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C O N T E N T S

Katalin CSEPREGI, MA*
II. Master's Degree Student (MSc.),
National University of Public Service,
Faculty of Political Science
and International Studies
Master's Degree in
International Public Service Relations

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István DR. KOVÁCS, PhD**
Police major, Assistant professor,
University of Public Service Faculty of Law Enforcement,
Department of Law Enforcement Management Theory,
Scientific secretary,
University of Public Service Doctorat School of Law Enforcement

ONLINE SEXUAL EXPLOITATION OF CHILDREN, IN PARTICULAR THE CRIME OF CHILD PORNOGRAPHY

The real challenge is to keep pace with today's rapidly changing world. However, the development of infocommunication tools and technologies not only brings benefits, it also offers plenty of opportunities for offenders. It is inevitable to use the internet these days, so it is extremely important to lay down the right rules and conditions for children. The most important step we can take against it is prevention and awareness raising. In the study, the authors sought to clarify basic concepts, describe the international environment, and analyze data from Hungary, which manifests itself in the analysis and evaluation of BSR and anonymous judgments.

* E-mail: cskata9@gmail.com
** E-mail: kovacs.istvan@uni-nke.hu

Keywords: child protection, child pornography, sexual exploitation of children, law enforcement, criminal law.

1. Introduction

In recent decades, we can say beyond a shadow of a doubt that great strides have been made with regard to children's rights. At the same time, however, it cannot be said that the challenges involved have diminished. One of the most prominent problems today is the detection and prevention of crimes against children. Thanks to the opportunities provided by the Internet, some of these crimes have also appeared online. The online sexual exploitation of children has reached enormous proportions these days. By way of illustration, it is worth highlighting the statistics published in the February report of the ECPAT organization and the Hintalovon Children's Rights Foundation that the proportion of pedophile contents reported to the National Media and Communications Authority in Hungary increased from 7.7% in 2011 to 41.6% by 2020. increased, of which 23.7% also depicted child sexual abuse. (Kiss et al., 2021:13) It is all up to us to fight, raise awareness and prevent the phenomenon.

The Internet has created a fascinating new world full of information that all people on Earth can enter unconditionally and without restriction, accessible to anyone with an online service. A virtual highway, a computer matrix where information races without speed limits and is able to connect people in different corners of the planet with other computers, cell phones, or other types of technological devices. (Petit, 2004: 1-26) We can rightly believe that this technology offers unique opportunities for children and adults (for example, we can get to know the whole universe in which we live), but we must never forget that - as Janus' double face - unfortunately, in addition to potential, abuse also a source of danger. (Bagnall et al., 2013: 867)

In no man's land, in a world where reality and virtuality are blurred, people hiding their identities, hiding behind smiling emoticons, just waiting to take sacrifices are dangerous enough to defend against: to limit and regulate that it can become a user of the worldwide road network. Network-based and Internet technologies such as feeds, chat programs, chat rooms, etc. they are the main route of the highway where criminals specializing in the sexual exploitation of children can harass. The various Internet interfaces have made it possible for criminals to establish contacts, possess, distribute and share material (images, videos and sound recordings) related to child pornography worldwide. Thanks to the globalization of the world and computing, in parallel with the growing demand for increasing

deterioration, they can do so in a cost-effective way to make their shared content available to the general public, both within and outside national borders.

Criminal offenses linked to sexual exploitation of children can be human trafficking, procurement, living on the earnings of prostitution, child prostitution and child pornography. (Kiss et al., 2021: 8) Sexual exploitation committed online includes the materials of the abuse, their production, distribution, broadcast, downloading and even the extortion by using them. Child pornography means any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes. (Law on OPCRC Hungary, No.2009/CLXI.)

Most perpetrators of child pornography offenses use computer technology to maintain, enhance, and share their collection. Digital cameras, and video cameras, mobile phones have made life easier one by one for abusers who want to witness their criminal behavior for private entertainment or commercial gain. Camera cell phones connected to the Internet can be easily used to send and receive pornographic material across borders. A lot of these or related websites that share material related to child pornography and sort it into different parts of the world come from Eastern Europe and can be linked to organized criminal groups. Children's sexually explicit, illicit images, audio, and video materials are particularly valuable in the world of the Internet, and while trafficking generates millions in profits for criminals, the reproducible child pornography found in cyberspace is irreparable and eternal in children's lives. they cause mental and physical harm.

