused on integration concerning its economic realm. However, the time also seemed appropriate to address its political Union and even went as far as introducing a CFSP that would "include all questions relating to the security of the Union, including the progressive framing of a common defence policy, which might lead to a common defence, should the European Council so decide".[1]

However, these reforms led to two divergent visions of the future of the European security. The NATO vision, led by the US and other Atlantic states, set out to "reinforce" a European pillar within the Alliance through the concept of an ESDI while the Europeanist camp, led by France, set out to attain an "independent" planning and operational capability.[2] The first real attempts at reconciling these two views began in 1994 and crystallized in the 1996 NATO Berlin Ministerial that sought to establish the Western European Union (WEU) as the organization responsible for any European-led military crisis missions. Namely, as early as 1991, the Alliance's Strategic Concept included recognition of a European Security and Defense Identity within NATO,[3] and at its Brussels summit in 1994 NATO declared itself in favour of developing a European Security and Defense Identity within the Alliance. This task fell to WEU, which was authorized to take autonomous action using NATO assets.[4] Furthermore, ESDI was rationalized as "separable but not separate military capabilities in operations led by the WEU". This left the Europeans able to engage in humanitarian and rescue tasks, peacekeeping tasks, and tasks of combat forces in crisis management, including peacemaking - the so-called "Petersberg tasks"[5] This seemed to help reduce the differences emanating from both sides of the Atlantic.

The St. Malo Declaration brought about an end to the concept of the WEU as the lead organization - if not an end to any real function for this

[1] Article 42 of the Treaty on European Union (TEU).

[2] Fabrizio W. Luciolli, "NATO - EU Relations: Present Challenges and Future Perspectives", Paper presented at: Netherlands Atlantic Association conference "New Strategic Concept of NATO: moving past the status quo", The Hague, 27 - 28 May, 2009.

[3] The Alliance's Strategic Concept, Rome, 7 and 8 November 1991. See Part I, Article 2. Available at: http://www.nato.int/cps/en/natolive/official_texts_27433.htm (accessed on 12 January 2015).

[4] Members of both organizations (EU and NATO) were designated as Full Members, members of NATO only were Associate Members, and members of the EU only were assigned the status of Observers. Despite their different status and even rights, all 18 European states were able to sit around a single table and voice their opinions. Thus, during 1990s, the WEU managed to improve security ties between various European stakeholders.

[5] The Western European Union Council of Ministers, Petersberg Declaration: 19 June 1992. Available at: http://www.weu.int/.(accessed on 12 January 2015).

organization at all - for European-led crisis management. At St. Malo, the UK and French proposed the process that would give the EU a capacity for "autonomous action" while retaining the Atlantic commitment to "unnecessary duplication".[1] The product of this Anglo-Franco agreement would be the creation of the ESDP as documented in the 1999 European Union Council meetings in Cologne and Helsinki. The recognition of this shift in policy from ESDI to ESDP was also prominent in the NATO 1999 Washington Summit Communiqué, whereby, NATO acknowledged "the resolve of the European Union to have the capacity for autonomous action so that it can take decisions and approve military action where the Alliance as a whole is not engaged".[2] Furthermore, the February 2001 Nice Treaty gave ESDP the legal basis it required.

At the Helsinki European Council of 1999, the EU underlined its determination to develop an autonomous capacity to take decisions and, where NATO as a whole is not engaged, to launch and conduct EU-led military operations in response to international crises. This process will avoid unnecessary duplication and does not imply to the creation of a European army.[3] At the Santa Maria da Feira European Council in June 2005 "modalities for developing EU - NATO relations" were "identified in four areas covering security issues, capability goals, the modalities for EU access to NATO assets, and the definition of permanent consultation arrangements".[4] The negotiation process led to a joint declaration issued on 16 December 2002 on the establishment of a strategic partnership between the two organizations in crisis management.[5] The permanent arrangements were finalized on 11 March 2003 and became known as the Berlin Plus arrangements after the 1996 Berlin Summit which saw the official start of the

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[1] Joint Declaration on European Defense, French-British Summit, Saint-Malo, 4 December 1998. Available at: http://www.iss.europa.eu/nc/actualites/analysisbooks/browse/1/select_category/10/article/from-st-malo-to-nicebreuropean-defence-core-documents/?tx_ttnews[pS]=978303600&tx_ttnews[pL]=31535999&tx_ttnews[arc]=1&cHash=ca903e9011.

[2] "An Alliance for the 21st Century", available at: http://www.nato.int/docu/pr/1999/p99-064e.htm (accessed on 10 January 2015).

[3] Presidency Conclusions, Helsinki European Council, 10 and 11 December 1999. Available at: http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/ACFA4C.htm (accessed on 5 January 2015).

[4] Presidency Conclusions, Santa Maria da Feira European Council, 19 and 20 June 2000. Available at: http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressdata/en/ec/00200-r1.en0.htm (accessed on 5 January 2015).

[5] EU-NATO Declaration on ESDP, available at: http://www.nato.int/docu/pr/2002/p02-142e htm (accessed on 5 January 2015).

WEU - NATO cooperation. The "Berlin Plus" arrangements provide the framework for cooperation between the EU and NATO. "Berlin Plus" gives the EU "assured access" to NATO operational planning capabilities and "presumed access" to the NATO common assets for EU-led operations "in which the Alliance as a whole is not engaged."[1] Namely, "Berlin Plus" allows the EU to borrow Alliance assets and capabilities for EU-led operations and thereby aims to prevent a needless duplication of the NATO structures and a wasteful expenditure of scarce European defense funds. The Berlin Plus arrangements in particular provide for:[2]

- EU access to NATO planning capabilities able to contribute to military planning for EU-led operations;
- establishment of a list of NATO assets and capabilities that could be made available to the EU for use in EU-led operations;
- identification of a range of European command options for EU-led operations, further developing the role of DSACEUR8[3] in order for him to assume fully and effectively his European responsibilities;
- the further adaptation of the NATO's defence planning system to incorporate more comprehensively the availability of forces for EU-led operations;
- NATO-EU agreement covering the exchange of classified information under the rules of reciprocal security protection;
- procedures for the release, monitoring, return and recall of NATO assets and capabilities;
- NATO - EU consultation arrangements in the context of an EU-led crisis-management operation making use of the NATO assets and capabilities.

In this way, a coherent and transparent way of developments is sought through better cooperation and mutual respect between the two organizations. The agreement was applied for the first time in March 2003 in

[1] "Berlin Plus" was originally outlined at the 1999 NATO summit in Washington, D.C. See Article 10 of the Washington Summit Communiqué, April 24, 1999, available at: http://www.nato.int/docu/pr/1999/p99-064e.htm (accessed 5 January 2015).

[2]"EU-NATO: THE FRAMEWORK FOR PERMANENT RELATIONS AND BERLIN PLUS" available at: http: //www.consilium.europa.eu/uedocs/cmsUpload/03-11-11%20Berlin%20Plus%20press%20note%20BL. (accessed on 8 January 2015).

[3] DSACEUR: Deputy Supreme Allied Command Europe. The DSACEUR plays an important role in those arrangements as the designated Operation Commander. The EU Military Staff (EUMS) set up a cell at SHAPE in order to improve the preparation of EU operations drawing on NATO assets and capabilities, while NATO set up a permanent liaison office within the EUMS.

the operation Concordia in the Republic of Macedonia (RM).[1] The operation Concordia was EU's first involvement in military crisis management. It was launched on 31 March 2003 as a follow-up of the Allied Harmony operation of NATO. Twenty-seven countries – 13 EU Member States and 14 non-members - contributed some military personnel to the mission from NATO. This mission, in terms of military intensity, was rather modest, consisting of 350 lightly armed personnel working in 22 light field liaison teams.[2] However, it was a key test of both the EU's ability to undertake military crises missions and of the fledgling EU-NATO relationship. The second mission to be conducted under the Berlin Plus arrangements took place in Bosnia and Herzegovina in 2004. In June 2004 NATO decided to end its SFOR (Stabilization Force in Bosnia and Herzegovina) mission and on 12 July 2004 the EU Council agreed to launch a European military operation in Bosnia and Herzegovina (EUFOR ALTHEA) as part of a global policy aimed at the stabilizing of the country.[3] On 22 November 2004, the United Nations Security Council adopted the Resolution 1575 authorizing the deployment of EUFOR ALTHEA under Chapter VII. Once again DSACEUR was appointed Operational Commander of the EU operation.

NATO and the EU's cooperation are primarily directed at supporting the fight against terrorism, strengthening the development of coherent and mutually reinforcing military capabilities, and cooperating in the field of civil emergency planning. From a NATO perspective, there is no doubt that a "stronger EU will further contribute to our common security".[4] NATO strives for improvements in the strategic partnership with the EU, which can be summarized by the following four premises: closer cooperation, higher transparency, greater efficiency, and continual autonomy.[5] To achieve a closer cooperation and higher transparency, NATO took various incentives

[1] However, Cyprus does not participate in operations under the 'Berlin Plus' as it does not have security arrangements with the Alliance. Also, it does not take apart in any meetings (internal EU or EU-NATO), which deal with NATO- related matters.

[2] Giovanni Grevi, Damien Helly and Daniel Keohane (eds), European Security and Defense Policy: The first 10 years (1999 - 2009), (Paris: European Union Institute for Security Studies, 2009) p. 176.

[3] Joint Action 2004/570/CFSP adopted by the Council on 12 July 2004. Available at: http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2004-0059&language=EN
(accessed on 8 January 2015).

[4] NATO, Riga Summit Declaration (Brussels, 29 November 2006): paragraph 41, available at http://www.nato.int/docu/pr/2006/p06-150e.htm (accessed on 5 January 2015).

[5] *Ibid*. NATO, Bucharest Summit Declaration (Brussels, 3 April 2008): paragraph 14, available at:
http://www.nato.int/cps/en/natolive/official_texts_8443.htm (accessed 8 January 2015). NATO, Strasbourg/Kehl Summit Declaration, (Brussels, 4 April 2009): paragraph 20. http://www.nato.int/cps/en/natohq/news_52837.htm?selectedLocale=en

within the NATO - EU Capability Group - a forum established in 2003 to allow formal coordination between both organizations besides the existing informal NATO - EU staff-to-staff dialogue.[1] To achieve greater efficiency in the NATO operations, the Alliance also agreed to integrate civilian public service planners (e.g., police) into the planning and conduct of military operations, following the idea of a "comprehensive approach" for conflict resolution. Considering the scarce resources of its members, NATO cannot afford to develop its own civilian capabilities and thus relies on cooperation in this field with other organizations, namely the EU.[2]

Avoiding unnecessary duplications would also allow greater efficiency to get more (capabilities) out of less (resources). Particularly, NATO encourages nations to re-prioritize financial resources, "including through pooling and other forms of bilateral or multilateral cooperation".[3]

However, two major political obstacles prevent closer cooperation, higher transparency, and greater efficiency between the NATO and the EU. First, France and the UK differ substantially in their political and state of CSDP and the question of how to progressively carry forward European integration in the defense sector. Second, the Greece-Turkey conflict over Cyprus blocks effective cooperation within the NATO-EU Capability Group. The missing security agreement between the EU and NATO allows Turkey to block cooperation with Cyprus. In return, Cyprus and Greece oppose Turkey having closer relationships with the EU, particularly through administrative arrangements with the European Defense Agency (EDA), which hinders effective cooperation between NATO and the EDA. Those political obstacles have a huge impact on NATO which is struggling to define how the Alliance wants to achieve an effective strategic partnership with the EU, how to achieve greater transparency in its relations with the EU, and how CSDP could effectively contribute to NATO's missions and vice versa. Particularly, this materializes in sharing information and intelligence in such missions, the development and employment of military and civilian capabilities, and the overcoming of the highly fragmentized European industrial defense market, which is a major factor in military capability shortfalls of the European countries.[4]

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[1] Paul Sturm, "NATO and the EU: Cooperation?" European Security Review No. 48 (February 2010): 1, available at: http://isis-europe.eu/wp-content/uploads/2014/08/esr_48.pdf (accessed on 12 January 2015).

[2]NATO, Comprehensive Political Guidance, paragraph 7e. available at: http://www.nato.int/cps/en/natohq/official_texts_56425.htm?selectedLocale=en(accessed on 15 January 2015).

[3] *Ibid*., paragraph 15.

[4] Andreas Winter, "The Lisbon Treaty and its Implications for the CSDP in the Light of the Emerging Strategic Partnership Between NATO and the EU" (Master's Thesis, Fort Leavenworth, KS: Command and General Staff College, 2010), 55, 61 - 62, 90 - 91.

THE LISBON TREATY AND ITS EFFECTS ON THE NATO - EU RELATIONSHIP

In implementing the Lisbon Treaty, the EU is undertaking the necessary steps to strengthen CSDP. The treaty aligns and harmonizes the institutions and procedures in CSDP and provides a fertile framework for future military capability development. That does not mean that the Treaty resolves every shortcoming in CSDP and that all provisions are directed towards a complementary relationship with NATO. This would be beyond rational expectations.

The Lisbon Treaty and CSDP

The Common Security and Defense Policy was clearly a major element in the Reform Treaty process. Over one third of the changes made to the treaties related in one way or another to this particular policy area while the reform process as a whole was built as making the EU 'a more effective global actor'. The Treaty of Lisbon reiterates that the Common Security and Defense Policy is an integral part of the Common Foreign and Security Policy. The ESDP becomes the "Common Security and Defense Policy" (CSDP) and could lead to a common defense if the European Council acting unanimously so decides.[1] Decisions relating to the CSDP are adopted unanimously by the Council. As such, the Treaty of Lisbon sought to introduce a number of quite significant changes to the way in which foreign policy operated in an EU context, namely:

- the dismantling of the pillar system and the drawing together of all of the Union's external activity under one treaty title (Title V)[2];
- the Union as a whole, not just the EC was granted 'legal personality';
- the creation of a High Representative of the Union for Foreign Affairs and Security Policy (combining the posts of Representative for CFSP and Commissioner for External Relations) heading up the new External Action Service;[3]

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[1] Article 42 of the Treaty on European Union (TEU).

[2] The *de facto* distinction between pillars one and two nevertheless remains in respect of external relations on the one hand and foreign and defence policy on the other as issues pertaining to the former are discussed within the context of the Treaty on the Functioning of the EU while the latter is discussed on the basis of the Treaty on European Union.

[3] The High Representative of the Union for Foreign Affairs and Security Policy is responsible for implementing the Union's CSDP and for coordinating the civilian and military aspects of the "Petersberg tasks" (Article 43 TEU). Member States may be involved in carrying out these missions under the framework of a permanent structured cooperation.

- the creation of a new post of European Council President;
- the significant expansion of the original 'Petersburg Tasks'. The Treaty extends the scope and range of the Petersberg tasks to include 'joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilization. All these tasks may contribute to the fight against terrorism, including by supporting third countries in combating terrorism in their territories.' (TEU Art. 43.1);
- the creation of a new 'EU common defence clause and solidarity clause' ;
- setting up of the European Defense Agency[1];
- the possibility of permanent structured cooperation (PESCO) - an agreement for 'Member States whose military capabilities fulfil higher criteria and which have made more binding commitments to one another in this area with a view to the most demanding missions' (TEU Art. 42.6).

Mutual Defense and the Solidarity Clause

The Treaty of Lisbon strengthens the obligation of the Member States and the Union for solidarity towards other Member States by providing a "common defence clause"[2] and a "solidarity clause"[3]. Namely, the Lisbon Treaty strengthens the solidarity of the Member States in dealing with external threats by introducing a common defence clause. This clause provides that if a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter on self-defence. This obligation of common defence is binding on all Member States. However, it does not affect the neutrality of certain Member States or the commitments made by the EU countries as members of NATO. This provision is supplemented by a "solidarity clause" which allows all civilian and military means to be mobilized to assist a Member State which has been the victim of a terrorist attack or a natural or man-made disaster.

At first glance, the intent of mutual defense duplicates NATO's role of providing a common defense of the member states. This would be

[1] The Lisbon Treaty institutionalizes the EDA created in July 2004 through a joint Council action. This Agency is responsible for: improving the defence capacities of the Union particularly in the field of crisis management; strengthening the Union's industrial and technological armament capacities; promoting European cooperation in armament matters.

[2] Article 42 (7) of the Treaty on European Union (TEU)

[3] Article 222 of the Treaty on the Functioning of the European Union (TFEU).

contradictory to achieving a complementary relationship and probably promote competition between both organizations. However, for the EU to act as another provider of collective defense is questionable for two reasons. First, the Treaty of Lisbon explicitly defines NATO‘s primacy in this regard. The Treaty clearly states that the EU respects the obligations of certain Member States, which see their common defence realized in NATO and that its policy “will be compatible with the common security and defence policy established within that framework”.[1] Second, the EU‘s six neutral Member States do not indicate any intent to change their distinct national defense policies of not participating in a CSDP. In practice, this means that the EU will not be able to organize its military forces for a territorial defense. Given NATO’s and the EU’s similar threat assessment, such an attempt would also be unnecessary and redundant. However, the solidarity clause might have important legal implications for the Union, for instance, in case of a terrorist attack. Meeting such threats remains vital for the EU, especially in conjunction with proliferation of weapons of mass destruction. Mutual defense may allow the EU to use military force internally to meet such threats and their consequences, including natural disasters, man-made accidents, or collapses of supply networks and communications. The mutual defense clause may also help to overcome the wide array of national caveats on the use of military forces inside the EU, and signals that solely nationalistic approaches in defense planning of its members are no longer feasible.[2]

In light of these reasons, the mutual defense clause is not directed to duplicate NATO‘s role and will certainly not promote competition between NATO and the EU. The legal and secondary implications of the clause could actually encourage EU Member States to focus on streamlining capability planning under the head of the EU. As long as this is in line with NATO capability planning, this could have positive effects for the Alliance as well. In this sense, the mutual defense clause could even promote a complementary partnership between both organizations, if the EU does not decide to decouple military defense planning from NATO‘s procedures and if the organization translates the political goal of common defense in operational terms. This emphasizes the need for NATO and the EU to strengthen cooperation through regular consultation, highlights that political consensus within the EU is required to shape CSDP more progressively in

[1] European Union, Consolidated Version of the Treaty on European Union, 26.
[2]Alyson J. K. Baylis, *“Common Foreign and Security Policy (CFSP)/European Security and Defense Policy” (ESDP): Challenges and Prospects* “(Hamburg: IFSH, 2005), 3 - 4

the future, and raises the question of how cooperation with NATO should be institutionalized.[1]

CONCLUSION

In implementing the Treaty of Lisbon, the EU is undertaking the necessary steps to strengthen CSDP. The treaty aligns and harmonizes the institutions and procedures in CSDP and provides a fertile framework for future military capability development. That does not mean that the Treaty resolves every shortcoming in CSDP and that all provisions are directed towards a complementary relationship with NATO. This would be beyond the rational expectations. Overall, the Treaty of Lisbon creates the necessary institutional prerequisites for successful capability development among the EU Member States and promotes a complementary relationship between NATO and the EU. The mutual defense clause is not directed to duplicate NATO‘s role and will certainly not promote competition between NATO and the EU. But there is a need for NATO and the EU to strengthen cooperation through regular consultation, highlights that political consensus within the EU is required to shape CSDP more progressively in the future, and raises the question of how cooperation with NATO should be institutionalized.

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[1] Paul Sturm, “NATO and the EU: Cooperation?” *European Security Review* No. 48 (February 2010), p.11, available at: http://isis-europe.eu/wp-content/uploads/2014/08/esr_48.pdf (accessed on 20 January 2015).

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NATO VS EUROPEAN SECURITY AND DEFENCE POLICY: DIVERGENT CONCEPTS OF SECURITY

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Abstract

Since 1999, when it began the process of establishing the European Security and Defence Policy as an operating part of the Common Foreign and Security Policy, many problems and issues have emerged, but also the need for cooperation with NATO. The EU through the ESDP has obtained the possibility for undertaking autonomous actions, but only by the requirement of "separable but not separate" capabilities. This paper aims to elaborate the problems that appear on the international scene when undertaking different operations and the participation of NATO and EU member-states in these operations. Operations undertaken solely by the EU through ESDP with participation of NATO member-states, create difficulties in the decision-making and cooperation, and thus interfere in the way the two organizations understand the concept of security. Further problems arose by the (un)necessary duplication of existing efforts and abilities, spending resources and the creation of a second set of military capabilities, as NATO and EU do not possess identical abilities, but rely on national contributions. For this purpose, the paper determines and elaborates five factors that affect the relationship between NATO and the EU/ESDP, as well as the development of mutual consultation and cooperation for the purpose of improving these relations. The conclusion includes proposals for solving mutual problems by answering several questions. Future actions of the two organizations, although they should act as joint venture partners for the maintenance of international peace and stability, will face with problems and

deficiencies in cooperation, because of the different perceptions they have for the concept of security.