I see the scientific problem below: online sexual exploitation of children has taken on enormous proportions, perpetrators are rapidly adapting to their environment and are constantly finding new methods. One of the factors of online space is that you can't hide in it, once an image or video comes to light, you can't delete it from there anymore. Every time children open or search for child pornography content, children become victims again and again. Communication about sexual abuse is lagging behind many times, and often victims do not dare to talk about what happened. A high degree of latency can be associated with this phenomenon, so prevention and identification of victims are a key task for child protection. (Hatvani et al., 2018: 1-106) Only 38% of the victims disclose to the public the events, and 40% of them only talk to family members or friends, therefore the majority of these cases are never revealed. (Broman-Fulks, 2007: 260-266) Abuse suffered online is just as dangerous as live, lifelong trauma for children who are exploited in this way. No child deserves to abuse their rights, and it would be precisely our job to protect their childhood and support their development. We are talking about an extremely fast-growing and cross-border problem that no single country can answer alone. Cooperation will play a key role in the fight against this.

The aim of the study is to describe the problem as widely as possible, to give as much attention as possible to attacks in the online space, to integrate its importance into the public consciousness and to design an appropriate law enforcement and civil cooperation strategy.

The scientific methodology is based on the analysis and evaluation of secondary statistical measures based on the Criminal Statistics System (BSR). The question is what percentage of the various types of decision-making procedure is a criminal offense of child pornography under Chapter XIX of the Criminal Code (the chapter on the crime of sexual freedom and sexual offenses).[1] (Law on CC, No. 2012/C.) In addition to statistics, judgments have also been studied that provide a deeper insight into the specifics of child pornography. As a result of all this, we can gain an insight into the real situation in Hungary, not only in relation to the victims, but also with the perpetrators and their methods; for example, how children's images and videos are used, how they are obtained and where they are stored, what motivates criminals, what lies behind the exploitation of a child.

The study starts from theoretical hypotheses such as:

- I assume that, according to the BSR data, the central region affected by child pornography in the period under review is Budapest, as the scene of most crimes;
- I assume that for the judgments I have analyzed, which also includes the findings of psychological opinions, the average age of victims is under 12 years of age, who are emotionally unstable, which is a causal relationship in the process of becoming a victim;
- I assume that among the perpetrators of the criteria I examine, most perpetrators are low-educated, between the ages of 30 and 50, most of their methods seek to build a "father-daughter" relationship of trust, and pornographic images and videos are mostly used for private purposes.

1.1. Theoretical approach to the study

The interpretation of security today is complex and depends on many factors. In our rapidly and constantly changing world, it cannot be clearly defined. It can express a state, a goal to be achieved, social satisfaction and a sense of comfort, but also a lack of threats. Security is important in any area of life, from our daily lives to global processes. Its remit thus extends from the individual, small communities, countries and regions to the whole world. The expansion and

1 The online sexual exploitation of children - as a form of appearance of child pornography - is highlighted also in the Criminal Code of Hungary and imposed by sanctions.

complexity of the concept is due to the increasingly diverse problems and the increasingly complex responses to them. Among the categories of the security theory concept, I would highlight human security, which, by its name, focuses on the individual. It addresses a wide range of current security threats and issues. Be it pollution, sustainable development, migration and terrorism or drug and human trafficking; you want to find answers to everything. (Péczeli, 2011: 1-13)

The online sexual exploitation of children is also a good example of these challenges. The Internet provides an excellent platform for reaching, networking and exploiting children. Due to its characteristics, it is difficult to keep up with the perpetrators and the constantly changing methods complicate the fight against it. The importance of prevention is strongly valid here. By preparing children and parents, raising awareness and using today's technology, there is a way to reduce the chances of becoming a victim.

The tools and methods of the information society are evolving at an unprecedented rate, which is undoubtedly a challenge to keep up with. The concept of this can also be approached in several ways. The continuous development of technology has brought with it the transformation of society, the appreciation of innovation processes, the effects of globalization, and the emergence of new roles. We take the existence of infocommunication technologies for granted; that we have a smartphone, that any information is immediately and unrestrictedly available so that we can handle most of our affairs online. Digital life has many benefits, time and energy savings. However, the risks, dangers and threats involved are less well known.

Furthermore, protecting children on the World Wide Web is an increasing challenge. New generations are already being born into this world, whose parents are already active users. (Soltész, 2017: 1-34) The average age at which children start using the Internet and using a smartphone is steadily declining. It is indisputable that in this way they also acquire a number of new and useful knowledge that will later help them to orient themselves in an ever-changing world. At the same time, experience shows that they are not really prepared for the internet, they are not properly educated about it, there is no open communication about this with their parents. As a result, their exposure increases and the proportion of hazards lurking towards them also increases.

2. The research

The research focuses on the crime of child pornography in Hungarian statistics, in addition analyzes court judgements as case studies. The statistics give answers how many cases were registered by authorities during the time period

between 2013 and 2018, and whether authorities were able to get to prosecution or not. They also bring us closer which county or city in Hungary is the most affected by the problem, what threats children have to face nowadays, and also what strategies authorities need to apply to handle the situation in the country. At the same time the analyses of the court judgements are in progress, which relate to problems and questions connected to the relation between victims and perpetrators, the methods of criminals, sanctions and other features. Both parts of the research are able to confirm or refute the hypothesis of this study, therefore new scientific results are expected in the end. Furthermore, a new database can be established, which gives a realistic picture about the characteristics of the Hungarian child pornography, and by focusing on each elements of the problem new law enforcement and crime detection, or preventive law enforcement strategy can be devised.

The research pattern is dual. On the one hand I use the data from the Criminal Statistics System (in Hungarian: Bűnügyi Statisztikai Rendszer, BSR) as an evalution of the police and prosecution data on the crime of child pornography. (It is an evaluation because with derivative data, I only do second-guessing by embedding mathematical functions.) On the other hand I analyze anonym judgements from the Collection of Court Judements (in Hungarian: Bírósági Határozatok Gyűjteménye), which only cover first instance decisions, circumstances and justifications. Examing the Collection I had the opportunity to analyse only ten court judgements, which had a first instance decision and were already uploaded in the system. Although this pattern reflects no representativeness, conclusions can be made and my hypotheses can also be tested.

2.1. Data processing and results: the results of the Crime Statistic System

The Criminal Statistics System conducts analyses in many categories. The different police and prosecution data are dated between 2013 and 2018. My research uses the mathematic analyses of these derived data. I examined the types of procedural decisions compared to the crimes in the XIX. Chapter of the Criminal Code in particular compared to the crime of child pornography. In this section of the Criminal Code crimes such as sexual exploitation, sexual violence, sexual abuse, incest, pandering, procuring prostitution or sexual act, living on earnings of prostitution or child pornography itself can be found. We differ five categories of the procedural decision types: rejection of denunciation, termination of investigation, indictment, distraction and other endings. After examining these data I made diagrams to illustrate the tendencies in each year.

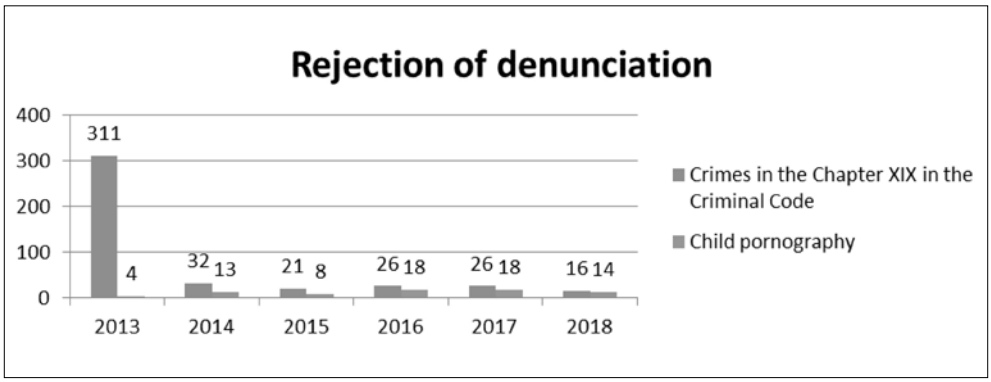

Figure 1. Data of the rejection of denunciation between 2013-2018 (edited by the author according to the BSR)