Key words: *European Union, European Security and Defence Policy, NATO, concept, security.*

INTRODUCTION: SOME OF THE EVENTS BEFORE EUROPEAN SECURITY AND DEFENCE POLICY

Several years before the Cologne Summit and the creation of European Security and Defence Policy, NATO started to strengthen its European pillar through development of the European Security and Defence Identity (ESDI) responding to European requests and contributing for the security of the Alliance.[1] NATO helped in creating the ESDI, but not as a fully independent entity, but in the frame of NATO, drawing out from capabilities as "separable, but not separate". Most of the work was done during the NATO's foreign ministers and defence ministers meetings in Berlin and Brussels in June 1996, at the end resulting with Berlin-Brussels agreement and creation of the possibility for EU to become military-effective organization.

On 4th of December 1998,the United Kingdom and France held a meeting in St. Malo and adopted a Declaration, giving a new meaning to the ESDI in the frame of NATO.[2] The Declaration from St. Malo is an invocation for acceleration of the implementation process of what was anticipated in the Treaty of Amsterdam - formulating a common defence policy. Although the Declaration refers to the ESDI in NATO, it endeavours for EU to possess capacity for autonomous actions, requiring necessary structures and capacities in areas where NATO as a whole or USA have superiority and where Europe is dependent.

After St. Malo, key focus was put on NATO's Summit in Washington in April 1999, where the allies acknowledged EU's determination to possess the capacity for autonomous actions, to decide and approve military actions in areas where NATO is not engaged.[3] NATO's Strategic Concept agreed that the ESDI should continue to develop, helping European allies to act autonomously, based on each case and by consensus,

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[1] North Atlantic Council, *Final Communiqué,* (Brussels: NATO, December 2, 1993).
[2] Franco-British Summit, *Text of a Joint Statement by the British and French Governments,* (Saint-Malo, France, December 4, 1998).
[3] NATO, *Washington Summit Communique, Press Release NAC-S(99)64,* (Brussels: NATO, April 24, 1999).

as well as to make its assets and capabilities available for operations where the Alliance is not military engaged.[1]

CREATION OF THE ESDP

The European Security and Defence Policy (ESDP) was created at the European Council Summit in Cologne in June 1999, when started the development of military and civilian capabilities for conflict prevention and crisis management and strengthening the EU's capacity for external actions.[2] When it comes to military capabilities, member-states at the Helsinki Summit in December 1999 introduced the Headline Goal declaring that EU is capable of setting 60.000 troops, deployable for 60 days and sustainable for one year.[3] In 2004, the Headline Goal was further elaborated in Headline Goal 2010 introducing the concept of battle groups, European Security Agency and civilian-military cells. At the Nice Summit in December 2000 new innovations were created, such as the Political and Security Committee (PSC), the EU Military Committee (EUMC) and the EU Military Personnel (EUMP).[4] At the Laeken Summit in December 2001 the European Council officially confirmed that the Union is capable of undertaking wide range of military and civilian crisis management operations from peace missions and a rule of law for protection of human rights.

Following these initiatives by the European Council Summit in Santa Maria de Feira, EU made major steps in developing ESDP modalities, not only in the military area, but also in the civilian crisis management.[5] Therefore, the EU member-states agreed in creating an Action Plan for introducing four priority areas: the police, strengthening the rule of law, strengthening the civil administration and civil protection. With the Civilian headline goal 2008[6], these four areas were complemented with two new

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[1] NATO, *The Alliance's Strategic Concept,* (Brussels: NATO, April 24, 1999).

[2] Cologne European Council, *Annex III: European Council Declaration on Strengthening the Common European Policy on Security and Defence,* (Cologne: Presidency Conclusions, June 3-4, 1999).

[3] Helsinki European Council, *Annex IV: Presidency Progress Report to the Helsinki European Council on "Strengthening the Common European Policy on Security and Defense" and on "Non-Military Crisis Management of the European Union"* (Helsinki: Presidency Conclusions, December 10-11, 1999).

[4] Nice European Council, *Annex VI: Presidency Report on the European Security and Defence Policy*, (Nice: Presidency Conclusions, December 7-9, 2000).

[5] Santa Maria de Feira European Council, *Annex I: Presidency Report on Strengthening the Common European Security and Defence Policy,* (Santa Maria de Feira: Presidency Conclusions, June 19-20, 2000).

[6] Brussels European Council, *Civilian Headline Goal 2008,* (Brussels: Council of EU, December 7, 2004).

areas: monitoring and support for EU's Special Representatives. Also, other measures were undertaken for improvement of the ESDP civilian capabilities: Committee responsible for civilian aspect of the crisis management, Civilian Response Teams and European Gendarmerie Force were established.

COOPERATION WITH USA AND NATO

At NATO's foreign ministers meeting in Brussels on 8th of December 1998, USA gave its first response regarding St. Malo Declaration, underlining the support for ESDI through measures for increasing capabilities. While emphasising the support, at the same time, USA placed three standards for evaluation, known as the "Three D's".

De-linking - autonomous activity by EU along with the absence of "separable, but not separate" and to avoid appropriation of NATO decisions regarding ESDI;

Discriminating - to avoid discrimination against NATO member-states that are not members of EU; and

Duplicating - to avoid duplication of the existing efforts and capabilities, spending resources and creating second set of capabilities.

USA viewed ESDP through NATO's objective i.e. as a controversy that represents a threat for NATO and USA's influence in Europe, especially after the introduction of the Headline Goal. EU statements for autonomy, self-preservation and independence reflected the ambitions and visions which may threaten the instutional designation after the Cold War. Whatever happens in Europe, either from political or economic reasons, USA does not have the possibility to withdraw, although reserves regarding ESDP might exist.

The fact that most of the European states are both EU and NATO members (with *de facto* "double veto") at first sight disturbed USA, as they had problems with the situation in which Europe is becoming more and more parasitic and, at the same time, more united. However, USA and EU reached new level in their mutual relations from two directions. First, is the fact that the ESDP basically changed the institutional designation and the shape of transatlantic connection. Second is that USA feels satisfied of reasons that Europe may take grater responsibility for its security, while USA may focus on new priorities, such as homeland security. This does not mean that USA have no concerns for Europe, that NATO is out of use or that transatlantic relations are disrupted. USA and ESDP focus on homeland security is not because of strategis disagreement, but a development of new relations out of the traditional transatlantic ones.

NATO's view is no longer relevant and it is in interest of USA to maintain a wider perception of ESDP and European security arrangements. For all elements, except the European collective defence and peace-keeping in Europe, EU may be a more interested partner in global conflict prevention than the European pillar in NATO. The development of parthership is not going to solve the debates regarding European priorities, securing budgets, NATO-EU relations, as these issues are going to be solved in a different and more constructive manner. Europe wishes to be treated on same level with USA, at the same time maintaining its national agendas and close bilateral contacts, as well as proving its value as a strategic partner in the global security.

Factors Regarding the Relations Between NATO and ESDP

Since Helsinki's decisions, attention was paid on the quality of relations between NATO and ESDP. Three reasons were of particular significance. First, the risk that a competitor may emerge; second, the effort in creating the ESDP structures; and third, the "unnecessary" in the word "duplicating" could be removed as the European states saw the opportunity in creating their own structures. Five other factors influenced the relations between NATO and ESDP: (1) military and economic cultures; (2) size of armament; (3) European NATO members; (4) military manufacture and trade; and (5) crisis management.

Military and economic cultures. One factor was the progressive decreasing of the WEU role, which for years served as a "buffer" between the NATO and the EU.Those issues related to defence in the EU, if not solved by NATO, were transferred to WEU. After Helsinki, these buffer zones progressively disappeared.

Armament relations. Since Helsinki, it became clear that NATO and ESDP are going to cooperate and mutually coordinate in terms of military planning. Some European states started to press the ESDP for "autonomous" capability and created special planning capabilities. For NATO this was a risk, especially by the need of creating homogenous connection among those operations which EU is not able to undertake and the potential involvement of NATO if the military threat escalates to a point where it must be involved. At the same way, NATO needs to know ESDP intentions regarding operations, in order to assess which military assets may be at disposal.

Decision-making and European alliance in NATO. The development of ESDP institutions raised the question about decision-making, as well as the way in which non-EU NATO members are able to participate in ESDP military operations. This is still the main question: Do

the EU member-states act as a single community in NATO? The answer may have a practical effect in the execution of NATO matters, especially in the North-Atlantic Council working on consensus. Such consensus is based on understanding that no allied state is prepared to give up its right to others in order to determine the circumstances in which their military forces are put at risks and that, after the consensus is reached, NATO respects its commitments. But, if the European alliance in NATO emerges, the way in which the North-Atlantic Council operates will change.

Defence productivity and trade. With ESDP development, several questions arise regarding the European defence industry. First, USA started to call on European states to keep pace with the defence industry in order to create mutual partnership. Second, European states started giving greater significance on assets for production of defence goods. Third, the USA pressure to stabilize European defence expenditures increased Europe's interest regarding the role of domain defence industries, rather than their assurance from the USA. Fourth, European states acknowledged the need of undertaking efforts for strengthening the industrial and technological defence basis in order to be competitive, dynamic and to improve the industrial defence cooperation. Fifth, defence industrial relations are more and more under the influence of the USA military technology *vis-à-vis* European partners.

Crises management. ESDP is designed to function as a CFSP instrument, contrary to NATO, which is more independent. The Alliance never developed a successful mechanism for crisis management. On the other side ESDP is designed and constructed to have responsibilities for crisis management and a capacity to confront with the situation from the beginning to the end. The European Council gave the mandate of establishing a mechanism for non-military crisis management and use of non-military instruments in order to coordinate and make more efficient the civilian measures and resources at the disposal of the EU and its member-states. This should not be seen as a challenge to NATO, but rather as a peak of lack of competence.

Developing Consultations and Improvement of Relations

EU in Santa Maria de Feira established formal arrangements for dialog, consultations and cooperation in crisis management, keeping its decision-making autonomy. The exchanges of European with non-EU NATO members are made on the basis of nature and function of EU-led operations, using NATO assets and capabilities. In periods with no crisis there shall be two meetings during each EU presidency, as well as two meetings with non-EU NATO member-states. In addition, two phases

distinguish in times of crisis: in the pre-operational phase dialog and consultations are intensive on all levels, by the time Council decision is made. If the possibility for use of NATO's assets and capabilities is considered, attention is put on consultations with European non-EU NATO member-states. During operational phase, European non-EU NATO member-states may participate in operations if there is a will and if NATO's assets and capabilities are being used. In case when assets and capabilities are not included they may be invited to participate by Council decision.

The Nice Summit signalized the determination of member-states for making the necessary effort regarding the improvement of their operational capabilities, especially in areas where European states rely on NATO. The Summit underlined the cooperation build with NATO on principles of consultation, cooperation and transparency, as well as the modalities for EU access to NATO's assets and capabilities. In one of the Presidency conclusion annexes, EU member-states draw out a distinction between situations where and where not the NATO's assets and capabilities are going to be involved. In the first case, non-EU NATO members are involved, according to NATO procedures. But, in the second case, where non-NATO EU members are invited to participate, they may dispatch liaison officers for information exchange and operational planning. Such formulation had particular implications for non-EU NATO members with Turkey being the most offended by the sense of expulsion from EU membership. Without full engagement, Turkey may find itself in a position where an operation is executing in its neighbour, attacking its interests, but with no possibility for active participation in all phases.

Since then the relations rapidly improved, at the same time seeking means for resolving the key opened issues during meetings between the North-Atlantic Council and the PSC.[1] The ambassadors of the two institutions are meeting six times a year, while foreign ministers two times a year. Regarding the role non-EU NATO members played in the ESDP process, it is agreed that NATO shall work with consensus and PSC rely on decisions when some of the non-EU NATO members' interests are involved; which means no mission without consensus.

Further improvements were reached in formal and informal efforts for resolving the remaining issues. These issues included: the importance of strengthening European military capabilities for NATO missions and EU-led operations where the Alliance is not engaged; value on non-European allies forces; bilateral meetings with non-European allies forces for confirmation and evaluation of the contribution in the European crisis management; EU's

[1] North Atlantic Council, *Final Communiqué,* (Budapest: NATO, May 29, 2001); Goteborg European Council, *Presidency Conclusions,* (Brussels: Council of EU, June 11, 2001).

acknowledgment for the need of capabilities improvement; strengthening the nature of EU's Headline Goal; and consultations between EU and non-EU NATO member-states. Improvements were also made in the following areas: EU secures the access to NATO's operational planning, the access to NATO's assets; the identification of EU's command options for complete and efficient undertaking of its responsibilities; and the adaptation to NATO's defence planning. Also, institutional concerns reflected the reality that most of the EU member-states are NATO allies and that the NATO decisions are adopted as long as there is a consensus. This illustrates the overlay membership value and international consultations, the pressure to reach agreement in EU and the formal consensus in NATO.

Proposals for Mutual Problems

NATO first. A complete European commitment is needed on the principle "where NATO as a whole is not engaged" and political processes needs to develop in order to secure that there shall be no doubts about this point or regarding NATO's capability at the beginning of the crisis. Most of the European states shall consider this as an implication of "NATO first", but it is important for maintaining NATO's cohesion.

Shared risks/shared effort. A confirmation for NATO's main principle that risks should be shared among allies is needed; and that there should be no share of efforts between NATO and ESDP or implicitly regarding some allies. The avoidance of sharing efforts is not only what EU member-states are doing regarding ESDP, but also the USA's will is critical for engagement in operations falling under NATO's article 5.

Cooperative planning. Defence planning methods should be common and compatible, meaning a unique set of processes. Cooperation should include mutual planning, governed by NATO, with full participation of the EUPM. Furthermore, military logic instructs have a need of only one methodology regarding command, control, communications and intelligence. At the same time, EU should select potential command arrangement before the crisis occurs.

Defence expenditures and capabilities. European governments should dedicate themselves to higher defence expenditures. Emphasis should be put on production, capabilities and interoperability, not only as an issue of mutual relations, but also as a critical issue for NATO as a whole, and allies should avoid duplication of NATO's assets available for ESDP.

Interoperability. EU through ESDP needs to focus its force modernization on interoperability with NATO. It is particularly critical not to develop two sets of interoperability, leading to implicit division of labour among allies. Furthermore, interoperability is critical if USA expects to be

capable for execution of military operations with the allies outside of Europe, whether formally through NATO or as a coalition of will. NATO, with double technology, may not be able to execute operations out of area covered by article 5.

NATO's crisis management. NATO should develop means to connect with the crisis management mechanism, along with ESDP relations. Also, priority arrangement is needed that the NATO-EU dialog shall be deeped, wide, gradual and effective on all levels for every future crisis that may affect both institutions. If the crisis occurs suddenly, it is likely to have numerous informal exchanges and consultations between NATO and ESDP, in frame of their bureaucracies and bilaterality with other governments. Even with NATO-ESDP cooperation, there are doubts whether USA shall be willing to share risks with other allies in peace-keeping missions and this creates worries regarding NATO's capacity to operate as an effective crisis management actor.

Political and strategic dialogues. There should be political and military dialogue at all levels between ESDP and NATO and member-states.A quality dialogue on this issue is significant if the share of labour and risk do not become too irritating in mutual relations. Wrong evaluation of USA's pressure for share of labour with European states may be interpreted, not as an effort for consolidation of NATO, but as stimulation for the increase of ESDP's role and influence.

Managing rhetoric and ambitions. EU must practice limitations and clarity in its rhetoric about what ESDP represents. There is a risk that ESDP declarations might be taken for granted and start to believe that USA might do much less military in Europe than the actual ESDP capabilities guarantee. It is of significant importance that the EU member-states that are mostly concerned with trans-Atlantic relation secure that the decision-making autonomy and acting through ESDP is not going to be the central focus of the European pillar, but it is to be held in perspective, regarding other security purposes.

Defence cooperation. Effective NATO-EU dialogue should be developed on defence cooperation among governments and it needs to focus on five principles: (1) mutual NATO-EU market; (2) exchange of high-defence technology; (3) developing common standards and measures for protection; (4) emphasizing interoperability for defence cooperation; and (5) securing new technologies in order to allow compatibility with NATO's military equipment.

Use of military force and leadership. Continual strategic dialogue in NATO needs to exist about military capabilities and defence expenditures. The latter suggestion is, in a way, harder to implement, but in a long-term period it is probably the most important for NATO's future and ESDP

development. For NATO and ESDP, building, training, sustainability and deployment of military forces must be connected with expectations. In order to achieve and keep democracy, it is necessary to spend significant funds on defence, strategic analysis, political vision and dialogue among states and institutions.

INSTEAD OF CONCLUSION: PRACTICAL STEPS FOR IMPROVEMENT OF CAPABILITIES

Europe must cope with all kinds of crisis and to be prepared to accept higher risks for deployment forces if speed is not of key importance and if no competing military priorities exists. If European states are able to accept casualties and collateral damage and if political consensus is build for deployment forces, then Europe may have a great role on the international scene. If USA's high war intensity is the unique standard, if risks are to be kept on minimum and if high level is needed for sustaining the public support, then Europe may face with greater challenges. The greatest potential for incresing capabilities lies in the following areas: conflict prevention and crisis management, strengthening strategic decision-making, expansion of international contact points and intelligence coordination. On the other side, three main issues shall be decisive in defining the ESDP's success: creating political will, promoting partnership with NATO and capabilities development.

Conflict prevention and crisis management. The two threats ESDP is facing are the failure to act successfully and the noninvolment of European key actors. European states may have difficulties in the decision-making process during crisis development regarding the kind and the best way to cope with it. If EU decides to undertake a military operation this will mean that the conflict prevention was unsuccessful. The second threat may potentially have more serious and long-term consequences than the failure. Mass recesions, collapse of euro or mass unemployment contribute for the political attention to be far away from ESDP and influence on defence budgets, building capabilities and crisis management aspects.

Strengthening the European strategic decision-making. Ideally, one body should coordinate all ESDP elements and external relations with states in crisis areas. Only when crisis management assets are connected, the conflict prevention is going to be successful. Such body needs to include the long-term capabilities development, defence-industrial cooperation, police coordination, as well as to coordinate crisis management and intelligence, bilateral military cooperation, non-proliferation, counter-terrorism and arms trafficking.

Expansion of international contact points. EU's external official should expand its international contact points by establishing connections with international organizations (UN, OSCE and NATO) and it needs to be infromed on all CFSP and ESDP issues and to be able to contribute.Priority must be given to EU-USA realtions and although priorities and principles may vary, EU member-states should not hide anything from USA and vice versa.

Establishing intelligence coordination. Whatever activity is undertaken by ESDP in the pre-crisis or crisis phase, intelligence for strategic decision-making is of highest importance. Whether EU-NATO or EU-USA engagement needs coordination or wheter it is a matter of autonomous EU operation, EU bodies and member-states should be able to undertake decisions based on their own evaluations. EU intelligence is needed on two levels - strategic decision and operational level - and for two reasons - long-term conflict prevention and active crisis management. Common European intelligence capabilities are an important step towards more effective strategic decision-making for conflict prevention and crisis management.

Creating political will. ESDP is not going to show any progress if it is not supported by strong political will. The most contemporary crisis are not a direct threat for the territorial integrity or survival of European states and an actual cure is not always easy to discover. Such approach creates possibilities for further development of common European views on crisis management. Whether with persuasion or because their security has a smaller value for several decades, European states , most probably, are not willing to became more militaristic on short or middle term. This does not mean that they lack actual military culture. In some way, EU is a step forward than NATO. Despite its imperfections and flaws, no other international organization has so many tools, military and civilian,which are essential for peace-building and peace-keeping. Certainly, there are differences in member-states interests and visions, but ESDP is not facing with some of the acute dilemmas, since it is implemented only "out of area".

Practical approach towards cooperation with USA and NATO. EU-NATO cooperation needs not only a formal agreement on the political front, but also a strategic compatibility and practical arrangements, identification of common strategic goals, compatible procedures and priorities of highest political level. The alternative for close EU-NATO cooperation is in accentuating, principally, EU-USA relations. With wide spectar of security elements, EU may become more important partner for USA than the more limited and focused European pillar in NATO. In addition, there are missions EU is willing to undertake through ESDP in which USA is not showing particular appetite. On one side, these include

operations where EU has the advantage because of its capability for mobilizing non-military elements, and on the other side it resolves conflicts in its neighborhood. The danger is in conducting ESDP operations that might undermine NATO's success because there is only one set of forces.

Development of defence and operational planning. EU is willing to strengthen its planning capabilities and to develop its own planning process, which is essential for preparation and conducting ESDP missions and operations. EU's defence planning, connected with military and non-military capabilities, may play a great role in increasing European capabilities.

Capabilities development. Lisbon Treaty helped in improvement of capabilities, not only for ESDP, but also for NATO. ESDP should be equipped with structures that may go further than the already designated ones and to enable production of the desired results. Capabilities should be available and prepared when necessary to confront with the increasing security challenges. EU should develop defence technological and industrial base, having in mind the fact that the majority of operations and missions do not require most developed technology equipment. Finally, EU may face with situations where some member-states cooperate in the area of military capabilities, while other prefer to continue focusing on the civilian front. Cooperation and mechanisms should be elaborated in order to secure interoperability between civilian and military mission components and not to undermine the effectiveness of the overall EU approach.