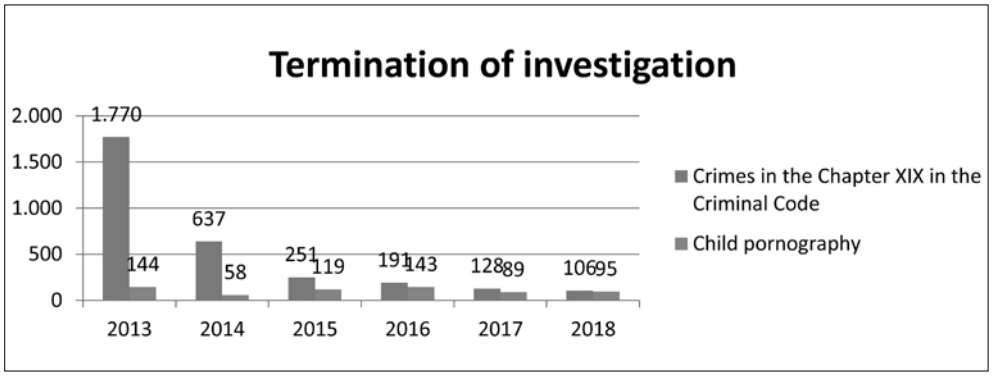

Figure 2. Data of the termination of investigation between 2013-2018 (edited by the author according to the BSR)

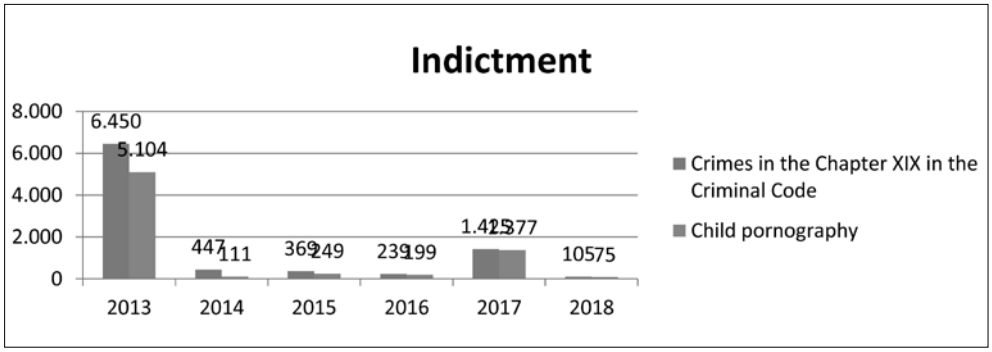

Figure 3. Data of indictment between 2013-2018 (edited by the author according to the BSR)

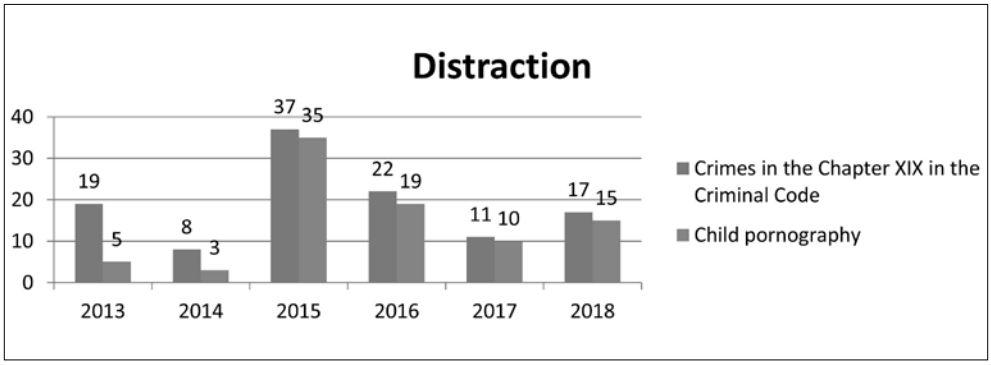

Figure 4. Data of distraction between 2013-2018 (edited by the author according to the BSR)

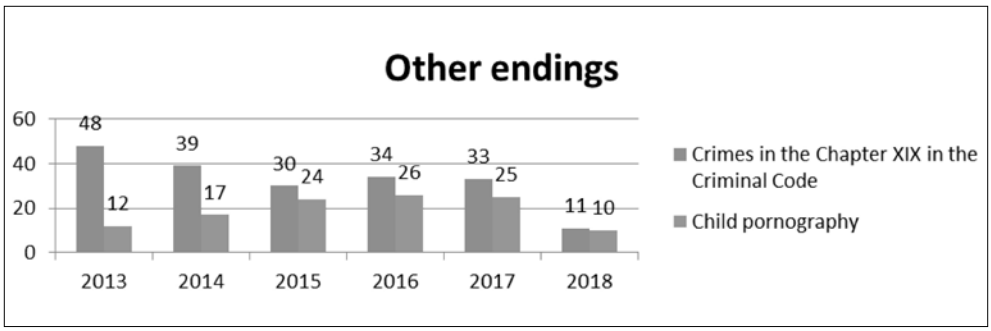

Figure 5. Data of other endings netween 2013-2018 (edited by the author according to the BSR)

In the first four diagrams it can be seen that 2013 has exceptionally high figures compared to other years. The rejection of denunciation fell down drastically, but afterwards the rate of the other crimes and the rate of child pornography started to equalize. The termination of investigation shows similar figures and tendencies. By indictment the year of 2017 is outstanding, 96,6% of the cases were related to child pornography. The figures of the last two diagrams are more fluctuating, however they have less cases. Most of the cases were indictment in 2013 with 6450 registered cases, of which 5104 were child pornography. The rate of child pornography is the highest in this category, 78,7% in the five years all together. The distraction follows it with 76,3%, then the other ending with 58,4%, the termination of investigation has 21% and lastly the rejection of denunciation has 17,4%. In the category of distraction in 2014 only three cases got into the system as child pornography cases, which makes it the lowest rate in the whole analyses. As we reach the year of 2018, we can notice that the figures decreasing continuously, at the same time the rate of child pornography increases from year to year.

The next diagram shows us in which county most of the crimes were committed in Hungary between 2013 and 2018. From the derived data I made this diagram to compare each area. However the result is not excessively diverse. Two counties stand out where most of the cases were registered: Nógrád and Heves. In the these neighbour counties there are 6185 cases in five years (4908 in Nógrád and 1277 in Heves). Interesting that in the database infromation were also given about data outside of the borders and data not related to the territory of the country.

It would be necessary to compare the relations between counties and cities, to correlate the number of the cases with the proportion of the population in each county in order to make further conclusions. Unfortunately BSR is not capable for this axamination, therefore I was not able to do this. From the above, it could be logically assumed (even if it were a general assumption) that the correlation between the population and the number of crimes committed would be very positive. In terms of child pornography however, by analysing the statistical figures, we can only define tendencies in terms of offences committed in the counties, which indicates the priority of different counties from year to year. According to these trend lines the most infected areas in the country are the capital, the north, the north-east and the east ones, and the least concerned are the south and west ones. More examinations would be needed to analyse the inputs and outputs, the push and pull factors, and eventually to draw deeper conclusions.

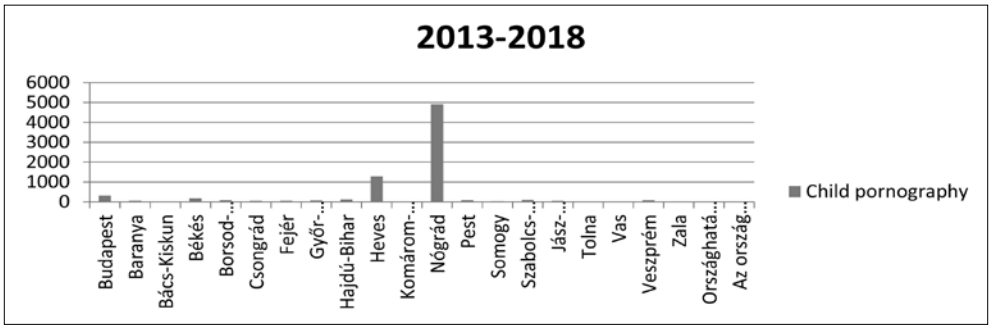

Figure 6. Registered child pornography cases by counties between 2013-2018 (edited by the author according to the BSR)

2.2. The results of the judgements

The detailed analysis and presention of the anonym court judgements were part of the research. This study does not enable to display them one by one, although the tables in the attachments can give further information and also help to understand the results.