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REGIONAL COOPERATION COUNCIL OF THE SEE COUNTRIES AND THE NEEDS FOR DEFENSE REFORMS IN THE REPUBLIC OF MONTENEGRO FOR EURO-ATLANTIC INTEGRATION

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Abstract

Today in the modern world the countries cannot achieve their national interests without developing cooperation with countries in their region and beyond and without sense of mutual comprehensive cooperation. Regional cooperation in the field of defense between the countries of Southeast Europe for Euro-Atlantic integration is an indispensable segment in achieving the fundamental objective of the SEE countries for improving their: security, understanding and developing a comprehensive national priorities for Euro-Atlantic integration. The main objective of this research paper is to present the results of Montenegro as a member of the A-5 group of SEE countries, which on the regional level through the Regional Cooperation Council have achieved excellent results, but on the national level this country should performed comprehensive reforms in the field of defense for Euro-Atlantic integration. The main hypothesis is: Where is and where should be the Republic of Montenegro in implementing the necessary defense reforms for Euro-Atlantic integration? The main hypothesis we will prove through the use of historical method and comparative analysis of the defense reforms in the group A5 of SEE countries. The reform process in some of the SEE countries is well under way. Some of them are waiting for invitation and some of SEE countries have political disagreements or they have national problems which are not yet solved. One of SEE countries which is true aspirant for integration in NATO is the Republic of Montenegro. Whether on the following NATO summit the Republic of Montenegro will receive an invitation for membership in NATO is a question which we will try to answer through scientific methods.

Keywords: Regional cooperation, defense reform, Republic of Montenegro, SEE, Euro-Atlantic integration

INTRODUCTION

After the breakup of Yugoslavia and the creation of new states, they made their best choice to create the need for establishment of their own security and defense systems to defend their sovereignty. One of these newly formed states was the Republic of Montenegro, which gained its independence after the independence of the former Federal Republic of Yugoslavia. After the independence, Montenegro was forced to transform their defense system and to create its own strategy that will be able to meet all future security challenges. Montenegro gain with no expected possibilities for former classical warfare and began to build its national defense strategy according to the new challenges and threats that were not of a territorial character. The new security threats are of completely different forms from the past. Montenegro is forced to join the collective defense systems because alone will not be able to respond with the new threats. Montenegro is a part of Regional cooperation incentives of the Balkan region and an applicant country for joining the NATO and EU. The Regional cooperation incentives aim with security cooperation of the Balkan countries, while the other countries, which are NATO and EU countries, have observer the status with mission to help in comprehensive reforms in our paper in the defense reforms as one of the key priorities for membership in the NATO and EU.

In the first part of this paper, we are representing the security challenges and threats which could threaten the Defense system of Montenegro. The second part of this paper is dedicated on Montenegro joining in the regional security cooperation incentives, as well as the application for membership in NATO and the EU. The third part has a more extensive analysis and comparison of the current reform in the defense system that is realized in Montenegro and the future activities in accordance with the tasks from the Strategic Defence Review. The Republic of Montenegro after its independence escaped the classical system of command and control from all three components: defense from the land, sea, and air. Unlike the previous strategy, the current required reform of the Defense system will meet the new challenges and threats to security. It resulted in a transformation of the full range of security and coordination of all activities, respecting the principles of good governance and democratic civilian control.

STRATEGIC DEFENSE, SECURITY ENVIRONMENTS OF MONTENEGRO

The reason for the redefinition will be found in the fact that Montenegro, as a sovereign state has the obligation to fulfill the primary mission of the state to protect its sovereignty, territorial integrity and independence. An important benchmark for redefining the future mission is to develop a system of defense capabilities by engaging in operations to preserve world peace and contribute to the development of security states.

A key part of the CSP is committed to the reorganization of the Ministry of Defense and the Army of Montenegro in which direction they steer the development and what kind of structure should be the ministry and army in order to be more effective in the management of the processes and programs. This implies finding the right model for more efficient management of human and material resources, which ultimately results in a more efficient and economical management and disposal of defense spending. Development of relevant military capabilities and establishing systems of sea and airspace are the key challenges for ensuring sovereignty over the territory of Montenegro and they secure the data exchange with partners and allies in order to improve security in the country and environment (Strategy for National security on Montenegro No 75/08)[1]. It is imperative to ensure a stable defense budget in order to ensure the continuous defense reforms, modernization of the army and achieving the required level of interoperability. The most important decision of SOP should mitigate the difficulties, misunderstandings and doubts so far in the reform of defense and army to provide a foundation for building defense capabilities that will improve security and stability and thus to contribute the strengthening of the global peace and security. Creation and development of the defense system of Montenegro is essential to evaluate the impact of the strategic environment. This should be done according to defense interests, goals, challenges, risks and threats to the security of Montenegro. The changes on global security plan, after the disappearance of bipolarity seeks a radical change in approaches and perception of the security and defense relations in the world. Montenegro considered that for secure future, conventional military threats are reduced to a minimum opposed to the dominant types of threats from a non-military nature. Countries must modernize its defense and security sector, not only to maintain the territorial integrity and sovereignty, but also for the prevention of all forms of asymmetric threats that had transnational character (Strategic defense

[1] Strategy of National Security (Official Gazette of Montenegro, No. 75/08)

review, 2013: 3)[1]. Taking into account the nature of the new defense security phenomena, they cannot be taken only at the national level. Asymmetric threats, according to the defense and security strategies of the NATO and EU members must increased interaction on globally threatened states and its citizens. Considering the fact that none state can independently and effectively respond to these threats, the importance of the states to be a part of regional and global security organizations such as the UN, NATO, EU, OSCE are a real need (National security strategy of Montenegro, 2008: No.75)[2]. The hybrid nature of the modern security challenges implied the need for a change in the structure and organization of national defense systems. In accordance with this reality, the Republic of Montenegro decided to adapt and significantly redefine their security and defense system. Global security dynamics and the complex security factors in accordance with the geo-strategic position of Montenegro, certainly have a significant impact on the security situation in Montenegro.

Challenges, risks and threats

The development of the defense system of Montenegro is very important and objective according to the assessment of the new risks and threats. The role of the immune system is now significantly changed compared to the traditional understanding of defense, having in mind the wide range of security risks and threats, their unpredictable and unconventional nature. Security threats today are less directed against the territory of the state and military facilities and they are more dedicated to the national infrastructure (embassies, airports, power plants, railways, civilian population, etc.) (Strategic defense review, 2013: 7)[3]. The instability of some countries and regions, terrorism in all its forms, the proliferation of weapons of mass destruction, religious and ethnic disputes, organized crime, illegal migration, cyber terrorism and crime, environmental pollution and climate change, pandemics, poverty, lack of food and drinking water, lack of strategic energy sources threatened any country in the world (Military law of Montenegro, 2014: No.32)[4]. Global terrorism became a threat to the democratic societies, through a various conventional and unconventional forms and methods. The availability of weapons of mass destruction by non-democratic regimes, various organizations and groups are threats to the

[1] Strategic overview of Defense of Montenegro – 2013, p. 3

[2] Strategy of National Security (Official Gazette of Montenegro, No. 75/08 from 08.12.2008)

[3] Strategic overview of Defense of Montenegro – 2013, p. 5

[4] Law on the army of Montenegro (Official Gazette of Montenegro, No. 88/09 from 31.12.2009, 75/10 from 21.12.2010, 40/11 from 08.08.2011, 32/14 from 30.07.2014) I General decisions

global security (National security strategy of Montenegro, 2008: No.75)[1]. The answer to these threats includes a whole society and the cooperation between states. Permanently, more of the present security risks should be seen in various natural and man-made disasters. Global warming and climate change add a new dimension on the Army as part of the security system to assist civil authorities in rescuing people and properties. Also, in the expansion of information technology, social networks and virtual computer programs, it is impossible to ignore the fact that all IT resources can be used against a company and thus pose a serious security threat. This wide range of threats requires a constant adjustment and reform of the defense system, which will allow the creation of the necessary skills, organization of interoperable forces and requirements for collective security and defense (Military law of Montenegro, 2014: No.32)[2].

Incentive for membership in NATO and the EU

SEE region still partially loaded the events of the past and current problems, which can cause certain forms of instability in the future. International organizations such as the UN, NATO, EU and OSCE through its security concepts are trying to find the most appropriate and effective responses to a wide range of threats endangering the security in the world. Their role in this direction increases significant responsibility for the overall security.

Considering that Montenegro stepped deep in the process of accession negotiations with the EU, it is important to mention the Common Foreign and Security Policy (CSFP) and the Common Security and Defense Policy (CSDP) as significant achievements in this sector of the EU, which must be taken into account, which are the subject of negotiations between Montenegro and the EU (Montenegrin government, Strategy for NATO and EU integration, 2007)[3]. A significant political and security goal of the EU is continuing to stabilize the Western Balkans, which at the end of the last century was hit by war destructions. Considering the security status in the wider environment and its demographic, economic and overall circumstances, the new security defense model of Montenegro should be incompatible as other NATO and EU members. Montenegro believes that the political and security situation in the region can be stabilized and held

[1] Strategy of National Security (Official Gazette of Montenegro, No. 75/08 from 08.12.2008)

[2] Law on the army of Montenegro (Official Gazette of Montenegro, No. 88/09 from 31.12.2009, 75/10 from 21.12.2010, 40/11 from 08.08.2011, 32/14 from 30.07.2014)

[3] Government of the Republic of Montenegro, Ministry of Defense, Ministry of Internal Affairs, Agency for Public Relations, Communication Strategy on the Euro-Atlantic integrations of Montenegro, 11 October 2007

through the regional cooperation, joint projects and integration into the EU and NATO.

Application for membership in NATO and EU

Cooperation Process in SEE is a forum for political and diplomatic dialogue between the participating countries that are open for cooperation in future development of the region, defining common goals and exchange of experiences. The incentive was established in Sofia in July 1996 with a meeting of foreign ministers from SEE, where the countries in the region were in the process of democratic reform. In order to strengthen the process of transforming the region into more secure area, in Sofia they adopted the Declaration on the expression of the will of the countries to begin the long process of multilateral cooperation in the following areas:

- Strengthen the stability, security and good neighborly relations;
- Economic development;
- Humanitarian, social and cultural issues;
- Justice, fight against organized crime, trafficking, narcotics, illegal weapons and fight against terrorism (Process of cooperation in SEE)[1].

International community recognized the process as the authentic voice of the region, which includes all the countries of SEE. The Republic of Montenegro signed the Stabilization and Association Agreement (SAA) in 2007 and applied for full membership in December 2008. The Council of the EU invited the Commission to prepare an opinion on this application, which was issued in 2010. Montenegro is making a substantial progress in meeting the political criteria for accession, but in the short term it must improve its administrative capacity. The ambassadors of the NATO member states on 31 March 2008 expected Montenegro to become a part of "*intensive dialogue*" with the upcoming NATO summit in Bucharest. The ambassadors are in constant talks with the Montenegrin Prime Minister Milo Djukanovic. Podgorica support their country's membership in NATO and the government of Montenegro. The Ambassadors of the NATO assessed that Montenegro has made an *"Impressive progress in reforming the defense system and willingness of their countries to continue with providing political and technical support in the process of Euro-Atlantic integration."* Djukanovic met with the ambassadors of NATO Government planned to intensify the process of the Montenegrin membership in the Alliance[2]. The Prime Minister of Montenegro said that Montenegro welcomes the decision to "*NATO's*

[1] http://www.mod.gov.me/rubrike/Reginalne_inicijative/134972/Proces-saradnje-Jugoistocne-Evrope.html

[2] http://www.pressonline.rs/info/politika/33445/nato-crna-gora-ostvarila-napredak-u-reformi-sistema-odbrane.html

expansion in the region", which was supported from Albania, Croatia, and Macedonia. He said: "*This will contribute to the security of the region and confirm the Euro-Atlantic perspective of the Western Balkans".* But Djukanovic welcomed the "open door NATO policy" and the principle that each country is assessed according to their individual progress.

RACVIAC was founded in 2000 as a regional center for the control and verification of arms and assistance of the Stability Pact in order to provide training for arms control for promoting confidence and security measures, as well the better cooperation in SEE[1]. Later, the focus shifted to a broader range of political-military issues, including the reform of the security sector as a building confidence and security in order to strengthen regional security in order to improve the Euro-Atlantic integration. In the current situation there is a need to adapt the new circumstances RACVIAC SEE, revised mission, goals and organizational transformation in the Center for Security Cooperation. All this resulted in a process of transformation of the Centre in 2007 and signing the agreement in 2010 and the adoption of a new strategy in 2011. After the ratification of the Agreement in December 2011 the Center granted a status of a regional organization and was renamed in Center for Security Cooperation. Montenegro's application in RACVIAC as a full member is from 21 March 2007[2]. Founded in 1996, the incentive of the defense ministers of SEE is a process of cooperation in defense, which began meeting at the level of defense Ministers in Tirana. In March 1996 was the first in a series of meetings at the level of Ministers of Defense and Meeting of the Deputy Chief of Staff SEE. With SEDM was established a strength political-military and security cooperation in SEE by strengthening the regional cooperation and good neighborly relations and capacity of regional defense through collective efforts to facilitate integration into Euro-Atlantic organizations. Montenegro actively participates in the project *"Building integrity and the women leaders in security and defense",* which was established with SEDM. On the Ministerial meeting in Sofia 20 / 21.10.2009 the Ministers agreed Serbia and Montenegro to join the SEDM. In March 2010 Montenegro and in June 2010 the Republic of Serbia informed the SEDM-CC that have completed their internal procedures for access in the SEDM, after which they became full members[3].

On the NATO Riga summit, 28 - 29.11.2006, one of the significant decisions was: Montenegro, Serbia, and Bosnia and Herzegovina to join the Partnership for Peace. At the NATO summit in Riga, the second day of the

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[1] http://www.mod.gov.me/rubrike/Reginalne_inicijative/134975/Centar-za-bezbjednosnu-saradnju.html

[2] http://www.mod.gov.me/rubrike/Reginalne_inicijative/134974/Inicijativa-ministara-odbrane-Jugoistocne-Evrope.html

[3] http://www.mod.gov.me/rubrike/partnerstvo-za-mir/93668/18779.html

session. Montenegro, Serbia, and Bosnia and Herzegovina joined the Partnership for Peace. The NATO leaders concluded that the membership of the three countries in the program is important for the security in the region (Bosnian incentive, 2010)[1]. After a few months, Montenegro deeply stepped on the adherence to the EU, it is important to highlight the common army and Security Policy (CSFP) and the Common Security and Defense Policy (CSDP) as important preconditions for the EU in these sectors, which must be considered subject to negotiation of Montenegro and the EU (Montenegrin government, Strategy for NATO and EU integration, 2007)[2]. A significant political and security goal of the EU is the sequel to the stabilization of the Western Balkans region.

FUTURE PRIORITIES FOR DEFENSE REFORM IN MONTENEGRO

Reorganization of the Ministry of Defense and the Army is a key priority, which will establish appropriate structures to ensure efficient operation and management process. It involves finding the right model for more efficient management of human and financial resources, which will ultimately allow a more efficient management and disposal of defense costs. Development of relevant military capabilities and establishing a system of surveillance at sea and airspace is a key challenge for ensuring the sovereignty of the territory on Montenegro and efficient exchange of information with partners and allies. Reorganization of the Army and the passage to the battalion organization will provide a more efficient structure of the units in the Army, adapting a wide range of security challenges and standards of the modern armies. Priority in the modernization, equipping and training the Army will be crucial for the Partnership goals and a performance standard for a given missions and tasks

Department of Defense

To achieve a more efficient use of resources and to improve management programs and processes continues the process of harmonization and improvement of existing structures through the Ministry:

- Integration of certain parts of the Ministry and the General Staff in a way that is unique to create functional units in the area of human and

[1] The Atlantic, Incentive of Bosnia and Herzegovina (2010) Brochure - "Bosnia and Herzegovina in NATO"

[2] Government of the Republic of Montenegro, Ministry of Defense, Ministry of Internal Affairs, Agency for Public Relations, Communication Strategy on the Euro-Atlantic integrations of Montenegro, 11 October 2007

material resources, smart defense and financial services and to provide the functions of General Staff;

- Decentralizing the management and transfer of powers to a lower level;
- Improving the capacity to fight against corruption in accordance with the National strategy to combat corruption, organized crime and international obligations. A special emphasis will be placed on improving the training of civilian and military personnel. Improving the coordination on the work of the authorities responsible for the control and strengthen the transparency of procedures for the procurement and implementation of defense spending (Strategic defense review, 2013:24)[1].

Development priorities will be:

- The development of the military-intelligence system;
- The development of the new organizational unit for Public Relations of the Ministry;
- The Establishment of Operational command center for uninterrupted command with military operations and crisis response;
- Functional reorganization of the Ministry of Defense which should allow connecting and promoting of various operational defense capabilities within the system, optimal and efficient use of resources and reduce unneeded administration.

Reorganization of the Armed Forces

The future structure of the Army is necessary to ensure a harmonized system of relations for defense and development opportunities of modern equipped and trained forces, which will be able to respond on all security challenges. Taking into account the demographic capacity of the state and strategic commitment to joining the European and Euro-Atlantic institutions, the Army will keep the existing unit structures without classical commands.

The size of peaceful composition will still be in line with the needs and opportunities of Montenegro with about 0.3% of the total population. The new organization of the Army will keep the strategic and tactical levels. The General Staff will provide continuous command, development and maintenance of combat readiness, implementation of defense policy making, doctrinal documents, international cooperation and other matters of defense. The General Staff will be the main expert and advisory body to the Minister of Defense and on other military security issues.

The General Staff of the Army of Montenegro will establish a Command operations center (COC), which will provide uninterrupted

[1] Strategic overview of Defense of Montenegro – 2013, p. 24

command with the units during the execution of the missions at home and abroad. Abolition of the brigade organization is based on the organizational structure that will represent battalion level or equivalent combination of navy and air units. A unified system of command and control in order to effectively manage all the Army forces in the country and abroad to provide monitoring of sea and air, forming a unified command information system. This will ensure the integration and networking of all components of the Army in a modular structure, capable for joint action and perform operations with different characters. This established an Army system which will model the joining forces depending on the specific tasks and challenges. The basic unit of action will be declared company which will be trained and evaluated in accordance with the NATO standards (Montenegrin government, Strategy for NATO and EU integration, 2007)[1].

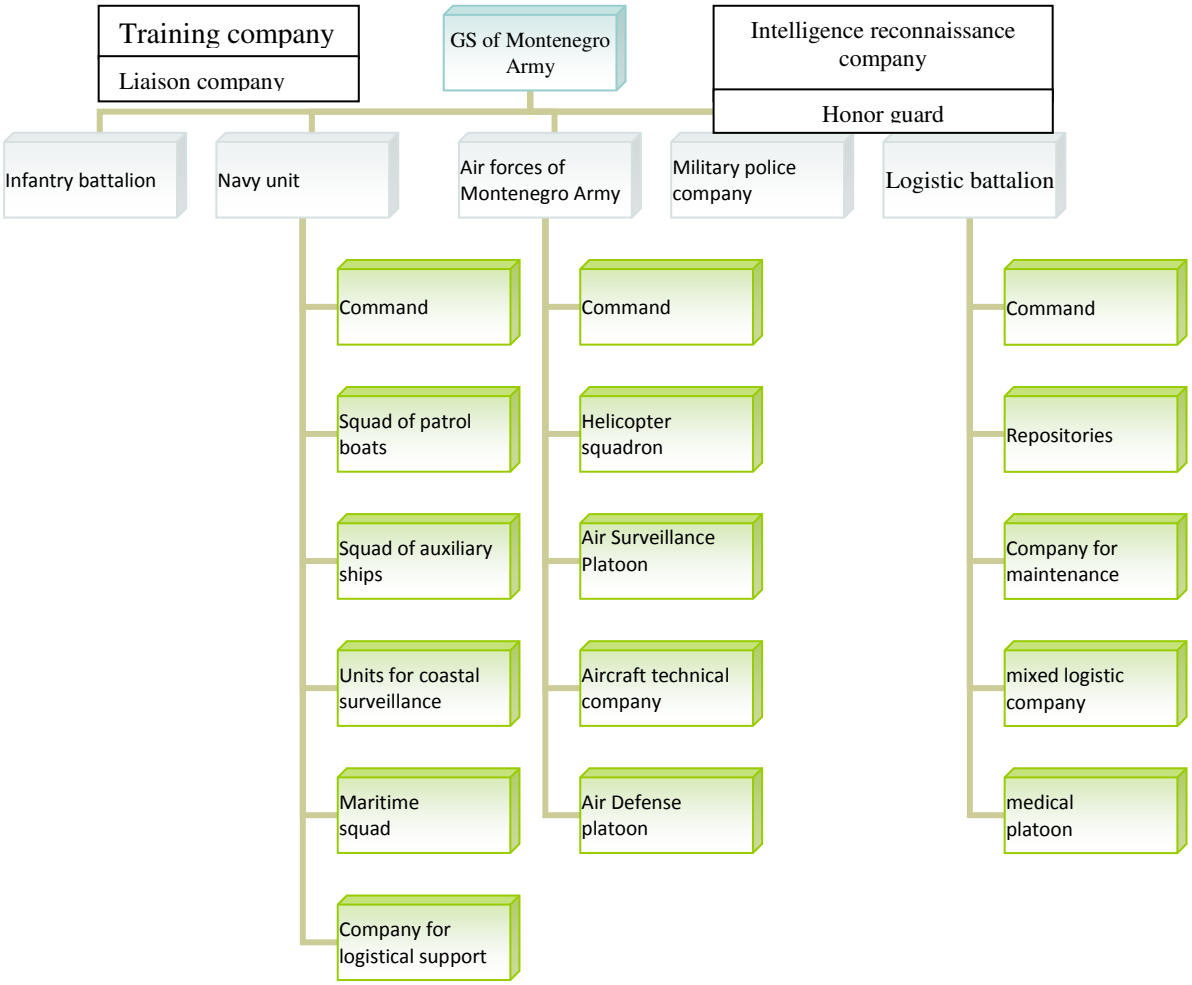
The dynamics of the process of reorganization on the army will be with adapting future concepts of defense, which will depend on the amount of funds allocated for defense spending, solving problems with excess equipment and infrastructure, as well as the projected development for the purpose of participating in the assigned missions and operations. The new organizational structure of the army will be established by the end of 2015.