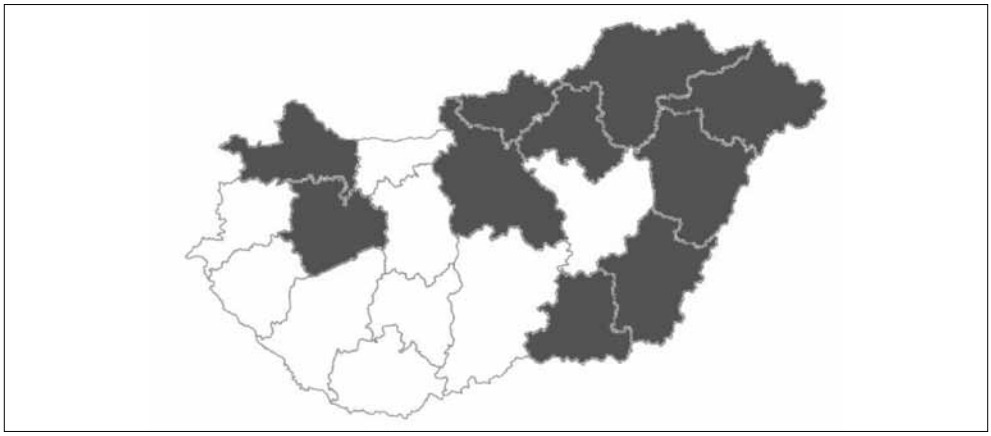

Figure 7. In terms of child pornography the most concerned counties in Hungary (edited by the author according to the BSR)

The imposed penalties in the judgements were closely related to other crimes. In general, perpetrators were sentenced to nine years. We can talk about one suspended sentence and one probation among the ten judgements. The person who gets disqualified from public affairs can not vote, can not fill official positions, can not be a member of associations or committees, can not be awarded, and loses all the posts from before. People found guilty to child pornography were disqualified from public affairs on average by 7,2 years. In 70% of the cases the location of the imprisonment was penitentiary, which means the most restrictive circumstances. The location for the rest were all prisons. Withdrawal of parental custody rights happened in two cases, each related to foster children, not bioligical ones. Detailed summary about the characteristics of the judgments can be found in the attachements at the end of this study.

Despite that the cases present different situations, different conditions with different actors, they have common elements regarding the pepetrators and the methods. From the twelve perpetrators only one was woman, which means 91,6% of them are men. One quarter of the criminals lived in some level of partnership during the time of the offense, and two-thirds of them had underage children. Their education level was mostly the level of high school (upper secondary education level). There are two outstanding figures. One perpetrator who didn't even finish elementary school, and one, harassing many pupils of him who actually graduated at a university. Out of the twelve three of them were unemployed in that time, one worked as a prostitute and the others all had legal jobs. On third had criminal records, which were however not related to children. They came to the attention of the authorities because of stealing, embezzlement and vandalism.

As I examined each case I wanted to particularly know whether they had already showed interest in children or not. In crimes of forcing into prostitution, they had not showed typical interest. The perpetrators decided to exploit those children in that certain situation, who were generally 16 years old. They wanted to make profit out of them and to draw more and more customers. Using their pornographic materials covered the time period while they advartised those girls. Their toolkit included mobile phones, cameras, besides that they only needed internet connection for uploading. Exploiting underage children was not their main criminal pofile. In the other cases the situation was different. Three of the perpetrators consciously visited multiple times child pornographic sites and participated in chat rooms, from where they downloaded CSAMs. Their attention focused on children under the age of twelve, their interest was specifically in minors. During the investigation the authorities discovered not only mobile phones and cameras, but also hard drives, CD/DVDs and pendrives full of child pornography. The public usually confuses these perpetrators and pedophiles, there are many concept confusions, unfortunately, I could only write a paragraph about this topic in my dissertation, however it would deserve certainly a whole another study. Among these twelve criminals only one was proven pedophile, but he was still fully aware of his acts, his conscious actions led to commit the crime. Besides the cases involving prostitution, there were five in which sexual assault happened, four in those were domestic. In one occassion it was his own child, the others were foster children. Pornographic pictures and videos were made 70% for private use preserving them in hard drives and computers. The usage often continued for years alongside of the abuse as well. Crimes committed against the victims took place everytime in a location which was known by the wictim, which was familiar to them or actually where they lived. All the perpetrators mistreated the age difference between them and their victims, misused the trust in them and selfishly exploited the good faith and innocence of the underage children. The most typical offense is well observed, even in cases of prostitution. The criminals intended to establish a trusting relationship with the victims, which resembles to a father-daughter relationship. They made them believe that their actions are completely normal and their secret is special and it needs to remain between them. The children obviously were not aware of the inappropriateness of their actions in view of their age and inmaturity. The perpetrators exploited this uncertanity and that is how they were able to continue the abuse even for years.

86,6% of the victims were girls, which is aligned with global trends. Their general age was 13. In two cases boys were also discovered on the tapes and pictures, but since they were not identified and were not direct victims in these cases, I focused in this study only on girls. Their story is available for us in details

and able to bring us closer to the problem. Except of one case, all contains disfunctional family relations. (The one exception is the case of the girl who was abused in a staircase by a cleaner but since she had good relations with the parents, she told everything and therefore authorities could act quickly.) The girls grew up mostly without a father figure in the family, their parents divorced and relations with each parent became worse in time. Among children forced into prostitution is typical to flee from home or from children's institutions. In two occasions the form of the new family is what meant a threat to the children, often the new step-father showed interest in them. Because of this the perpetrators had a really good base to initiate sexual intercourse and build up the trust between them and their victims. They misused that the minors needed money, various presents, attention and care from adults. The online sexual exploitation plays an important role in these cases. For prostitution they served as tools for advertise the girls and make them attractive for customers. For domestic violence they were perfect tools for extortion, they blackmailed the victims with pictures and videos to maintaine the sexual abuse. In one third of the judgement it was spicifically mentioned that these children suffered physical, emotional and ethical traumas as a consequence of the sexual exploitation, moreover the abuse adversely affected their pshychosexual deveopment and in the future they are in need of treatment to handle the guilt and tension inside of them. The harms suffered will have an influence on their life, on which the treatment can lighten, but make it as never happened cannot.

3. Proving the hypotheses

The most concerned region of the country is not the capital, but Nógrád and Heves counties. It can be clearly observed that the eastern part has outstanding figures during these five years, while the southern part has typically fewer and fewer. Despite that every year less and less crimes against sexual freedom and sexual offenses are registered, the rate of child pornogrpahy in those crimes has increased significantly. We can conclude from this that authorities pay more and more attention to investigate and detect these cases.

Most of the victims were girls, but their general age were 13 years. The cases related to the crime of prostitution has a bigger age group (15-18 years), than the cases involving domestic violence and abuse (7-13 years). It is justified in majority of the cases that the background of these children was full of problems or was simply bad or had no connection to the father at all. The victims were emotionally unstable, which explains partly how the new father figures could easily

misuse their trust. Because of the abuse most of them in need of treatment, they suffered severe harm in their physical, emotional and intellectual development.

The age of the perpetrators could not be examined unfortunately, because it was not available in all the judgements. As a result of the anonymity they were given only in one-third of the cases. However low level of their education was proven, generally they finished high school. The established father-daughter relations played a huge part of the process of the abuse, it is particularly true for the judgements containning domestic violence and abuse. The number of victims although were on average 1-2. Sexual assault was realised in most of the cases, sometimes continuing for years. Except of the cases related to prostituions perpetrators made pornographic pictures and tapes for private use, and also as a base for blackmailing and maintaining the exploitation.

4. Recommendations and summary

The only way to tackle crime in today's fast-paced world is for law enforcement and civil society organisations to work together, and if the countries intensify their beyond border relations and communication. My recommendation is also related to this, because the cyberspace has many segments which we know nothing about, the globalization of technology can be used for harmful aims as well. The protection of children appears nowadays in many international contracts, however as I mentioned before, I consider the harmonisation of these inevitable to avoid the anomalies from different regulations. (e.g.: the age of children, sanctions etc.) I propose also the half-yearly – instead of the yearly - discussions and debates between ratifying countries about criminal infestation and vulnerability, and in the framework of the justice and home affairs with a relevant strategy to reduce, abolish and fight against child pornography. As far as I concerned a consensus-based, sanctioning criminal policy against child pornography must be a part of an effective strategy, which can reduce the number of the cases, and help to convict the perpetrators. Furthermore internet-savvy companies need to be involved in the law enforcement cooperation, to improve the technical side and to help the unity of crime prevention, detection and disruption.

Hungary following the international tendencies constantly evolving in the field of child protection. Figthting against online child sexual exploiation is emphasized particularly nowadays during the pandemic and distance learning as our life keeps transfering to the digital space. Hungary is a meber of the WePROTECT global association for identifying victims, and also of the INHOPE global hotline network. Specifically the National Bureau of Investigation Cybercrime Department

of the Standby Police (Készenléti Rendőrség Nemzeti Nyomozó Iroda Kiberbűnözés Elleni Főosztálya) deals with the crime of online child sexual exploitation.