Ground forces

Ground forces will develop smaller, mobile, sustainable, interoperable and deployable units. Transforming from brigade to battalion level, Montenegro will create composition with effective operational capabilities. The abolition of the brigade command will reduce the number of employees who participate in the decision making process. It will not affect the quality of decision-making, but they will generate key tasks and shorter time for decision-making performance (Strategic defense review, 2013: 27)[2]. Battalion level organizations will provide more favorable conditions for the planning, organizing and successful use of power in specific operational situations by date, time and space.

[1] Government of the Republic of Montenegro, Ministry of Defense, Ministry of Internal Affairs, Agency for Public Relations, Communication Strategy on the Euro-Atlantic integrations of Montenegro, 11 October 2007

[2] Strategic overview of Defense of Montenegro – 2013, p. 26



Picture 1: Future structure of the Montenegro Army

Ground forces (Attachment 4) consist of an infantry battalion, military police detachments, intelligence -Reconnaissance Company, and an honor guard. Ground forces would have solely command which will function as an independent command which will be placed under the Chief of Staff, from the composition of the infantry battalion and a squad of military forces to pose for engaging in international missions and operations. The main strength of the infantry battalion should have two companies, which will be trained by NATO standards, simultaneously with undertake obligations partner goals to achieve readiness to perform tasks within NATO by 2017 (Law for use of Montenegro military forces in NATO missions, 2008:

No.61)[1]. The main infantry force which are trained by the partnership goals should be able to achieve readiness to perform in 2017. The new organizational structure of the Army will be part of the process of integration on parts of the company special forces squad of military police in a military-police unit. Military-police unit in the area of implementation of technical measures prescribed identification processing perpetrators of offenses (criminal operations), physical security of the defense minister, army chief, foreign military and state representatives and delegations which visited the Ministry of Defense and military (Law for the number of active and reserve military forces, 2010: No.74)[2].

The new organizational structure of the Army will perform integrating intelligence squad of special forces and electronic reconnaissance in intelligence-reconnaissance unit. Intelligence-reconnaissance company's organizational ability of the army in order to achieve the interoperability in the field of military intelligence and in accordance with accepted partnership goals, developed skills for collecting military intelligence for making decisions about the use the units of the army. The intelligence - reconnaissance units would undertake and provide support to Montenegro army in international missions and operations.

The Honorary guard is designed to perform military honors, duties related to state and for protection of persons and objects of particular importance in crisis situations. Reorganization of ground forces will be implemented through the planned reduction of units, leaving and reducing unnecessary infrastructure location and speed commands for newly formed units. The active reserve is part of the reserve forces on the armed forces in size from 400 people. The composition of the active reserve is: 30 reserve officers, 70 NCOs and 300 reserve soldiers (Law for the number of active and reserve military forces, 2010: No.74)[3].

Reforms in aviation

With the reorganization of the Air Force, Montenegro Army will provide monitoring, control and protection of air space in cooperation with allies, improving mobility units and improving the ability to respond in crises. Air represents the kind of army designed to monitor, control, and

[1] Decree on announcement of the Law on assignment of the units of the army of Montenegro in the international forces and participation of the members of the civil protection, police and employees of the organs of the state administration in the peace missions and other activities abroad (Official Gazette of Montenegro, No. 61/08 from 13.10.2008)

[2] Regulation on the number, composition, and the manner of engagement of the active reserve army of Montenegro (Official Gazette of Montenegro, No. 74/10 from 17.12.2010)

[3] Regulation on the number, composition, and the manner of engagement of the active reserve army of Montenegro (Official Gazette of Montenegro, No. 74/10 from 17.12.2010)

protect the airspace of Montenegro through cooperation with the regional partners and allies. Aviation composition will have helicopters, easy system for air defense system for monitoring airspace. They will give a support to the ground forces, navy and civilian institutions. Air Force will be equipped with a helicopter, lake systems of defense forces, and system for searching. The main challenge will presents establishment of the modern operating center, which will have the ability to continuously monitor the situation in the air space and collecting data from their own sources and their substitution by Montenegrin Civil Aviation, NATO, neighbors and future operational command center. This includes the purchase of new modern radar that will allow integration of radar image at national and regional level and data exchange with NATO. The Government of Montenegro adopted the recommendation in consultation with NATO experts and they chose the location Brsuta over Bar, as the optimal solution for setting up military radar control for airspace (Defense strategic review, 2013: 29)[1]. The protection of airspace ("Are Policing") is one of the most important and complex challenges facing the country. Having in mind the position and size of the space, possible threats endangering the airspace will be protected by NATO (Defense Law, 2009: No.86)[2].

In relation to the provision of goods, the aircraft developed a capable tactical transport, tactical skills for transport, search and rescue on land and sea, medical evacuation and firefighting. Therefore, priority will be buying multipurpose medium helicopters. Air Force will protect the airspace and develop other elements for support, primarily for search and rescue capabilities (Strategic defense review, 2013: 27)[3]. Air opportunity of Montenegro army will be achieved by adjusting the activity of the organizational structure of the army integration in NATO and equipment necessary for multipurpose helicopters and means for monitoring and control of air space, through a regional approach. The economic opportunities of the country, capacity of the Air Force and non-profitability of its use are the issues for the protection of airspace which will be determined with NATO support.

Reforms in Navy

Building the capacity of the Navy will provide an oversight of the sea and the effectiveness of the protection of the interests of Montenegro in the sea and will get a new quality with the purchase of new patrol boats through sale or conversion of existing ships of the Navy. Navy is the kind of army

[1] Strategic overview of Defense of Montenegro – 2013, p. 28

[2] Law on Defense (Official Gazette of Montenegro, No. 47/07 from 07.08.2007, Official Gazette of Montenegro, No. 86/09)

[3] Strategic Defense Overview of Montenegro, 2013, p. 27

designed to control and protect the sovereignty of the internal waters and territorial sea and the protection of the sovereign rights of Montenegro external zones and continental coast (Military Law of Montenegro military forces, 2014: No.32)[1]. Sovereignty of the Sea includes smooth execution on the functions of the command, control, and communication (C2I), electronic monitoring and control of the territorial sea, the presence and function of the naval force at sea. Implementation of the "Navy Information Management Systems - NIMS" in cooperation with the USA will provide the necessary conditions for integrated control of sea and C2I system. The C2I system will allow continuous monitoring of the Montenegrin territorial waters and continental coast of the electronic exchange of data in real time, with the state institutions and countries in the Adriatic-Ionian region, NATO and the EU. This will be part of the national command information system (CIS) in future operational command center. The presence of the Navy for purchase of two new modern patrol boats will be realized by introducing the operational use of two ships of the type "Koncar" and a universal transport ship. Current patrol boats will be withdrawn from operational use. Providing funds to purchase the two new and modern patrol boats are the major challenges for the long term to solve the problem of office presence at the sea and protection of sovereignty in the territorial sea (The decision on determination of prohibited zones, 2008: No.37)[2]. By providing the necessary funds and implementation of this project it is planned to make the sale or conversion of existing buildings of the Navy. The Navy plans equipping and developing explosive devices for protection of the ports from possible terrorist attacks. The navy in cooperation with the state institutions and the countries of the region will develop the ability to respond on different crisis, primarily for search and rescue (SAR), environmental incidents, and the fight against terrorism.

Improving the management of human resources

Through the long-term planning, a system of professional development and career for every member of the Army will be built, which will enable the planning of the training according to the "next duty and improvements" (Procedure of promotion military personnel, 2010: No.23)[3]. The amendments of the existing organizational structure and formation of the Army comply "formation place-act" to achieve an appropriate rank pyramid

[1] Law on the army of Montenegro (Official Gazette of Montenegro, No. 88/09 from 31.12.2009, 75/10 from 21.12.2010, 40/11 from 08.08.2011, 32/14 from 30.07.2014)

[2] Decision on defining forbidden zones and their labeling (Official Gazette of Montenegro, No. 37/08)

[3] Rulebook on ranks and way of promotion of professional military employees, (Official Gazette of Montenegro, No. 23/10)

structure in order to build a sustainable pyramid officer ranks and to invest in additional efforts which in short term will be recruited large number of officers as well as to create different career paths, with the best rated officers provide improvement in service[1]. Existing decision made by the officers automatically meet the formal requirements, based on the provisions of the armed forces which will need to be adjusted in accordance with the actual needs of the Army of Montenegro. Therefore it is necessary to develop a mechanism that will detect the individual abilities and results achieved during the best performing tasks. This method of evaluation of the armed forces will be an incentive for successfully completing work tasks with the ultimate goal of establishing a system that relies on the knowledge, training, and ability. By analyzing the existing structure of the employees, they are expected to achieve a balanced structure to the 2020 ratio: Officers: NCO: contract soldiers = 1: 2.5: 3.5.

At the same time, special attention should be paid to the specifics or individual modes and services, which will not be possible to fully implement this connection (Strategic defense review, 2013:31)[2]. Also, it is important to establish mechanisms for planning outflow of the existing staff. Thanks to the efforts of the Ministry of Defense which invested in the development of incentives for gender equality in the sector of defense and security, it is important to make progress in representation of women in the defense system, talking about sex structure of soldiers under contract, the participation of women in the modern armies. For this purpose, it is necessary to develop mechanisms that will enable a more equal representation of women in the structure of the NCO and officer personnel. For the purposes of the quality of human resources, the Ministry of Defense will continue to lead and ensure the quality of living standards of its staff in a way that will be through the valorization of military property and solving housing issue of the members of the Ministry of Defense and Armed Forces Montenegro (Regulation on amount wages of the persons in Armed Forces of Montenegro, 2010: No.66)[3].

Improving the educational system

One of the priorities of the future system development capacity of modern educational officers is the existing system of higher education in Montenegro. Accordingly, educational programs for higher education

[1] Rulebook on ranks and way of promotion of cadets (Official Gazette of Montenegro, No. 41/08 from 04.07.2008)

[2] Strategic overview of Defense of Montenegro, Podgorica, 2013, p. 31

[3] Regulation on close establishments, Manners of realization and the amount of earnings of employed in the service of the army of Montenegro (Official Gazette of Montenegro, No. 66/10)

institutions will cover part of the military education. In this way the future officers would get licensed education. This type of education will enable the conclusion of appropriate partnership arrangements between the Ministry of Defense and current University of Montenegro, which together with the training of cadets at military academies partner countries will provide a sufficient number of junior military personnel or proper filling of gender issues. When it comes to the top-level of training, the command HQ will plan leadership duties to manage the policies and programs for Master's and doctoral studies. In order to improve the leadership skills, in Montenegro it will be developed specifically military education system, but it will use the capabilities of NATO and the partner countries.

Material resources

Depending on the needs and changes in Montenegro, the army will change their organizational and functional structure of logistics, with the rational and successful resource management. The directorate of material resources is responsible for the management policy development process, logistics, equipment and modernization, standardization and investment[1]. On the other hand, the army should take the executive functions and implementation of operational tasks support maintenance and improvement of military capabilities (Strategic defense review, 2013: 32)[2]. To achieve a more efficient use of resources it is needed:

- Integrated logistic support in a way that the Department of Logistics executive functional unit has Directorate of material resources and the command subordinate to the Chief of Staff;
- Reduction of the number of functional relations and decision-making levels;
- Clearly define the responsibilities and powers in every levels of decision-making;
- Provisions for regulating the logistics system and the shape of the structure.

Logistic Support

The structure of logistical base will be adjusted according to the assigned missions and tasks which will be organized at battalion level. The Navy and Air Force will be the reserved current elements of logistics support. To achieve more efficient management of inventories and improve supply planning implementation of integrated logistics information system,

[1] Decision on defining of the subjects and services of special importance for the defense (Official Gazette of Montenegro, No. 15/08 from 05.03.2008)

[2] Strategic overview of Defense of Montenegro, 2013, p. 32

the optimization of infrastructure facilities use elements of logistics support. One of the first steps in this direction will reduce the number of storage capacity from the current to a large number of objects that can be used in the future (Regulation of reconstruction on military facilities, 2008: No.48)[1]. Besides improving the health of members of the Army, this will enable achievement of the skills for engaging the medical staff in the module ROLL - 1 in international missions and assistance for civilian authorities during emergencies. The support of the host country will define the capacity that will be required to accept the Allied forces (Decree on reconstruction of military facilities, 2008: No. 48)[2]. Providing logistical support to the forces deployed outside the territory of Montenegro will be governed by the conclusion of appropriate agreements with the partners and allies.

Weapons and Equipment

Key priorities for equipping and modernization are:

- Purchase of equipment for the reporting units;
- Modernization of command and operative centers;
- Purchase of multipurpose helicopters;
- Purchase of modern air radars;
- Center for aviation;
- Acquisition of patrol boats (Strategic defense review, 2013: 32)[3].

The main priorities of equipping the army will be aimed at increasing mobility, movement and protection of individuals and units, solving the problem of controlling the sea and air space to improve control of information systems. The long-term plan for the development of defense will define the dynamics and development of future opportunities through:

- Equipping declared forces for participation in international operations in accordance with the dynamics of the realization on the objectives of the partnership;
- Use on development projects for international cooperation;
- Development of a single command and control system.

To equip and modernize it is necessary to allocate about 70 million, with no infrastructure costs. (Appendix 7). Financing costs for equipment is

[1] Regulation on the planning and management of space, building, reconstruction, and maintenance, military objects in the military surrounding (Official Gazette of Montenegro, No. 48/08)

[2] Regulation on the planning and management of space, building, reconstruction, and maintenance, military objects in the military surrounding (Official Gazette of Montenegro, No. 48/08)

[3] Strategic overview of Defense of Montenegro, 2013, p. 32

planned to provide the defense budget, donations and revenue from the sale of weapons and military equipment.

Infrastructure

In the next period, infrastructure development will focus on:

- Optimization of the infrastructure which is projected that by 2017 the ground forces will have 4-5 barracks. The Navy will be stationed in Bar, while the Air Force will keep the existing location. Logistic base will develop their capacities in three locations (Decision of colecting data for objects from significant defense importance for defense, 2008: No.30).[1]
- Raising the standards of work and accommodation of the Army. In order to raise labor standards and improve the training process will continue with infrastructure improvement of barracks and polygons.
- To promote the storage of weapons. The process of improving the safe storage of ammunition continued the modernization of stack "*Brezovik*", where the pace of work will depend on available funding. It is necessary to accelerate and reduce the number of individual storage capacities (Strategic defense review, 2013: No. 33)[2].
- Raising the standards of the Army, in order to improve the standards of the soldiers and their families to continue construction of residential buildings.

Defense spends

For the successful continuation of defense reforms, modernization of the Army and achieving the necessary level of interoperability, providing a stable defense budget will become an imperative in the time of economic crisis. In order to achieve a balanced and sustained defense budget is necessary:

- to ensure sustainable cost structure 50:30:20. Ministry of Defense is committed to the establishment in 2017 of defensive structures staff about 60%, operating costs 25% and for modernization and equipping

[1] Decision on defining of data on military objects and regions with those objects and other objects of special importance for the defense which are approved to enter in the cartographic and other publications (Official Gazette of Montenegro, No. 30/80)

[2] Strategic overview of Defense of Montenegro, 2013, p. 33

about 15%. Planning target structure of defense costs will be related 50:30:20 and it can be achieved by 2020.

- to provide the division level of the defense budget of 1,4% . Taking into account the fact that economic growth has slowed due to the economic crisis and the GDP growth will take place in the planned dynamics, it is necessary to ensure sustainable and balanced structure of defense costs. In the period of lower GDP growth (next two - three years) it is necessary to take the division of 1,2-1.3% of defense spending with positive and progressive upward trend and reached the level of distribution of 1.4% of GDP. This section doesn't include retired military. Such an approach would establish balanced structure of defense spending, which would facilitate the implementation of major projects in order to reach the relevant military capabilities, especially in terms of equipping and modernization[1].

Table 1: Structure on defense spending of the budget (in millions of Euros)[2]

Year	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023
Administration	28.47	28.88	27.86	28.60	28.95	30.40	30.99	30.06	36.11	38.27
Operations	9.49	11.00	12.28	14.30	15.01	16.95	18.59	20.40	21.66	22.96
Modernization	5.18	5.96	7.08	8.17	9.65	11.11	12.39	13.62	14.44	15.31
Total	43.14	45,84	47,21	51,07	53,62	58.47	61.97	68.12	72.21	76.54

CONCLUSION

The need for reforms in the defense system of the Republic of Montenegro for Euro-Atlantic integration is not forcibly imposed by some external factors, but the necessary criteria set up by the European Union and NATO. Before they enter into membership of these organizations in the aspiration for membership, each state has certain obligations and current tasks through reforms in their defense system. Today and in the future it is impossible every country independently to build their national security of its citizens if they do not cooperate with their neighbors and even more in the region and beyond. Therefore, regional cooperation in SEE countries, the Euro-Atlantic integration is especially important in the field of defense.

Most of the countries in SEE, much earlier perpetrated their reforms and they were willing to join EU and NATO, while a part of them started their reforms much later in defense the sector. Defense reforms of Montenegrin Army face many challenges in the personal sector, the release of excess material and technical resources, facilities, ammunition, military

[1] Law on the budget and fiscal responsibility (Official Gazette of Montenegro, No. 20/14 and 56/14) and Article 10 and 11 from the Law on the budget of Montenegro for 2015

[2] Strategic overview of Defense of Montenegro, 2013, p. 34

equipment. Most of the equipment was outdated and require for additional funding, but less approved budget for defense was not able to respond the modern challenges. However, a long-term defense review of Montenegro Army provides continuing reforms in the defense sector. In order to form a small, well-trained, and mobile equipped Army with modern equipment capable for meeting all challenges in the country and outside of Montenegro with their armies of Allied forces.

The emphasized reform process in some countries is well under way. Perhaps they wait for the invitation as in these countries there are no political disagreements or national problems. The political disputes with veto on individual countries will prevent the further countries for aspiring membership in NATO and the EU. However, in Montenegro unlike these countries there are not external factors that would be an obstacle to the EU and NATO. The membership of the countries in this region that long ago fulfilled their membership obligations must wait further and they must fear for their security. The conflict in Ukraine which has destruction of the casualties should be a signal of NATO and EU to hurry with the entrance of the small states. Are we to expect the next invitation wave for Montenegro to join the NATO and EU is still needed time to show? As things stand now, the Republic of Albania should no later than 2016 join the EU, while Montenegro NATO. The long-term goal is the development of military units which will be ready, efficient, fully equipped, trained, and motivated. This provides decentralization of the command function in a way that will take the command and responsibility of the Army Command and Operations Center which will be a professional staff of the Ministry of defense and they will deal with the implementation of defense policy, planning, military cooperation and the development of doctrine and regulations (Iliev et.al, 2013: 593)[1]. The development of Army legislative will focus on the harmonization of national legislation that would facilitate the participation of membership in the collective defense and will allow improved management and disposal of defense budgets. Realization of the key development priorities of the Ministry of defense and strategic Army will be able to meet the challenges and responsibilities in accordance with the Constitution and laws for international obligations.

[1] Andrej Iliev, Drage Petreski, Dragan Gjurcevski. Euro-Atlantic integration in SEE trough regional cooperation, International conference in EURM, 2013, p. 593

ATTACHMENTS:

Table 2 : Pyramid structure of the ranks

generals 2			1 general
Colonel 21			11 Colonel
Lieutenant colonel	82		52 Lieutenant colonel
111	majors		65 majors
First lieu.- capt. 73			101 First lieu.- capt.
Formation requirements	289	230 Real requirements	

Table 3 : Projection structure of personnel

Personal category	Formation	Present condition	(+) Over (-) Missing	Designed structure from 2015	Designed structure for 2018
Officers	289	232	-57	260	240
NCOs	872	803	-69	780	640
Soldiers	693	555	-138	670	720
Civilians	240	261	+21	240	200
Total	2094	1831	-264	1950	1800

Table 4 : *Future personal structure of Montenegro Army*

Unit	General Staff	Infantry battalion	Navy	Air units	Logistic battalion	Intelligence reconnaissance	Military police company	Training Center	Honor Guard	Signal company
Designed structure of personnel 2015	85	600	350	200	350	80	110	50	80	70
Total	1950									

Table 5: Movement of real GDP growth and separation of defense (in million / EUR)

Year	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023
Growth of GDP	1,5%	2%	3%	4%	5%	5%	5%	5%	5%	5%
Calculations	3,595	3,667	3,777	3,928	4,125	4,331	4,591	4,866	5,158	5,467
Spending	1.20%	1.25 %	1.25 %	1.30 %	1.30 %	1.35 %	1.35 %	1.40 %	1.40 %	1.40 %
Amount	43.14	45,84	47,21	51,07	53,62	58.47	61.97	68.12	72.21	76.54

Table 6: Structure of expenses for defense budget

Year	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023
Administration	66%	63%	59%	56%	54%	52%	50%	50%	50%	50%
Operation	22%	24%	26%	28%	28%	29%	30%	30%	30%	30%
Modernization	12%	13%	15%	16%	18%	19%	20%	20%	20%	20%
Total	100 %	100 %	100 %	100 %	100 %	100 %	100 %	100%	100 %	100 %

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Decision on defining of the subjects and services of special importance for the defense ("Official Gazette of Montenegro", No. 15/08 from 05.03.2008)

Decision on defining of forbidden zones and their designation ("Official Gazette of Montenegro", No. 37/08 from 13.06.2008)

Regulation on the planning and management of space, building, reconstruction, and maintenance, military objects in the military surrounding ("Official Gazette of Montenegro", No. 48/08 from 11.08.2008)

Decree on announcement of the Law on assignment of the units of the army of Montenegro in the international forces and participation of the members of the civil protection, police and employees of the organs of the state administration in the peace missions and other activities abroad ("Official Gazette of Montenegro", No. 61/08 from 13.10.2008)

Law on the budget and fiscal responsibilities ("Official Gazette of Montenegro", No. 20/14 and 56/14) and Article 10 and 11, Law on the budget of Montenegro for 2015

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ACHIEVEMENTS OF THE EUROPEAN INTERNAL SECURITY STRATEGY AND FUTURE CHALLENGES OF THE EUROPEAN UNION IN THE FIELD OF INTERNAL SECURITY FOR THE PERIOD FROM 2015 TO 2020

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Abstract

This paper describes the strategic guidelines and development policies of the European Union in the field of internal security. European Union policies in this field aim to promote and protect the adopted European values. The authors point to the achievements of the European internal security strategy in the fight against challenges, risks and threats that have been recognized by the European Union. They intend to highlight the implementation of the strategic objectives defined by the Stockholm Programme and Action Plan for its implementation for the period from 2010 to 2014. Also, the paper presents future challenges and threats to the European Union in the field of internal security, with particular emphasis to the prevention of organized crime, terrorism and cybercrime. The European Union intends to promote a broader approach to the prevention of the mentioned threats by implementing the renewed version of the European internal security strategy for the period from 2015 to 2020. The efforts are made to ensure synergy of all EU policies relating to internal security. In the

future, the European Union will support the development of the European security sector, relying on the research in the field of social security through the implementation of the Programme Horizon 2020 with possibility of participation of institutions and researchers from candidate countries for EU accession.

Keywords: *European Union, Strategy for Internal Security, challenges, risks and threats, research, Horizon 2020*

INTRODUCTION

The evolution of *internal security* of the European Union[1] started from the framework of non-institutional cooperation in the early 1970's through the formation of the groups Pompidou, Trevi and Schengen. Institutionally speaking, only the *Amsterdam Treaty* of 1997[2] initiated the idea of creating the EU as an Area of Freedom, Security and Justice (AFSJ), i.e. creating a series of policies designed to, within the "third pillar" (*justice and home affairs*), exercise the right to freedom and security of movement within the EU. Two years later, the Tampere Programme was established as the first legal framework in the area of internal security for the period from 1999 to 2004. This five-year programme implied a broad cooperation in police and judicial affairs. The cooperation was expanded with the so-called Hague Programme[3] which was implemented from 2005 to 2010[4], and which, among other things, included strengthening of the fundamental rights of citizens and deepening and expanding security cooperation in the field of migration, asylum and the prevention of terrorism.[5] At the same time, with the adoption of the Lisbon Treaty[6] and the changes which the treaty brought in the area of freedom, security and justice (the abolition of the pillars), on 2nd December 2009, the so-called Stockholm Programme was adopted for the

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[1] Hereinafter EU

[2] *Treaty of Amsterdam,* Official Journal C 340, Signed on 2nd October 1997 and entered into force on 1st May 1999.

[3] *The Hague programme: Strengthening freedom, security and justice in the European Union*, Official Journal 2005/C 53.

[4] On the Hague Programme see: Zwaan, W.J., Goudappel, F. (ed.) (2006). *Freedom, security and justice in the European Union – Implementation of the Hague Programme*. The Hague: Asser press.

[5] See: Ivetić, S., Pavlović, G. (2014). *Activities of the European Union in prevention from crises and catastrophes,* in the Collection of papers "Combat of crime and European integrations, with a retrospection of ecology crime". Trebinje: High School for Internal Affairs and the Hanns Seidel Foundation, p. 43 – 55

[6] *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community*, Official Journal of the European Communities, 2007/C 306. Signed on 13th December 2007 in Lisbon, it came into force on 1st December 2009 after being ratified by all member states of the European Union.

period from 2010 to 2014[1]. The Stockholm Programme is a continuation of the Hague Programme and it is in connection with the further development of strategic guidelines and EU development policies in the field of internal security.[2] In accordance with this programme, important political priorities, on whose realization the EU has been working in the recent years, are: promoting citizenship and fundamental rights; a Europe of law and justice; a Europe that protects; access to Europe in a globalised world; a Europe of responsibility, solidarity and partnership in the area of migration and asylum; and a Europe in the era of globalization, i.e. the external dimension of freedom, security and justice. In addition to other things, it was required that the programme defines a comprehensive strategy for internal security of the EU, whose implementation is the responsibility of the Standing Committee on operational cooperation on internal security - COSI.[3]

ACHIEVEMENTS OF THE EU INTERNAL SECURITY STRATEGY FOR THE PERIOD FROM 2010 TO 2014

Based on the Stockholm programme, in early 2010 the EU[4] Internal Security Strategy was adopted and after that the action plan for its implementation[5] was adopted. The action plan identified the most pressing challenges and threats to the security of the EU and the five strategic objectives and several specific steps for each of these objectives, which were implemented in the period from 2010 to 2014. The five strategic objectives which were defined in this strategy are: disrupt of the international crime networks; prevent terrorism, radicalization and recruitment of terrorists; raise the levels of security for citizens and business in cyberspace; strengthen security through better border management and increase Europe's resilience to crises and disasters.

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[1] *The Stockholm programme — an open and secure Europe serving and protecting citizens,* Official Journal of the European Union, 2010/C 115.

[2] On freedom, security and justice in the European Union after the Lisbon Treaty and the Stockholm programme see: Wolff, S., Goudappel, F., Zwaan, W.J. (ed.) (2011). *Freedom, security and justice after Lisbon and Stockholm*. The Hague: Asser press.

[3] This body, within the Council, was formed on the basis of Article 71 of the Lisbon Treaty precisely with the goal of strengthening and promoting operational cooperation relating to internal security and facilitating cooperation between national authorities of the member stated in this domain. Čavoški, A., Reljanović, M. (2009) *Legislation and Internal Affair in the European Union,* Belgrade: Law Faculty of the Union University and the Official Gazette, p. 210 - 211.

[4] *Internal Security Strategy for the European Union: „Towards a European Security Model"*. Bruxelles: Council of European Union, 8/3/2010.

[5] *The EU Internal Security Strategy in Action: Five steps towards a more secure Europe,* COM (2010) 673 final, Brussels, 22/11/2010.

Disrupt international crime networks

The three key activities that were envisioned under this strategic objective are: to identify and dismantle crime networks; to protect the economy against criminal infiltration; and to confiscate illegally acquired assets.[1] In order to accomplish these activities, great effort was invested in developing the so-called work of police agencies based on intelligence information as well as increasing cooperation between police agencies within the EU. At the same time, Europol and Eurojust were strengthened, which led to increased operational cooperation in investigations, including joint investigation teams (JITs) as well as proposals for new legal framework for these agencies. Furthermore, comprehensive policies and framework were established in relation to various criminal phenomena, as well as guidelines for cooperation between stakeholders. Thus, in the EU Drugs Strategy from 2013 to 2020, for example, new guidelines were established in the fight against drug trafficking. In addition, in January 2013, the first report of the EMCDDA (The European Monitoring Centre for Drugs and Drug Addiction) and Europol about drug markets was released, which represented an important step in identifying new trends and fostering cooperation among law enforcement agencies. On the issue of combating human trafficking, a strategy for the period from 2012 to 2016 was adopted, which aims to eradicate human trafficking[2]. During 2013, an EU civil society platform against human trafficking was established, which gathered more than 100 organizations. In December 2011, the Directive on combating sexual abuse and sexual exploitation of children and child pornography entered into force[3]. Important measures for fighting against criminal acts motivated by profit were introduced. Some of them are: the establishment of the Asset Recovery Offices - ARO in the Member States and their cross-border cooperation; then, the proposal of the Fourth Directive on combating money laundering[4] and the Fund Transfer Regulation[5]; and the agreement on the new Directive on the freezing and confiscation of the proceeds of crime[6]. In February 2014, the first EU Anti-Corruption Report[7], based on the extensive EU mechanism for reporting on corruption and assessment of corruption was

[1] See: The EU Internal Security Strategy in Action, *op. cit.,* p. 5 - 6

[2] *The EU Strategy towards the Eradication of Trafficking in Human Beings 2012 - 2016*, COM (2012) p. 286

[3] *Directive on combating the sexual abuse and sexual exploitation of children and child pornography*, Directive 2011/93/EU

[4] *4th Anti Money Laundering Directive,* COM (2013) p. 45

[5] *Fund Transfer Regulation,* COM (2013) p. 44

[6] *Directive on the freezing and confiscation of the proceeds of crime*, OJ L 127, 29.4.2014, p. 39

[7] *First EU Anti-Corruption Report*, COM (2014) p. 38

made. Concerning the threats which the illegal use of firearms poses to the safety of citizens, the EU has ratified the United Nations Firearms Protocol[1]. Furthermore, the Directive regarding the European Investigation Order in criminal matters established a common EU mechanism for obtaining all types of evidence in criminal[2] and similar matters. Also, the EU Agencies began training police authorities. In this regard, a new approach to training was introduced, i.e. a new European Law Enforcement Training Scheme (LETS) was produced, which was based on four educational areas: Area 1 - Basic knowledge about the EU dimension of law enforcement; Area 2 - Effective bilateral and regional cooperation; Area 3 - Specialized thematic police action in the EU; Area 4 - civilian missions and capacity building in third countries. The main objective of this new approach is to train all types of employees in the area of law enforcement (police, border police, and customs officers) at all levels, including exchange programmes.[3]

Prevent terrorism, radicalization and recruitment of terrorists

In terms of this strategic objective, three main activities were established, namely: empower communities to prevent radicalization and recruitment of terrorists; prevent terrorists from accessing funding and materials and monitor their transactions; and protect traffic.[4] Different steps were conducted in the area of working with communities, local authorities and civil society. Thus, during 2011, the so-called radicalization Awareness Network (RAN) was initiated, with the aim of empowering local stakeholders in combating radicalization and recruitment. Also, during 2014, the Communication on preventing radicalization to terrorism and violent extremism[5] was adopted as well as the Revised EU Strategy for Combating Radicalization and Recruitment to Terrorism[6]. As a response to the

[1] *UN Firearms Protocol*, OJ L 89, 25.3.2014, p. 7.

[2] Judicial authorities of Member States may ask each other to examine witnesses, search homes or to monitor bank accounts. It also introduced the automatic mutual recognition of investigation orders and constraints were given under which each Member State may refuse to execute the order. See: *Directive regarding the European Investigation Order in criminal matters,* OJ L 130, 1/5/2014, p. 1.

[3] *The final implementation report of the EU Internal Security Strategy 2010-2014*, COM (2014) 365, Brussels, 20/6/2014, p. 4 - 6

[4] About this matter in more detail, see: Mitrović, LJ., Grbić - Pavlović, N., Pavlović, G. (2012) *Combat against terrorism in the light of the European strategy of security*, in the Collection of papers "Harmonization of the Foreign Policy of Serbia with the all-embracing foreign and security policy of the European Union. Beograd: Institute for International Politics and Economy and Hanns Seidel Foundation, p. 447 - 461

[5] *Communication on preventing radicalisation to terrorism and violent extremism,* COM (2013) p. 941

[6] *Revised EU Strategy for Combating Radicalisation and Recruitment to Terrorism,* 9956/14, Brussels, 19.5.2014

emergence of foreign fighters travelling to conflict zones (particularly to Syria) the Commission has developed RAN guidelines on best practices[1]. Furthermore, implemented in detail was the EU - US Terrorism Financing Tracking Programme - TFTP. This programme has proven to be a valuable tool for identifying and tracking terrorists as well as the networks that support them worldwide. In order to be able to deal with terrorist crises, Member States have received support from Europol, Eurojust and other EU platforms for law enforcement, such as the ATLAS network[2]. At the beginning of 2013, ATLAS conducted a successful joint exercise called "Common Challenge", in response to a simulated coordinated terrorist attack in nine Member States[3]. Furthermore, great efforts have been invested in detecting and securing dangerous materials such as explosives and CBRN agents. A new approach to the implementation of the European Programme for Critical Infrastructure Protection (EPCIP) was initiated, with an emphasis on prevention, readiness, response, and, in particular, on the interaction between different sectors. In connection with activities of risk assessments in the field of air traffic safety, they were extended to a number of risks associated with passengers. A common methodology was developed by experts from the Member States and the EU Centre for analyzing intelligence data and which provides a reference framework for future action in this area.[4]

Raise levels of security for citizens and business in cyberspace

Under this strategic objective, the EU Internal Security Strategy and the Action Plan identified three key lines of action, namely: strengthening the capacity of law enforcement and judicial authorities; collaboration with industry to strengthen the protection of citizens, and strengthening capacities

[1]See:http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/radicalisation_awareness_network/ran-best-practices/ran-search

[2] Atlas network, which was created in 2001, is an association made up of special intervention forces, i.e. police units in the 28 EU Member States working to combat terrorism and other serious crimes. The network is funded with support from the European Commission and the Directorate General for Internal Affairs. The objective of ATLAS is to improve cooperation between police forces, improve skills through training and exchange best practices. The ATLAS network is chaired by the German Police Special Unit (GSG9). The ATLAS network is an example of a proactive attitude against terrorism and emphasizes solidarity and cooperation among EU Member States, as stated in Article 222 of the Lisbon Treaty and contributes to the protection of citizens and public security in the EU. See: http://europa.eu/rapid/press-release_IP-13-335_en.htm, access: 27/02/2015 at 12.44

[3] The participating countries were: Austria, Belgium, Ireland, Italy, Latvia, Slovakia, Spain, Sweden and Romania.

[4] The final implementation report of the EU Internal Security Strategy, *op. cit.*, p. 6 - 7

to combat cyber-attacks.[1] In this regard, the EU adopted the Directive on attacks against information systems[2], which coordinates the criminal law of the Member States in relation to these crimes (e.g. on illegal access to information systems, illegal interference with systems and data and illegal interception), and facilitates cooperation between agencies and law enforcement bodies. Furthermore, in early 2013, the Cyber-security Strategy for the EU[3] was adopted in which, among other things, the importance of cooperation between the public and private sectors was emphasized so they could strengthen prevention and security in general. Also, the adoption of a Directive on network and information security[4] was proposed and its aim was strengthening of the national resistance and increasing cooperation in the event of cyber-attacks. The European Cybercrime Centre (EC3), in Europol, became operational in 2013. EC3 is the focal point for all matters related to cybercrime and, on that basis, cooperates with the Member States, Eurojust, and third countries in connection with the investigations. It also collaborates with the private sector through advisory groups about Internet Security and financial services. Promotion of the Budapest Convention on cybercrime was continued as a framework for international cooperation in the fight against this type of crime and as a model for national legislation. In 2012, in cooperation with the USA, the Global Alliance for combating sexual abuse of children online was launched. The Alliance currently consists of 53 countries that are working to improve the identification of victims, prosecution of perpetrators, raising awareness and reducing the amount of pornographic material available on the Internet.[5]

Strengthening security through better border management

In connection with the implementation of this strategic objective, four key activities were identified, namely: facilitate the full potential of EUROSUR (European Border Surveillance System); reinforce the contribution of Frontex at external borders; undertake joint management of risks in the movement of goods across external borders; and improve inter-agency cooperation at the national level.[6] EU action on the implementation of the above activities mentioned are undertaken with the aim of protecting

[1] About this matter in more detail, see: Ivetić, S., Pavlović, G. (2012). *Combat against cyber crime in the European Union with a retrospection on the Republic of Srpska*, in the Collection of papers "Combat of crime and European integration with a retrospection to the high-technology crime". Laktaši: Higher School for Internal Affairs and the Hanns Seidel Foundation, p. 53 - 64

[2] *Directive on attacks against information systems,* Directive 2013/40/EU

[3] *The Cyber-security Strategy for the EU,* JOIN (2013) 1, 07/02/2013

[4] See: *Directive on network and information security,* COM (2013) p. 48.

[5] The final implementation report of the EU Internal Security Strategy, *op. cit.,* p. 7 - 8

[6] See: The EU Internal Security Strategy in Action, *op. cit.,* p. 11 - 13

the rights and freedoms of the EU citizens, such as free movement of persons within the Schengen area and the free movement of goods and services in the internal market. Putting EUROSUR into operation needs to be mentioned as an important measure that was undertaken at the end of 2013[1]. This multifunctional system for detecting and preventing cross-border crime helps matters related to immigrants at the external borders of the Schengen area. As a further important measure, we could highlight the entering into force of the new legislation on the management of the Schengen area[2], with the aim of improving the assessment and monitoring as well as providing support to Member States. Concerning the issue of free movement of persons, currently discussed is the Smart Border Package[3], which consists of legislative proposals for the Entry / Exit System (EES) and the Registered Traveler Programme (RTP).[4]

Increasing Europe's resilience to crises and disasters

Four activities are designed within this strategic objective, and within each of these activities there are several steps (actions) that will be done in order for the EU to increase its resilience to crises and disasters, namely: to fully exploit the solidarity clause; develop a comprehensive approach to threat and risk assessments; network the various centers for situation assessment; develop a European readiness to respond to emergency situations.[5] The first activity under this strategic objective is the so-called Solidarity clause. It is an institute which was introduced by the Lisbon Treaty (Article 222[6]), and implies a legal obligation of Member States to

[1] Regulation (EU) No 1052/2013 establishing the European Border Surveillance System (Eurosur).

[2] See: Regulation (EU) No 1053/2013; Regulation (EU) No 1051/2013.

[3] *Smart Border Package,* COM (2013) 95, COM (2013) 97

[4] The final implementation report of the EU Internal Security Strategy, *op. cit.,* p. 8 - 9

[5] About this matter in more detail, see: Ivetić, S., Pavlović, G. (2014). Activities of the European Union in prevention from crises and catastrophes, in the Collection of papers "Combat of crime and European integrations, with a retrospection of ecology crime". Trebinje: Higher School for Internal Affairs and the Hanns Seidel Foundation, p. 43 – 55

[6] Solidarity clause - Article 222 of the Lisbon Treaty: 1. The Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster. The Union shall mobilise all the instruments at its disposal, including the military resources made available by the Member States, to: a) prevent the terrorist threat in the territory of the Member States; protect democratic institutions and the civilian population from any terrorist attack; assist a Member State in its territory, at the request of its political authorities, in the event of a terrorist attack; b) assist a Member State in its territory, at the request of its political authorities, in the event of a natural or man-made disaster. 2. Should a Member State be the object of a terrorist attack or the victim of a natural or man-made disaster, the other Member States shall assist it at the request of its political authorities. To that end, the Member States shall coordinate between

assist each other in case of terrorist attacks, natural and man-made disasters. Accordingly, the solidarity clause provides a common framework for action for all cases in which a Member State is the object of a terrorist attack, or the victim of a natural or man-made disaster. There is the opinion that the European Union, in this way, is establishing a system of collective security modeled on NATO and its principle *casus foederis* (lat. the case when you need to fulfill obligations within alliances).[1] In December 2012, a joint proposal of the European Commission and the EU High Representative for Foreign Affairs and Security on the decision to implement the solidarity clause was adopted[2], and it is currently being discussed by the Member States. At the end of 2013, a new legislation for the EU was adopted, the EU Civil Protection Mechanism[3]. This mechanism contributes to the establishment of European readiness to respond to emergency situations. The mechanism[4] is based on previously separated resources of the Member States and good planning. Its operation will be supported by the European Emergency Response Coordination Centre, which began operations in May 2013. In connection with the increase of resilience to natural disasters and ones caused by humans, a large number of activities were conducted in order to implement the EU framework policy for disaster risk management.[5] Member States have made different progress in implementing national risk assessment in accordance with the instructions of the European Commission from 2010.[6] By early 2013, the European Commission had contributions

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themselves in the Council. 3. The arrangements for the implementation by the Union of the solidarity clause shall be defined by a decision adopted by the Council acting on a joint proposal by the Commission and the High Representative of the Union for Foreign Affairs and Security Policy. The Council shall act in accordance with Article 31 Paragraph 1 of the Treaty on European Union where this decision has defence implications. The European Parliament shall be informed. For the purposes of this paragraph and without prejudice to Article 240, the Council shall be assisted by the Political and Security Committee with the support of the structures developed in the context of the common security and defence policy and by the Committee referred to in Article 71; the two committees shall, if necessary, submit joint opinions. 4 The European Council shall regularly assess the threats facing the Union in order to enable the Union and its Member States to take effective action.

1 Bilandžić, M. (2012) Towards the Strategy of national safety of the European Union – Analysis of the Strategy of internal safety of the European Union, Police and Safety, Year 21, Publication 1, page 62, footnote 12.

2 Second Report on the implementation of the EU Internal Security Strategy, COM (2013) 179 final, Brussels, 10/4/2013, p. 14

3 EU Civil Protection Mechanism, OJ L 347, 20.12.2013, p. 924.

4 Members of the mechanism are the 28 EU Member States, plus Macedonia, Iceland and Norway.

5 *A community approach on the prevention of natural and man-made disasters,* COM (2009) 82 final, Brussels, 23/2/2009

6 *Risk Assessment and Mapping Guidelines for Disaster Management*, SEC (2010) 1626 final, Brussels, 21/12/2010.

from 12 countries participating in the EU Civil Protection Mechanism (the Czech Republic, Denmark, Estonia, Germany, Hungary, Italy, Netherlands, Norway, Poland, Slovenia, Sweden and the United Kingdom) with varying degrees of detail of the national risk analysis that reflect the need for a broader approach to risk management and data on disasters. Based on that, the European Commission has prepared the first cross-sector overview of the natural risks and risks posed by man, which the EU could face in the future.[1] In this regard, in April 2014, the Commission published the first review of natural disasters in the EU which were caused by man, which covered 12 major natural hazards and hazards caused by man in 17 national risk assessments that were prepared by the Member States. The content is supplemented by information on related EU policies and the results of relevant research activities which are funded by the EU[2]. In order to support the Member States, cooperation at the EU level has been enhanced among centers of several sectors and centers for individual sectors of the Commission as well as relevant agencies using a new framework for exchange of confidential data[3].[4]

FUTURE CHALLENGES OF THE EUROPEAN UNION IN THE FIELD OF INTERNAL SECURITY FOR THE PERIOD FROM 2015 TO 2020

The European Commission, in a report on the implementation of the internal security strategy, emphasizes that the five strategic objectives which were achieved in the period from 2010 to 2014, remain important, and that they must be confirmed in a renewed internal security strategy. In addition to that, the focus of the new EU internal security strategy should be to review activities carried out within each objective for the period from 2015 to 2020 and establish new activities in managing challenges, risks and threats to the security of the EU and its citizens.[5]

In this regard, already in March 2014 the European Commission established communication with relevant EU entities and a document entitled "An open and secure Europe: making it happen"[6] was developed, and then, in June, the document "Strategic guidelines for legislative and operational

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[1] De Groeve, T. (ed.) (2013) *Overview of Disaster Risks that the EU faces.* Luxembourg: Publications Office of the European Union.

[2] *Overview of natural and man-made disaster risks in the EU*, COM (2014) 216 final, Brussels, 8/4/2014

[3] See: Council Decision 2013/488/EU.

[4] The final implementation report of the EU Internal Security Strategy, *op. cit.*, p. 9 - 10

[5] *Ibid*., p. 18.

[6] *An open and secure Europe: making it happen*, COM (2014) 154 final, Brussels, 11/3/2014

planning in the area of freedom, security and justice" was adopted.[1] Furthermore, by the end of 2014, "EU Council Conclusions on development of renewed EU internal security strategy"[2] and "Resolution of the European Parliament"[3] on this topic were adopted. Among other things, these documents emphasize that one of the key objectives of the EU is the construction of an area of freedom, security and justice, while fully respecting the fundamental rights of the citizens. The priority is to find a way to effectively consolidate and consistently implement existing legal instruments and measures of policy in the field of asylum, immigration, borders, and police and judicial cooperation. Of key importance will be the strengthening of operational cooperation, with the potential of innovation in the field of information and communication technology, improving the role of various EU agencies as well as providing strategic use of the EU funds.[4]

The EU is part of a globalised and interconnected world in which international mobility is expected to rise. So, the EU will also face demographic change, urbanization, increasingly diverse societies and shortages in the labour market. Therefore, it is essential to maximize the possible benefits of policy in the field of internal affairs in order to promote economic growth and attract people with the right skills into the EU. In such an interdependent world, the issues of internal affairs must be incorporated into the general EU foreign policy which will enable a stronger dialogue and cooperation with third countries. Considering that technology is developing rapidly, the ways in which people connect are also changing. All these changes bring new challenges in the field of security. Thus, cybercrime is increasingly causing concern, human trafficking is becoming more sophisticated, cross-border organized crime is taking on new forms, and terrorism remains the biggest threat to security. Therefore, there is going to be a tendency to use technological innovation and science in the future in order to help address these risks, and the programme for research and development Horizon 2020[5] will be the first to be used.[6]

Thus, the strategic objectives of the future EU Internal Security Strategy should be the same as in the previous strategy, namely: disrupting international criminal networks; preventing terrorism and combating

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[1] *Strategic guidelines in the area of internal security*, EUCO 79/14, European Council, Brussels, 27/6/2014

[2] *Draft Council conclusions on the development of a renewed European Union Internal Security Strategy*, 15670/14, Council of the European Union, Brussels, 19/11/2014.

[3] *European Parliament resolution on renewing the EU Internal Security Strategy*, (2014/2918(RSP)), Brussels, 17/12/2014

[4] Strategic guidelines in the area of internal security, *op. cit.*, p. 1 - 2

[5] On research related to the security of the EU, see: European Commission, (2014). *Security in 2020: Meeting the challenge*. Luxembourg: Publications Office of the European Union.

[6] An open and secure Europe: making it happen, *op. cit.*, p. 2 - 3

radicalization and recruitment of terrorists; raising the level of security of citizens and businesses in cyberspace; strengthening security through better border management; increasing Europe's resilience to crises and disasters; and constructing internal security in a global context, i.e. connecting with foreign policy and security of the EU.[1]

CONCLUSIONS

With the adoption of the Internal Security Strategy and its consistent implementation through the Action Plan, in the period from 2010 to 2014 the EU has greatly enhanced its own previously projected normative and institutional capacities for managing security challenges, risks and threats in the field of internal security. As a logical continuation of further planned EU activities in this area, there is a need for adopting the new Internal Security Strategy for the period from 2015 to 2020. The new strategy should be adopted until mid-2015. The strategic objectives on which the EU will continue to work concerning internal security will apparently remain unchanged. It can be expected that a new action plan for the implementation of the new EU Internal Security Strategy will provide concrete steps (actions) in achieving these goals. Also, it is expected that there will be a rise in the number of past activities on the realization of strategic objectives. It is undeniable that there is agreement within the EU on the necessity of including non-member states of the EU. Because of that, these states, in accordance with their respective constitutional structure, should take coordinated action for voluntary synchronization, i.e. amendments to the existing national legislation and harmonization with the EU acquis (Acquis Communautaire), including the field of internal security. At the same time, it is necessary to work on the development of national capacities modeled on the EU, through the development of strategies and action plans to prevent the presented security challenges, risks, and threats.

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SAFETY CONCEPT - BEFORE AND AFTER THE COLD WAR

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Abstract

In the introductory part of the paper, the author provides scientific and theoretical determination of the terms globalization, security concept and reference values and interests. Security is a dynamic phenomenon. Therefore, there is change in the conceptual determinations with respect to the reference values, the dangers that threaten them and the subjects and the manner and means of protecting them. The introduction of the term "concept of security" in the scientific literature, is actually in the need to point out that security is an open dynamic system in which it is the "conception" or "term security" that expresses a lengthy process, desired state, in terms of needs and values or something that must remain. In this regard, the author will determine reference values - content security concept in the pre-Cold War and post-Cold War. The individual and collective values, national international and global values will be determined, and, in the last part of the paper, the author will talk about the traditional and the modern concept of national security and international security.

Keywords: the concept of security, reference values and interests, the traditional and the modern concept of national security and international security.

INTRODUCTION

"The concept of security is theoretical and practical construction of protection and promotion of reference values and interests of certain categories of objects, which are objects of security. The security concepts are a product, but also means of the security theory and practice, and their value is conceptually innovative and instrumental. They are also called and levels (analysis) of security. They occurred on the basis of relevant security practice, primarily with an aim for improvement. Also, there was a need to

remove a number of omissions and ambiguities in determining the notion of security".[1]

Security is a dynamic phenomenon, so there is change in the conceptual determinations with respect to the reference values, dangers that threaten them, the subjects, the manner and means of protecting them. For example, in the center of the so-called Cold war (state centric – "Westphalian") security are: territory and borders of the state, external security of the state, military factors of safety, human factor, relation East – West, willingness of state action and the central role of the states in security. At the heart of the so-called Post cold security is: individuals and the community, environmental and natural factors (improvement of the environment), global security, preventive and revitalizing role of states, with the emergence of non-state actors of security.[2]

The effort security to be defined universally as "the absence of threats to acquired values, respectively the absence of fear that these values can be attacked", open certain dilemmas: whose values may be threatened; what are those values, who can threaten them; who will manifest fear of this type of threat, how to distinguish between sincere and false fear and whether the absence of threats or fear should be understood in absolute or relative terms?[3]

The issue of "true definition" and building "a substantial affirmative concept" for security is almost impossible. We could rather talk about definitions and theoretical constructs that are more or less useful or relevant, but which cannot be completely accurate or completely inaccurate. Generally, the term security can be defined by giving the answer to these questions and their concentration and certain logical rounded and harmonious mental purposes.

All these questions can essentially be reduced to a few of the following, namely:[4]

Whose security? - It is necessary to identify an object or subject of protection. As a so-called "reference object" or "reference entity" of

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[1] Mihajlovic Sasa., Keserovic, Dragomir., *Osnovi bezbednost*, Faculty of security and protection , Banja Luka, 2010

[2] Law, D. M.: Ljudska bezbednost i reforma sektora bezbednosti, deset godina posle, Ljudska bezbednost, n.2, Faculty of civil security , Belgrade 2004, pg. 96.

[3] Presiding to Mihajlovic Sasa., Keserovic, Dragomir., *Osnovi bezbednost*, Faculty of security and protection , Banja Luka, 2010. Expand see:Møller, B.: Nacionalna, socijetalna i ljudska bezbednost – Opšta razmatranja sa prikazom balkanskog slučaja, *Ljudska bezbednost*, broj 1, Fakultet civilne odbrane, Beograd, 2003 (number 1, Faculty of civil security, Beograd, 2003, pg 37.

[4] MIhajlovic, S ,, *Nacionalna bezbednost – od vestfalskog koncepta do posthladnoratovskog,* Vojno delo, number 2, Belgrade, 2009 pg 56-57 . Compare: Simic, D., *Nauka o bezbednosti, -savremeni pristupi bezbednosti* pg, 22.

protection can be: an individual, social groups, the state and the international system [1]

Security of what - you need to identify the values and interests that are the subject of protection, i.e. the object of threats;[2]

Security of whom / what? – it involves identifying sources, holders and the types of threats to protected values, which can be of natural, human and technological nature;[3]

Who performs the services of security? - It is necessary to identify the entities that protect the values; and[4]

How is safety exercised? - It is necessary to identify the priority methodologies – methods, tools and activities to protect specific endangered reference values and interests.[5]

Based on the aforementioned issues are created different concepts or notions of security.

The analysis of these issues or their wide versions (e.g. Security for whom, security for which values, security from what threats, what means to safety, at what price and how long),[6] we conclude that the concepts are actually aggregate interpretation of security as a function (how is safety exercised) organization and system (who provides security), focused on the situation of accomplishment and protection of the reference values of the individual objects of security (whose security, safety and security of whom and from who /what).

It is reasonable in the center of security to be the man as an individual and collective, the state, international community and humanity. Therefore, we can talk about security of people, countries, international and global security. These levels of analysis are somewhat correlated, so all of them in their own way are important for the maintenance, protection and promotion of national security, from which they are derived. Finally, none of these

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[1] Presiding to Mihajlovic Sasa., Keserovic, Dragomir., *Osnovi bezbednost*, Faculty of security and protection , Banja Luka, 2010. Expand see: Baldwin, D. A.: The Concept of Security, Review of International Studies, No 23, British International Studies Association, 1997, p. 13

[2] Ibid., p. 13-14

[3] Presiding to Mihajlovic Sasa., Keserovic, Dragomir., *Osnovi bezbednost*, Faculty of security and protection , Banja Luka, 2010. For sources, resources and forms of threats see: Rakic, M., Vejnovic, D, ,, Sistem bezbednosti i drustveno okruzenje', Banja Luka, 2006

[4] Presiding to Mihajlovic Sasa., Keserovic, Dragomir., *Osnovi bezbednost*, Faculty of security and protection , Banja Luka, 2010. For subjects of security see: Rakic, M., Vejnovic, D., ,, Sistem bezbednosti i drustveno okruzenje'', Banja Luka 2006

[5] Baldwin, D., The Concept of Security, op. cit., p. 16.

[6] Baldwin, D. A.: The Concept of Security, Review of International Studies, No 23, British International Studies Association, 1997, p . 12-17

concepts denies the others, nor the values and interests promoted within them.

STATE AND TRANSNATIONAL SECURITY CONCEPT

According to the state security concept, object of protection is to achieve security of the state. The concept of transnational security is relatively new and exposes a new, very dangerous phenomenon of security plan during the post cold war world. The idea starts from the assumption that in the future sub-state and transnational actors will be a serious source of instability. Transnational actors are multinational, transnational corporations, while the sub-state actors are terrorist groups, various social and national movements, ethno - national movements; religious extremists, criminal organizations, terrorists and insurgents, who despite acting on sub and transnational level still retain their connection with the states.[1] They have an increasingly important role on the international stage, and somewhat strive for possessing similar powers as that of the states. The new role of non-state actors and organizations is also emphasized (governmental and non-governmental organizations). They have their territorial bases. Most of them are involved in activities that transcend national boundaries. There is an increase in the non-state actors in those areas in which most threatened are the interests of individuals, groups, nations and the world in general. A group of non-government character can put pressure which may result in greater effects than other participants in international relations. They contributed to a faster decay of the weaker countries, whose state erosion ended with tragedies, wars, ethnic cleansing and massive violations of human rights. Some non-government organizations have contributed to the increasing chaos, and before the eyes of the world public display images of breaking of human rights, which was the main reason for the approval of military intervention and interference in the internal affairs of developing countries.

Despite national, international and regional security, global security as a concept grew out of the idealistic tradition and seeks to replace coercion, conflict and war in the international system with cooperation, negotiation and peaceful change. This means that the global security concept inevitably requires deepening and widening of security content outside military and political content i.e. the concept of global security incorporates human rights, environmental protection, economic prosperity and social development.

[1] Ibid, p.2

According to Barry Buzan[1] - author who studies new concepts of security in international relations by the subject or the level of analysis, security could be divided in:

Individual security
National Security and
International (regional) security.

We conclude that the traditional understanding of security is no longer able to explain the complex nature of contemporary security challenges, risks and threats. The introduction of the term "concept of security" in the scientific literature, is actually the reason to point out that security is an open dynamic system in which "conception" or "think safety" expresses a lengthy process, desired state, in terms of needs and values or something that must remain.[2]

Today, in the era of all dimensional globalization, the impression is created that the concept of security is obsolete, and new problem-oriented approaches are created. However, reality is not literally such. Namely many turbulences in the Cold War era obviously undermine the state's role in the international arena, but they did not overcome or change it [3] However, the security reality has changed: traditionally dominant national security is reconstructed in international security, because it includes the security systems of the countries, not just individual states - nations; this changes the agenda of security threats from purely exclusively military (mostly global or nuclear war) to a wide range of other threats, such as those relating to the environment, migrations and sexes. National security is deconstructed as the nation and the state often geographically do not match, and the focus on national security is relocated (moved) from the state to individuals and the community as primary security officers.[4]

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[1] Buzan, B.: *People, States & Fear – An Agenda for International Security Studies in the Post-Cold War Era*, Lynne Rienner Publishers, Boulder–Colorado, 1991.

[2] Kekovic, Z., Teorija sistema bezbenosti, Banja Luka 2009, p. 114

[3] Rosenau, J. N.: The Dinamism of a Turbulent World, World Security – Challenges for a New Century (eds. Clare, M. T.; Chandrani, Y.), St. Martin's Press, New York, 1998, p. 18–21.

[4] Presiding to Mihajlovic Sasa., Keserovic, Dragomir., *Osnovi bezbednost*, Faculty of security and protection , Banja Luka, 2010. Expand see: Shaw, M.: The Development of "Common-Risk" Society: A Theoretical Overview, Military and Society in 21st Century Europe – A Comparative Analysis (eds. Kuhlman, J.; Callaghan, J.) Transaction Publisher, LIT, Hamburg, 2000, pp. 13–26, u: Reforma sektora bezbednosti, (ur. Hadžić, M.), Institut G 17 plus CCVO, Beograd, 2003, p 186; Snow, D. M.: Same, p..1–13.

Notable are three approaches to expanding the traditional concept of national security [1] the first approach requires overcoming of the understanding that military aggression is the greatest threat to national security by including new wider potential threats, such as the negative economic development, environmental degradation (environmental degradation), human rights violations, threats to democracy and great migration movements.

The other approach involves expanding the content of security including numerous aspects of the individual, through regional to global security issues.

Finally, the third approach is based on traditional state- centric approach to security by including new forms and content (common, collective, and cooperative) security.[2]

STATE – CENTRIC AND HUMAN – CENTRIC APPROACH TO SECURITY

The expansion of the content of national security is reflected in the international and global security: between two reference facilities - the state and the people, establishing a dialectical relationship, and between internal and external threats to these objects and between the mechanisms for their protection. The modern national security emerges as a mid way between traditional and state-centric and "human-centric" approach to security. The safety of people covers a broader idea of security, from the exclusive preservation of national security (national sovereignty), to the safety of the individual (individual sovereignty).

The state is crucial in the defense of human security, because there is no security of the state if its people are not safe. At the same time, state and human security are the main content of international obligations and subject to interest and efforts of international organizations and states in their relations. So we come to the conclusion that human, national and international securities are closely related, and that primarily the states possess the capacity to protect. State-centered and human centered approach to security is necessary, but not complacent to solve contemporary security

[1] Presiding to Mihajlovic Sasa., Keserovic, Dragomir., *Osnovi bezbednost*, Faculty of security and protection , Banja Luka, 2010. Although there is a perception that " power , interests and material wealth of the states , as the basis for their security, long will be important factors of international life," are three important approaches to expanding the traditional concept of national security.

[2] Presiding to Mihajlovic Sasa., Keserovic, Dragomir., *Osnovi bezbednost*, Faculty of security and protection , Banja Luka, 2010. Expand see: Tatalović, S.: *Nacionalna i međunarodna sigurnost*, Politička kultura, Zagreb, 2006, p.8

problems. Human-centric security complements state-centric security by focusing on the people and deals with forms of insecurity, which are not threats to national security. They complement the concept of international and global security. Despite these arguments, many countries remain prone to state centered approach, respecting the safety of people.[1] Furthermore, recognition of events that threaten national survival and well-being are no longer limited to the military; the volume of threats has spread to human rights, the environment, economy, disease, crime and social injustice and inequality. The consequence of this is the extension of this concept in relation to the nature and type of threatening phenomena, and the methodology for their prevention and their eradication, namely: from military to non-military challenges, risks and threats to security; from military to non-military mechanisms to counter new security problems; the individual actions of the state to the common (joint) respond to security problems - the protection of the territory and sovereignty to the protection of common values .[2]

Many listed factors, including the crisis of the so-called internal safety of the countries have made the traditional concept of national security unsustainable. So, the research and the practical field of national security are extended in several directions:

-" Up" towards the international and global security;

- "Down" towards the social, human and individual security and;

- "Sideways" (horizontal) towards cultural, political, economic, environmental, health, energy, information technology, food, social and other areas of security.[3]

The security of the state (state security), or the concept of national security (national security) is among the so-called old, traditional approaches to security. At its center is the sovereign state, respectively its survival, territory and sovereignty as vital values and interests that are protected by

[1] Presiding to Mihajlovic Sasa., Keserovic, Dragomir., „Osnovi bezbednost, Faculty of security and protection , Banja Luka, 2010. Expand see: Slaughter, A-M.: A North American Perspective, The New Challenges to International, National and Human Security Policy, The Trilateral Commission, Warsaw, 2004, p. 9, 19; Kerr, P.: Razvoj dijalektičkog odnosa između državocentrične i ljudskocentične bezbednosti, Ljudska bezbednost 2 (ur. Dulić, D.), Fund for an Open Society, Belgrade, 2006, p. 22, 35–39, 45.

[2] Presiding to Mihajlovic Sasa., Keserovic, Dragomir., *Osnovi bezbednost*, Faculty of security and protection , Banja Luka, 2010. Expand see: Baldwin, D. A.: same; Johnson, T. A.: National Security Issues in Science, Law and Technology, Routledge, London, 2008.

[3] Presiding to Mihajlovic Sasa., Keserovic, Dragomir., *Osnovi bezbednost*, Faculty of security and protection , Banja Luka, 2010. Compare to: Alkire, S.: Konceptualni okvir za ljudsku bezbednost, Ljudska bezbednost 1 (ur. Dulić, D.), Fund for an Open Society, Belgrade 2006, p.109

military facilities and the ability to deter military aggression or to respond successfully.[1]

The concept of state sovereignty, according to which no one is above the state, unites these legal rights, including sovereign political authority based on territory and autonomy. Territoriality is the right to exclusive political authority over a geographic area (internal sovereignty), and autonomy means that no external factor – e.g. another state - has authority within the defined boundaries of the states (external sovereignty).[2]

"The concept of national security is based on the doctrine of the inviolability of sovereignty, which dates from Augsburg peace in 1555, the ruler who got the right to decide the religion of their country (cuius regio, eius religio – whose realm, his religion). This right is confirmed and reviewed with the Paris peace in 1635 and the peace of Westphalia of 1648, which ended the Thirty Year religious war in Europe between Catholics and Protestants (conflict over religion and supremacy of the Holy Roman Empire and the Pope as supreme sovereign who rules on the basis of God's law, caused a civil war in Bohemia in 1618, a war that extended across Europe). It is the last feudal war and the first war between sovereign states. After that, European rulers refused to recognize the authority of the Roman Catholic Church, replacing the system of papal power of the middle Ages in geographically and politically separate states that do not recognize any higher authority. The newly freed countries were given the same legal rights, territory under their exclusive control, unlimited control in matters of domestic politics and freedom for handling foreign policy and signing of agreements with other countries. World leading Catholic countries could ignore papal call to war with counter-reformist policy".[3]

The concept of state sovereignty is dominant in the Peace of Westphalia, when sovereign states are exclusive security actors at national and international level. That is why this concept is called state centric and

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[1] The concepts of national security, with more details see: - Mijalković, S .: Nacionalna bezbednost - od vestfalskog do posthladnoratovskog koncepta, Vojno delo - opštevojni naučno-teorijski časopis, n. 2 , Ministry of Defense of Republic of Serbia , Belgrade , 2009 , p. 55-73.

[2] Presiding to Mihajlovic Sasa., Keserovic, Dragomir., *Osnovi bezbednost*, Faculty of security and protection , Banja Luka, 2010. Expand see: – Nye J. S. Jr.: Understanding International Conflicts: An Introduction to Theory and History, Longman, New York, 1999, p. 207; Kegli, Č. V.; Vitkof, J. R.: Svetska politika – trend i transformacija, Centar za studije Jugoistočne Evrope, Fakultet političkih nauka i Diplomatska akademija MSP SCG, Beograd, 2006, p. 121; Holsti, K. J.: States and Statehood, Perspectives on World Politics (eds. Little, R.; Smith, M.), Routledge, London–New York, 2006, p. 17–23; Heywood, A.: Political Ideas and Concepts – An Introduction, MacMilan Press LTD, London, 1994, p. 49.

[3] Mijalkovich Sasha., Keserovich Dragomir., *Osnovi bezbednosti*, Faculty of Security and Protection, Banja Luka, 2010.

orthodox. Besides states, today for security are also important other entities acting on internal, but also on the international scene - individuals, social and private groups, non-governmental organizations, international organizations, etc. (the so-called non-state, sub-national and transnational actors).

In the center of the traditional concept of national security are the vital state values (sovereignty, territorial integrity, political independence, survival of states and national unity) and state interests in the anarchic (unstable and conflict) foreign policy, which are often against the interests of other countries, and should be protected from direct wars and subversive or nuclear threats (so called the concept of national values and foreign interests). Primary means of protection of the state is its power. It generally comes down to the military, and then the economic power, and the accession of the countries to certain alliances, by which the gained power would overcome the size and the destructive potential and active threats to it (the so called-strategy of deterrence) or its allies (the so called-strategy of extended deterrence).

For the security of states traditionally is used the phrase national security, regardless of the distinction in terms state and nation. It is thought that the first phrase is used by Walter Lippman in 1943 in his book American foreign policy.[1] This phrase, after the Second World War, became a standard term for the concept of security. Its use is not completely correct, given that it marks the security of states. Therefore the name National Security, which is less used, was actually more suitable because it marks the security of the state values and interests, primarily the sovereignty, survival of the state and society, the constitutional order and the order of power. The care of the daily security of the people was put in the background; it has been neglected or about certain aspects "shyly discussed". The biggest threats and dangers to national security are armed attack outside and various forms of "subversion from within and externally supported" (and vice versa), rather than economic, social, environmental, educational, health, nutritional, physical security problems and other problems of the people. In this sense, security is identified with the so-called External security of the country and the citizens represented instruments of the operational security or defense of the country.[2]

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[1] Presiding to Mihajlovic Sasa., Keserovic, Dragomir., *Osnovi bezbednost*, Faculty of security and protection , Banja Luka, 2010. Expand see: Tatalović , S .: *Nacionalna i međunarodna sigurnost*, Politička kultura, Zagreb, 2006, p. 143

It is interesting to note that within the intelligence and security system of the Kingdom of Yugoslavia, under the Ministry of Interior, there Directorate of National Security, which refutes this claim.

[2] Mijalkovich Sasha., Keserovich Dragomir., *Osnovi bezbednosti*, Faculty of Security and Protection, Banja Luka, 2010.

Modern national security is a synthesis of safety of society (regardless of ethnic, racial and ideological orientation of its members) and the security of the state, and their participation in international and global security. It is about a state of protection of its vital interests and values, which are realized by means of the functioning of government and non-government sector of the national security system, by relying on the types of international cooperation in security. The references of the national and state values and interests are protected from a variety of threatening phenomena (today it is protection from crime, terrorism, internal armed conflicts, environmental and social threats, natural and technological disasters), and not predominantly from armed aggression, political, military and economic pressures or subversive actions of other countries. An important area of the protective function is to prevent threatening phenomena (so-called-reducing the dangers). In the protection of national security participate entities at all levels of security: individuals, society, nations, and the international community. States still have all capacities (human, material and technical and organizational) for the protection of all levels of security from most of the challenges, risks and threats.

Traditional reference values of national security are presented as survival in the broadest sense, the survival of the state, national survival, physical survival, territorial integrity, political independence, quality of life, national identity, and national interests. On the threshold of the third millennium, as vital values of national security, despite the defense part is the safety of citizens, health security, economic security, environmental security and social security.[1]

Reference values of contemporary national security are primarily peace, freedom, rights and safety of people and social groups, quality of life, national unity, dignity, dignity and identity, a healthy environment, energy stability, economic and social prosperity, information resources, legal order and the rule of law; territorial integrity, political independence and survival of states and societies. Reference interests are a function of the reference values.

In the era of globalization and a whole international integration, we have witnessed the abolition of borders in Europe, the creation of a single market for production, capital, goods and services, homogeneous international-regional policy, increase in the tolerance between traditional adversarial nations and states, transferring some traditional state-exclusive powers to supranational and non-governmental entities, the creation of joint

[1] Presiding to Mihajlovic Sasa., Keserovic, Dragomir., *Osnovi bezbednost*, Faculty of security and protection , Banja Luka, 2010. Expand see: Simić, D. R.: *Nauka o bezbednosti – savremeni pristupi bezbednosti*, Službeni list SRJ i Fakultet političkih nauka, Beograd, 2002, p. 30

armed forces, improving the model of police cooperation, greater cooperation in the field of security and start in the development of a single supranational security system. This brings into question the purpose of their existence and legitimacy of the traditional concept of national security.

INTERNATIONAL SECURITY

International security is security in relations between states, the international security system and community. It occurs as a result of the need to stabilize, control and to make safe the anarchic state relations, which are the product of the inability to control the development of power and the use of force, or the product of regulatory impotence over international institutions.

International security is stipulated by countries with asymmetric political, economic and military power, countries which strive to achieve mutual conflicting interests. International security can be seen at worldwide level (World, planetary security), Continental (Continental security) and regional level (regional security).[1]

Relations between states are accomplished through cooperation, through competition clashes, even international security has always been created by two models: the conflict model (their own safety as well which countries compete) and cooperative model (own security as a common goal of the state).[2]

Traditionally, the primary subject of international relations, international law, international security, is the etiology and control of forces as a form of international communication. This approach justifies "the impression that in every century as some sort of natural law-appears a country that has power and will, intellectual and moral strength, in accordance with its own system of values to shape the entire international order, to affect international relations, to interfere in the internal affairs of other countries, to impose their own values and to engage itself beyond its borders".[3]

So, power is constant in international relations; what changes is its intensity and shape (overt or covert, military, political and / or economic,

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[1] Compare - Mijalkovich , S. , Bezbednost države i koncepti međunarodne bezbednosti, Defendologija- theoretical journal for safety , security, defense , education , training and qualification , number 25-26 , Defendologija Center for Security, Sociological and Criminological Research , Banja Luka , 2009 , p . 69-83 .

[2] Presiding to Mihajlovic Sasa., Keserovic, Dragomir., *Osnovi bezbednost*, Faculty of security and protection , Banja Luka, 2010. Expand see: Tatalović , S .: Ibid p. 228

[3] Presiding to Mihajlovic Sasa., Keserovic, Dragomir., *Osnovi bezbednost*, Faculty of security and protection , Banja Luka, 2010. Expand see: Kissinger, H .: Diplomatija I, Verzal Pres, Belgrade, 1999 , p 5th

direct or indirect - through third actors or on the territory of third countries, legitimate or illegitimate, legal or illegal). However, international security is not a simple sum of the security of states as main subjects of the international community. It requires the construction of a system of international values that states and other international actors will respect. The fact that the use of force in international relations has been constant in the past, suggests that probably it will happen in the future. Aware of this, states sought to prevent and control this use (the traditional concept in the past and today the modern concept of international security).

According to the traditional concept of international security mechanisms for maintaining international security are: the balance of power, collective security, world government, while according to the modern concept of international security mechanisms for maintaining international security are: security community, security mode (security regime); security complex, security cooperation (cooperative security).

Today we talk about global security concept that is an extension of the security of mostly military area to other areas, primarily economic, energy, social and environmental security, including the security of the individual and society as a whole. It is determined by the global security interests and global threats, which include individual, national and regional security that exist between ideal political and / or real political relationship between sectors (political, legal, military, economic, social and environmental), which is essentially a mutual correction, controlling and modeling to achieve peace and security on the planet and people.[1]

Furthermore we will determine the types of security that are content to global security.

"Territorial security is a state of non-violence of territorial integrity. Territorial integrity is synonymous with the sacred integrity of the national territory of the state, respectively its indivisibility-not splitting part and parts of the national territory without the consent of the state and its citizens. Preservation of territorial integrity is one of the conditions for the survival of the state and society.

The safety of state sovereignty implies political independence, autonomy of the states. State government and state are sovereign, when they are not subordinate to a higher authority within the country or abroad, or when they have a legal opportunity to their own decisions to determine the framework of its authority and interventions and to apply all necessary measures to protect its sovereignty".[2]

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[1] Kotovchevski, M., National Security of the Republic of Macedonia, the first part, Skopje, 2000

[2] With independence, the state government is continuous and indivisible. Marković, R .: Ustavno pravo i političke institucije, Službeni glasnik, Beograd, 1995, p. 178

Social Security means comprehensive guarantee for citizens against certain risks, the occurrence of which might reduce or case damage to professional skills, reduces the standard of living or impose obligations and duties. It refers to "that complex of activities performed by the community (through public services) so that ensures its citizens their well-being or physical, moral and intellectual development, guarantee funds, which are sufficient to meet needs at any stage of life, but also means that will protect them from all the major risks (social insecurity), which may affect their lives and the community".[1]

The economic and energy security means protection of economic and energy potentials from physical threats with the absence of danger that can threaten the economic and energy stability and independence. The economic and energy stability imply regular functioning of the economic and energy systems, and realization of the desired and planned situation of economic and energy development, as well as their persistent protection and protection of the interests of their users. In addition, the energy stability covers energy efficiency and energy availability....

Energy efficiency is the reliable and efficient supply of citizens and other users with energy or increasing the availability and efficiency of energy supply to the consumers, the modernization of the energy system (infrastructure and installation), which increases the efficiency in the use of energy, improves functional and healthy environment for the user and reduces local and global environmental impact. Energy availability is the possibility of physical availability of required quantity and types of energy to consumers of energy, at a price that does not jeopardize the quality of life. Economic and energy independence (autonomy) involves national independence from foreign economies (import), international donations and aid, as well as the independence of energy supply by other countries and international organizations.[2]

Information security is a state of protection of important life values and interests of the individual, society and the state in the sphere of information from internal and external threats (risks) or the state of protected information environment of the society, which allows its creation, use and development in the interest of citizens, organizations and countries.[3] It is not

[1] Presiding to Mihajlovic Sasa., Keserovic, Dragomir., *Osnovi bezbednost*, Faculty of security and protection , Banja Luka, 2010. Expand see: Nedeljković, Lj.: Osiguranje za slučaj nezaposlenosti u Srbiji (magistarska teza), Faculty of Law, University of Belgrade, Belgrade, 2007, p. 16

[2] Presiding to Mihajlovic Sasa., Keserovic, Dragomir., *Osnovi bezbednost*, Faculty of security and protection , Banja Luka, 2010.

[3] Presiding to Mihajlovic Sasa., Keserovic, Dragomir., *Osnovi bezbednost*, Faculty of security and protection , Banja Luka, 2010. Expand see: Petrović, L.: Informaciona sigurnost

only one of the security sectors, but the intersection of all security areas in which information technology occupies an important place.

Environmental security is an integral component of the security of the individual, society, state and the international community, and marks:

- Security environment (environmental protection) - its protection, maintenance and enhancement that protect it from the effects of threats of natural, human or technical-technological origin (risks and threats to the environment) and

- Security of the people, countries, international organizations and the planet, or security from contaminating their safety with effects of degraded environment (environmental risks and threats).[1]

CONCLUSION

Security is a dynamic phenomenon, so there is change in the conceptual determinations with respect to the reference values and interests, dangers that threaten them and the subjects, the manner and means of protecting them.

The issue of "true definition" and building "a substantial affirmative concept" for security is almost impossible. Rather we could talk about definitions and theoretical constructs that are more or less useful or relevant, but which cannot be completely accurate or completely inaccurate. Generally, the term security can be defined by responding to the following questions: Whose security? Security from whom / what? Who's carrying out security services? By which means is security accomplished?

And based on the issues mentioned before, different concepts or notions of security are created. Therefore we can conclude that the concepts are actually aggregate interpretation of security as a function (how is safety exercised) organization and system (who provides security), focused on the situation of accomplishment and protection of the reference values of certain objects of security (whose security, safety and security from whom who/what).

In the era of all dimensional globalization, national security is restored in international security, because it includes the security systems of the countries, not just individual nations; this changes the agenda of security threats from purely exclusively military to a wide variety of other threats, such as those relating to the environment, migrations and gender; National

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u savremenom svetu, Info M - Journal of Information Technology and Multimedia Systems, No. 24, Faculty of Organizational Sciences, Belgrade, 2007, p. 10-11.

[1] Presiding to Mihajlovic Sasa., Keserovic, Dragomir., *Osnovi bezbednost*, Faculty of security and protection , Banja Luka, 2010.

security is deconstructed as the notions nation and state often do not geographically match, and the focus on national security is relocated (moved) from the state to individuals and the community as primary security officers.

According to the traditional concept of international security mechanisms for maintaining international security are: the balance of power, collective security and world government, while the concept of the modern international security mechanisms for maintaining international security are: security community, security mode (security regime), security complex, security cooperation.

The global security today is determined by the global interests and global threats, together with the security of the state and safety of citizens, its content expands on territorial security, security of national sovereignty, social, economic and energy security, environmental security, information security, etc.

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NATO DEPLOYABLE CAPACITIES AND CAPABILITIES POLICY

Igor Gorevski, PhD

Abstract

Faced with the challenges of the new era and the implementation of numerous international operations for establishment of peace around the world, at the beginning of the 21st century NATO introduced a deployable capacities and capabilities policy for its members and partner countries. This policy aims to reduce the burden of the United States and other major powers in conducting international operations, and to enable inclusion and contribution to international operations of smaller countries in accordance with their available national resources. This NATO policy began to come into view at the Prague Summit 2002 and was specifically defined in Riga Summit 2006, complemented with the declarations of the next summit of NATO and the New Strategic Concept 2010. "At the Chicago Summit, Allied leaders agreed on how best to prepare for future security challenges which could also include non-conventional threats, such as cyber attacks. According to the summit documents and declarations, Allies leaders agreed that by 2020 the Alliance will have a coherent set of deployable, interoperable and sustainable forces that are equipped, trained, exercised, and commanded so as to be able to meet the objectives to which the Alliance has set itself. These Allied forces should be able to operate together, and with partners, in any environment". Despite the member countries, the partner countries and countries aspiring to NATO membership also have an obligation for development of such forces. Macedonia adopted this NATO policy for development of deployable capacities and capabilities.

Key words: *NATO, policy, deployable capacities and capabilities*

INTRODUCTION

After the tectonic changes which took place in the Euro-Atlantic area in the late XX century, NATO rapidly began to develop multitude policies. These policies aimed to prepare the Alliance for political and military action in the new changing strategic environment in the world. The development of deployable capacities and capabilities policy was one of these policies. This policy has been developed evolutionary as the Alliance evolves and transforms. Fully, the origin of the modern concept of the NATO's

deployable forces was set in 1994 with the establishment of the Combined Joint Task Forces. Since then, NATO has conducted several cycles of transformation with the main objective to ensure that its policies, capabilities and structures are appropriately dimensioned to cope with the current and future security challenges and threats. Thus, NATO aims to ensure consistency in the implementation of its modern, deployable, and sustainable capabilities and capacities policy. And now, three decades later, terminological confusion and controversy that implies this policy is still present. Most often, at the expert public and in particular the involved subjects there is a different interpretation of what is meant by the terms declared, deployable, sustainable and deployed capacities and capabilities. Namely, by the term "declared" capacities and capabilities, NATO understood forces that each country prepares, trains, and equips in accordance with the NATO's operational capabilities concept. These forces are primarily prepared for the purposes of the national army, which does not mean that they will automatically be deployed at the NATO request. The "deployability" of the capacities and capabilities is the number of forces (land, maritime, and air) that countries are able to prepare, equip, and send in operations at NATO request with previous decision of the national authorities. The "sustainability" of capacities and capabilities is the overall number of force strength that countries are able to deploy and sustain in operations for an extended period of time (this period is defined as a total of 18 months). "Deployed" capacities and capabilities are forces that countries have already deployed in international operations. The current NATO level of ambition for each country has in place and sustains deployable capacities and capabilities at a level of 50% of its strength by 10% simultaneously deployed in operations.[1] In parallel with the development of the deployable capacities and capabilities policy, NATO introduced a range of tools and mechanisms aimed at standardizing of all procedures and processes, as well as to achieve greater interoperability of allies and partners forces. Most obvious is the interoperability of forces in the area of training through joint exercises, evaluation through the Operational Capability Concept, i.e. in accordance with CREVAL* and TACEVAL** standards and in other areas.

These tools and mechanisms led the majority of NATO member countries to reach the level of deployable forces, but the level of constantly deployed forces is still below the planned 10 percent. The situation is similar

[1] Andreas F. Rasmussen, *The Secretary General's Annual Report 2011*, (Brussels: NATO Public Diplomacy Division, 2012), 17, http://www.nato.int/nato_static/assets/pdf/pdf_publications/20120125_Annual_Report_2011_en.pdf.

* Combat Ready Evaluation

** Tactical Evaluation

in the partner countries which have adopted the NATO deployable capacities and capabilities development policy. Its deployable and sustainable forces are equipped, trained, and prepared in compliance with the NATO requirements and standards. The percentage in the part of deployed forces varies from country to country depending on its national resources. The need of continuous development of deployable capacities and capabilities for the Alliance is more than necessary to achieve the set of the overall range of goals and objectives for keeping and promotion of peace, security and stability in the Euro-Atlantic area. In the development, sustain and promotion of such capacities and capabilities, NATO actively involves its partners, not only from Europe, but also from the other parts of the world and countries aspiring for NATO membership.

This deployable capacities and capabilities policy is more and more implemented by partner countries from the NATO partner networks. Over time, NATO ambitions are constantly evolving for deployable capacities and capabilities that member countries and partners need to have ready for deployment at any time. The NATO policy on participation in crisis management operations has fueled the parallel development of the Alliance deployable capacity policy.

NATO DEPLOYABLE CAPABILITIES AND CAPACITIES POLICY FROM PREVIOUS TO THE NEW STRATEGIC CONCEPT 2010

At the Summit in Prague in 2002, NATO launched a new Action Plan of the Alliance for dealing with global threats and conducting crisis management operations. In the Prague Declaration paragraph 4 states that "in order to carry out the full range of its missions, NATO must be able to field forces that can move quickly to wherever they are needed ... to sustain operations over distance and time, including in an environment where they might be faced with nuclear, biological and chemical threats, and to achieve their objectives".[1] In order to implement this policy, it is necessary that NATO takes over concrete steps in terms of strengthening of its relationships and partnership with the European Union and to support the development of the European Security and Defence Identity. Alliance does it because "the NATO and the European Union share common strategic interests".[2] NATO does the first step in that makes available to the EU its own capacities for conducting crisis management operations in Europe. However, in recent

[1] "Prague Summit Declaration, Issued by the Heads of State and Government Participating in the Meeting of the North Atlantic Council in Prague, 21 November 2002," NATO Press Release (2002)127, last modified January 18, 2008, www.nato.int/docu/pr/2002/p02-127e.htm.

[2] "Prague Summit Declaration"

years the EU has failed to improve the necessary level of usability and deployability of its military component embodied by Battle Groups. In contrast to the EU, NATO has acted quickly and in 2002 established NATO Response Force (NRF) wich full operational capability was declared in 2006. NATO promoted these forces as a "coherent, high-readiness, joint, multinational force package … technologically advanced, flexible, deployable, interoperable and sustainable".[1] Through these forces, NATO aimed to improve interoperability among the member countries on the buttlfield and support the creation of modern, versatile and deployable forces.

With the Riga Summit Declaration a step forward was made in the development of deployable capacities and capabilities policy when member countries stated that "the adaptation of our forces must continue. We have endorsed a set of incentives to increase the capacity of our forces to address contemporary threats and challenges".[2] Those incentives beside the other also include "improving ability to conduct and support multinational joint expeditionary operations far from home territory with little or no host nation support and to sustain them for extended periods".[3] The requirements are that those forces should be deployable, sustainable and interoperable and that they can be deployed at any moment. While the Comprehensive Political Guidance of 29 November 2006, part 3 "Guidelines for Alliance Capability Requirements" paragraph 13 in given detailed information on what is required by allies and partners in this area and what level of deployable and deployed forces should be achieved by them. "On this basis, the Alliance requires sufficient fully deployable and sustainable land forces, and appropriate air and maritime components. This requirement is supported by political targets as set out by the Defence Ministers for the proportion of their nation's land forces which are structured, prepared and equipped for deployed operations (40%) as well as the proportion undertaking or planned for sustained operations at any time (8%), and by the Allies undertaking to intensify their efforts, taking into account national priorities and obligations, to this end".[4] Also, the Allies reached an agreement to intensify their efforts, taking into account national priorities and obligations to accomplish this

[1] Ulrich Karock, *Strasbourg – Lisbon-Chicago: NATO Quo vadis?* (Brussels: Policy Department, Directorate-General for External Policies, European Parliament, 2013), p. 12

[2] "Riga Summit Declaration, Issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Riga, 29 November, 2006," NATO Press Release (2006)150, last modified February 27, 2009, www.nato.int/docu/pr/2006/p06-150e.htm.

[3] "Riga Summit Declaration"

[4] "Comprehensive Political Guidance, endorsed by NATO Heads of State and Government," North Atlantic Treaty Organization, last modified November 29, 2006, www.nato.int/cps/en/natolive/official_texts_56425.htm?selectedLocale=en.

goal. In paragraph 16, sub-item "a" specifies that “this requires forces that are fully deployable, sustainable and interoperable and the means to deploy them”.[1] Despite qualitative requirements, as NATO’s top priorities are definite “joint expeditionary forces and the capability to deploy and sustain them; high-readiness forces; the ability to deal with asymmetric threats; information superiority; and the ability to draw together the various instruments of the Alliance brought to bear in a crisis and its resolution to the best effect, as well as the ability to coordinate with other actors”.[2]

In the Bucharest Summit Declaration issued on April 3, 2008 the Alliance sets higher goals "continue to transform our Alliance with new members; better responses to security challenges, taking into account lessons learned; more deployable capabilities; and new relationships with our partners”.[3] To accomplish this goal, countries will continue their efforts to be able to deploy and sustain and do their forces more deployable. In the Strasbourg / Kehl Summit Declaration on 04 April 2009, in paragraph 3 it is stated that “the indivisibility of our security is a fundamental principle of the Alliance, and an ongoing transformation will strengthen the ability of the Alliance to confront existing and emerging 21st century security threats, including by ensuring the provision of fully prepared and deployable forces able to conduct the full range of military operations and missions on and beyond its territory, on its periphery and at strategic distance.[4] Also, the political commitment to provide forces to meet the requirements of the Alliance is expressed. In this context, NATO continues to support efforts on member countries to do forces more deployable, sustainable, interoperable and more useful. Such political efforts are supported by the Declaration on Alliance Security issued on April 4, 2009 which states that “we must make our capabilities more flexible and deployable so we can respond quickly and effectively, wherever needed, as new crises emerge”.[5]

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[1] "Comprehensive Political Guidance”

[2] "Comprehensive Political Guidance”

[3] "Bucharest Summit Declaration, issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Bucharest on 3 April 2008 (NATO)," NATO - Homepage, last modified May 8, 2014, http://www.nato.int/cps/en/natolive/official_texts_8443.htm.

[4] "Strasbourg / Kehl Summit Declaration Issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Strasbourg / Kehl on 02 April 2009," NATO Press Release (2009) 044, last modified May 8, 2014, www.nato.int/cps/en/natolive/news_52837.htm?mode=pressrelease.

[5] "Declaration on Alliance Security , issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Strasbourg / Kehl," NATO Press Release (2009) 043, 4 April 2009, last modified August 7, 2012, http://www.nato.int/cps/en/natohq/news_52838.htm.

The results from these policy could be best seen in the period between 2004 and 2010 when "the number of land forces that can be deployed and sustained has increased: the number of deployable troops has risen by just over 6.5 per cent and the number of sustainable troops by over 21 percent"[1] (Rasmussen 2012, 17). These land forces were "supplemented in 2009 by targets for air forces with 40 percent deployable and 8 percent sustainable in operations… available for deployed operations, including out-of-area and at strategic distance".[2]

NATO DEPLOYABLE CAPACITIES AND CAPABILITIES POLICY WITH THE NEW STRATEGIC CONCEPT 2010

Allies adopted the New Strategic Concept in Lisbon in 2010 which is a new action plan that NATO will become more efficient than ever before. The Allies Strategic Concept stresses deployability and sustainability of the forces, development of joint capabilities, as well as the modernization ability.[3] According to NATO Secretary General Rasmussen *"NATO is an unparalleled community of freedom, peace, security and shared values*." *"But the world is changing. We face new threats and new challenges. And this Strategic Concept will ensure that NATO remains as effective as ever in defending our peace, our security and our prosperity."*[4] From the Concept it can be seen that in the future NATO plans to invest more resources in the development of deployable capacities not only among member countries, but also among the partner countries. However, the NATO Lisbon Summit Declaration issued in November 20, 2010 we could see a small slowdown in development of deployable capacities policy because it merely reaffirms the policy development of deployable forces in times of economic crisis.[5] At this Summit, NATO has stressed commitment to fully implement the reforms and transformation. Also, it stressed its continuation of member countries national efforts to do its forces more easily deployable, sustainable and interoperable and in that way to become more usable. A more detailed

[1] Rasmussen, *The Secretary General's Annual Report 2011*, p. 17
[2] Rasmussen, *The Secretary General's Annual Report 2011*, p. 17
[3] "Active Engagement, Modern Defence - Strategic Concept for the Defence and Security of the Members of the North Atlantic Treaty Organization adopted by Heads of State and Government in Lisbon on 19 November 2010," NATO, last modified May 23, 2012, www.nato.int/cps/en/natolive/official_texts_68580.htm.
[4] Andreas F. Rasmussen, "NATO Adopt New Strategic Concept" (speech, Press Conference, The Lisbon Summit of Heads of State and Government, Lisbon, November 19, 2010).
[5] "Lisbon Summit Declaration issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Lisbon," NATO Press Release (2010) 155, 20 November 2010, last modified July 31, 2012, www.nato.int/cps/en/natolive/official_texts_68828.htm.

review of this NATO policy is given in the Annual Report of the NATO Secretary General Rasmussen dated from 2011 where in the "usability" part it is said that a variety of measures have been used to deal with the development of deployable, interoperable and sustainable force. From 2004, the focus is on the so-called usability of Alliance forces. "Under this incentive, targets are set for the deployability and sustainability of Allies' land forces of 40 percent of land forces to be deployable and the ability to sustain 8 percent on operations or other high-readiness standby. These targets were later raised to 50 percent and 10 percent respectively".[1] These forces are able to sustain deployed in operations with a high level of readiness, ready to be deployed at any time. The longstanding engagement to international operations, especially engagement in Afghanistan has a very positive impact on the development of the overall deployable capacities of NATO member countries and its partners. It contributed, today, Alliance as well as partner's forces to be much better prepared, apart from the past, to conduct worldwide expeditionary operations.

In the Secretary General's Annual Report of 2012, it is stressed that "NATO's forces have undergone a dramatic transformation. Armour-heavy land forces previously prepared for the defence of continental Europe are now capable of being deployed and sustained over great distances in diverse roles and in challenging, often unfamiliar environments".[2] The transformation of the defensive NATO forces give it a new quality of the overall development of deployable capacities and capabilities policy. It allowed "of the 23 European Allies with armed forces, the large majority of them increased the deployability and sustainability of their land forces by 2010, … and collectively generated 110,000 more deployable land forces in 2010 than in 2004, representing an increase of over 25 percent".[3] This increase in deployable capacities was monitored in parallel with the rise of necessary logistics elements for independent functioning of these forces in the operations in all conditions.

NATO DEPLOYABLE CAPACITIES AND CAPABILITIES POLICY AFTER CHICAGO SUMMIT 2012

With adoption of the Chicago Summit "Declaration of Defense Capabilities: towards NATO Forces 2020" in April 2012, a new impetus of

[1] Rasmussen, *The Secretary General's Annual Report 2011*, p. 17

[2] Andreas F. Rasmussen, *The Secretary General's Annual Report 2012*, (Brussels: NATO Public Diplomacy Division, 2013, 2013), p. 15, http://www.nato.int/nato_static/assets/pdf/stock_publications/20130131_Annual_Report_2012_en.pdf.

[3] Rasmussen, *The Secretary General's Annual Report 2012, p. 13*

the development of NATO deployable capacities policy was noted. NATO leaders have put the focus on development of joint capabilities and capacities capable of pursuits of key tasks arising from collective self-defense, crisis management and cooperative security in order to take the leading role in the promotion and protection of peace in the worldwide. It means that NATO in the forthcoming period significant attention will pay to the development of a coherent set of modern, tightly connected, deployable, interoperable and sustainable forces equipped, trained, exercised and commanded so that they can operate together and with partners in any environment.[1] In accomplishing this goal, NATO puts the emphasis on the support that should give Smart Defence Concept and Connected Forces Incentive. With the Smart Defense Concept, NATO plans to rationally use its resources and the resources of the member countries. It should provide effective and priority spending of resources and avoiding duplication. With this Concept, the focus is primarily placed on the development of joint capacities and capabilities between the member and partner countries. However, the decision for the development and deployment of the forces remains in national terms. According to this Concept, the focus is on the development of critical capacities through joint multinational projects which involve better force protection, better observation and better training. With this it is expected to deepen the connection between the Allied forces, to strengthen the relationship between the NATO command structure, and the NATO force structure and national headquarters.

While, the Connected Forces Incentive focuses on the interoperability of NATO's forces – their ability to work together. In this incentive, an important element is placed on promoting interoperability and readiness of the NATO Response Force, which will be more involved in training and exercises. For that purpose in 2013 "NATO developed tools to clearly illustrate the current performance of individual Allies across a number of areas, as well as wider trends in capability development over time. NATO forces need to be flexible, agile and deployable, with all the supporting infrastructure and logistics this entails so that they can respond to a variety of threats".[2] This trend of development of NATO deployable capacities and capabilities policy is expected to continue further. At the Alliance Summit in the United Kingdom in 2014, NATO gave a new impetus to this policy, but the requirements remain unchanged. After all, it seems that the Alliance will

[1] "Summit Declaration on Defence Capabilities: Toward NATO Forces 2020," NATO Press Release (2012) 064, 20 May. 2012, last modified May 20, 2012, www.nato.int/cps/en/natolive/official_texts_87594.htm?mode=pressrelease.

[2] Andreas F. Rasmussen, *the Secretary General's Annual Report 2013*, (Brussels: NATO Public Diplomacy Division, 2014), http://www.nato.int/cps/de/natohq/topics_106378.htm?

seek for enhanced engagement of its partners in the part of deployed forces in operations.

MACEDONIA'S DEPLOYABLE CAPABILITIES AND CAPACITIES POLICY AND CONTRIBUTION TO INTERNATIONAL OPERATIONS

Macedonia's deployable capabilities and capacities policy arises from the fulfillment of the strategic goals for full membership in NATO and in the EU. Political commitments to develop deployable capacities and capabilities are grounded in the National Security and Defence Concept 2003, Strategic Defence Review 2004, National Security Strategy 2008, Defence Strategy 2010 and the Long Term Defence Development Plan 2014 - 2023. Also, Macedonia has undertaken obligations in the framework on Partnership for Peace and in the Membership Action Plan for NATO. These obligations are reflected primarily by implementation of the requirements given in the Partnership Goals and NATO Planning and Review Process.

With the National Security and Defense Concept 2003 and the Strategic Defence Review 2004, the defense system got rid of the functions that are not related to defense, left the recruiting system and moved on to full professionalization and transformation of the defense and the army accordance with the NATO standards. With the implementation of the Strategic Defence Review obligations and Transformation cycle 2004 - 2012, the Army of the Republic of Macedonia has reached the level of 30 % deployable capacities and capabilities. The Defence Strategy 2010 set a higher goal and is committed to develop deployable capacity of a level of 50 percent and a level of 8 percent sustainable capacities and capabilities for participation in international operations. At the request of NATO, the Army of the Republic of Macedonia will deploy military force at a maximum level of one Medium Infantry Battalion Group and National Support Element.[1] The mechanisms on how to achieve these goals, in more details are worked out in the Long Term Defence Development Plan 2014 - 2013. In 2012, a new cycle of transformation of the army began and it plans "to further develop and sustain interoperable and deployable forces and capabilities to a level of 50% of the overall structure of the ground forces of the Army".[2] This

[1] The President of the Republic of Macedonia, *Defence Strategy of the Republic of Macedonia*, (Skopje: Official Gazette of the Republic of Macedonia No. 30 of 01.03.2010).
[2] Ministry of Defence of the Republic of Macedonia, *Long-Term Defence Development Plan: 2014-2023*, (Skopje: Ministry of Defence of the Republic of Macedonia, 2014).

projection is supported and synchronized with the NATO Planning and Review Process and obligations arising from the Partnership Goals 2014* that our country has consistently implemented.

The results from the implementation of the NATO deployable capacities and capabilities policy and implementation of NATO standards in the development of defense and transformation of the Army confirmed that Macedonia has made much on this plan. With the Army transformation process, Macedonia has developed and sustained its own capacities and capabilities according to the NATO requirements for deployable capacities and capabilities policy. According to the official documents, for contribution to NATO / PfP activities Macedonia has declared a Medium Infantry Battalion Group, Role 2 Medical Treatment Facility from the beginning of 2014, Two Transport / utility Helicopters MI-8/17, Long-range Surveillance Company, Two Special Operations Forces Teams, Military Police Company, Engineer Platoon and Engineer (Demining) Team.[1] All these forces have declared according to the Operational Capability Concept and have already been evaluated or will be adequately evaluated in near future.

Another excellent example for usability of deployable capacities and capabilities of the Army of the Republic of Macedonia is the so far contribution to the international operations. It proves that the Republic Macedonia became a significant contributor to security from the very beginning. Today, the Army of the Republic of Macedonia actively contributes in three international operations (ISAF, ALTHEA and UNIFIL) and gives support to the NATO forces in KFOR. "Since 2002 up to the present time, more than 3 300 troops or 50 percent of our Army have been deployed in international operations".[2] It is confirmed that Macedonia has adopted and practically in national frameworks implements the NATO deployable capacities and capabilities policy. Macedonian's intentions are to continue to develop its national capacity and capabilities in accordance with the NATO policies and though for a long time will keep the primacy of a country with the longest experience in the "waiting room" for full NATO membership.

In parallel with the development of capacity and capabilities for NATO-led operations, Macedonia actively contributes to the field of the EU

* In April 2014, the Republic of Macedonia has adopted a new Package of Partnership Goals 2014 in total 37, which purpose is enhancing of the overall Army interoperability with these of NATO members.

[1] Ministry of Defence of the Republic of Macedonia, *Long-Term Defence Development Plan: 2014-2023*.

[2] Talat Xhaferi, "Addressing of the Minister of Defense of the Republic of Macedonia" (speech, Referring on the military readiness of the Army of the Republic of Macedonia, Army House, Skopje, February 17, 2014).

Common Security and Defence Policy. In the second half of 2012, the Republic of Macedonia participated in the EU battle group. In 2013 it declared its capacities and capabilities in the Declared Force Catalogue of the EU, and participates in the EU battle group in the second half of 2014 with 130 - 150 personnel.[1]

It makes Macedonia a strong promoter of common and shared values of the EU and NATO and a strong contributor to peace, security and stability in the Euro-Atlantic area. We expect this trend to maintain in the forthcoming period, and this should be reflected in a rapid equipping and modernization of the armed forces in the next ten years and afterwards. Confirmation of this is the commitment of the Government of the Republic of Macedonia, which according to projections in the Long-Term Defence Development Plan of the Republic of Macedonia 2014 - 2023, plans a long-term investment in defense. These investments are planned to exceed over 200 million euro in military equipment and other necessary combat systems. This policy of the Government should be an additional incentive to continue the implementation of the NATO deployable capacities and capabilities policy.

CONCLUSION

The NATO deployable capacities and capabilities policy will continue to develop upwards in the forthcoming period. This deployable forces policy is a logical consequence of the overall NATO policy of conducting international operations to preserve peace, security, and stability in the Euro-Atlantic area. At the last NATO Summit in the United Kingdom in September 2014 the Alliance was focused on achieving previously set goals of the member countries and partners. It is a logical consequence of the continuity of the NATO policy to participate in international operations and fight against terrorism which faces new challenges every day. The Alliance increased the "pressure" to the partners to allocate more resources on their engagement in international operations.

All partners showed that their armies have independently developed deployable capacities and capabilities interoperable with those of the NATO member countries. Their contribution to the International Security Assistance Forces was a real relief to the burden of the United States and other allies. The fact is that the deployable forces of the member states of NATO are trained to operate in all conditions and in any environment. However, NATO is facing with the challenge of usability of the allied forces. Many of the member countries and partners have declared significant strength of forces,

[1] Xhaferi, "Addressing of the Minister of Defense of the Republic of Macedonia"

but these forces in specific conditions are not usable and have certain national caveats. They can be used only for specific tasks that do not involve their engagement in combat actions. An additional challenge to the NATO and the smaller allies is the obsolete equipment they have as opposed to the more powerful last generation equipment. Despite all challenges and caveats faced by the Allies and partners, the NATO deployable capacities and capabilities policy has proved as successful mechanisms for interoperability. This policy of the Alliance has contributed countries to transform their armies according to the NATO standards primarily for national needs, and then for the needs of the Alliance. Training and exercise of the units according to the NATO Operational Capability Concept contributes to countries to increase the overall readiness of their national armies and to increase the level of part of their forces to the level of "combat ready" - able to be deployed in the operation in any moment and in every environment. It means that NATO and the member countries and partners will continue to invest in future development of the deployable capacities and capabilities. It is more certain that member states will fail to achieve the political goals set for the development of deployable forces by 2020. It will cause the Alliance to set higher goals ahead in terms of not only developing deployable capacities and capabilities, but also in terms of the usability of forces. The percentage of deployability and usability of the forces in the near future is possible to reach the milestone of 100% deployability and usability of national armies.

The NATO deployable capacities and capabilities policy is an integral part of the defense policy of the Republic of Macedonia since its membership in the Partnership for Peace in 1995. Since then, aligned with national needs and resources, Macedonia has started to transform its defense system and its army according to the NATO standards and requirements. The results of the continuous implementation of NATO standards speak for themselves in a positive sense. At the beginning of the XX century, Macedonia becomes an exporter of peace, security and stability and an active and recognized contributor to international operations. The overall reforms progress and the implementation of the deployable capacities and capabilities policy was recognized with the achievement of the required NATO standards for membership in 2008. Since then, Macedonia has continuously been improving its capacities and capabilities, and proof of that is a new cycle of transformation of the Army 2012 - 2015. With this cycle of transformation, the Army of the Republic of Macedonia should reach the level of deployability and usability according to requirements of the NATO deployable capacities and capabilities policy. It is more certain that Macedonia will continue to follow the trend of implementation of the NATO policy for deployable and usable forces in the future. In near future, it will

result in development and dimensioning of the Army of the Republic of Macedonia at the same level of usable and deployable forces with those of the Alliance, and why not 100% deployability and usability.

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