Accepting the Digital Child Protection Strategy in 2016 was a huge step in this process. It defines fundamental concepts and sets important new goals, in addition draws attention to the possible threats and possibilities, gives legal background, involves the civil and governmental actors, and highlights the importance of prevention. (Government decree on DCPSH, No. 2016/1488)

In my opinion education has a key role to master the conscious internet and media use. It is a hard task, because schools don't have a unified regulation on what and how to teach children about the internet, it depends on the institutions themselves. The recently published Public Education Strategy for the EU 2021-2030 although provides specific plans on digital competences and services. It includes not only the improvement of infrastructres, but also the expansion of the knowledge of the pupils and teachers. (PESEU 2021-2030) This strategy is supported by the National Curriculum, renewed in 2020, by extendeing the current IT education and putting in several classes the methodological solutions and pedagogical tools aiming the development of digital competences. From the civil side I consider it important to mention the work of some foundations and organisations, such as the International Children's Emergency Service (Nemzetközi Gyermekmentő Szolgálat) and the Blue Line Foundation for Children in Crisis (Kék Vonal Gyermekkrízis Alapítvány), who actively participate in child protection in Hungary. They make happen the Safer Interent Program - originally established by the EU - organising webinars, conferences and courses in this topic. (SAFEinternet web) The publication of the Blue Line Foundation for Children in Crisis is a school guide on sexual harassment, which adresses in a clear and detailed way the characteristics, the recongition of harassment, also the customs of young people and how to prevent the abuse in schools. (KÉK Vonal, 2018: 1-34)

However we should never forget that setting an example is the responsibility of the parents, children learn plenty of things from them, such as their internet habits. In order to ensure the safe and confident relation between children and the internet, we need communication, consciousness and prevention.

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Attachments

1. Table. Characteristics of the victims according to the judgements (edited by the author)

Judgements	Sex of the victim	Age of the victim	Family background	Live sexual abuse
No 1	girl	8	lived with both of the parents	no sexual act, only showing genitals
No 2	girl	17	grew up in a children's institute	yes
No 3	girl	<18	fleeing from the foster parents	yes *
	girl	15		yes *
No 4	girl	15	divorced parents, fleeing from children's institute	yes *
No 5	girl	16	grew up without a father	yes
	girl	17	grew up without a father	yes
	girl	16	grew up without a father	yes
	girl	16		yes
No 6	girl	9	alcoholic father	yes
	girl	7	deceased father	yes
No 7	girl	8	new family, stepfather	yes
No 8	girl	13	new family, stepfather	yes
No 9	boys	<18 (generally 12-13)	-	no
No 10	girls and boys	8, 10, 11	-	no
*Sexual abuse by multiple people, forced into prostitution.				

2. Table. Characteristics of the perpetrators I. (edited by the author)

Judgements	Sex	Marital status	Number of their underage children	Education	Criminal record	Occupation
No 1	male	single	0	elementary	no	cleaner
No 2	male	married	1	high school	no	entrepreneur
	female	single	0	elementary	no	prostitute
No 3	male	divorced	1	elementary	yes	unemployed
No 4	male	partnership	1	non-finished high school	yes	factory worker
	male	single	0	non-finished elementary	no	unemployed
No 5	male	divorced	3	high school	yes	dancer, association president
No 6	male	single	0	non-finished university	no	cleaner
No 7	male	married	2	high school	no	Sergeant Major
No 8	male	partnership	1	high school	no	janitor
No 9	male	single	1	high school	no	employee in a telemarketing company
No 10	male	married	1	high school	yes	unemployed

3. Table. Characteristics of the perpetrators II. (edited by the author according to the BSR)

Interest in children	Method of committing the crime	Duration of use of CSAMs	Aim of use	Amount and place of imprisonment
visiting child pornographic sites	taking pornographic photographs of the victim's underwear and genitals	deleting after a couple of hours	private use	7 years in penitentiary
-	taking pornographic photographs for advertisement	short time	profit making	4 years 2 months in prison
-	taking pornographic photographs for advertisement	short time	profit making	4 year suspended imprisonment
-	taking pornographic photographs for advertisement	years	profit making	18 years in penitentiary
-	taking pornographic photographs for advertisement	months	profit making	6 years in penitentiary
-	taking pornographic photographs for advertisement	months	profit making	2 years 6 months probation
-	taking pornographic photographs, then printing and showing them to other girls	years	private use	5 years 8 months in prison
pedophile	taking pornographic photographs and videos in exchange of presents	years	private use	13 years 9 months in penitentiary
-	taking pornographic photographs during the sexual abuse	years	private use	12 years in penitentiary
-	taking pornographic photographs during the sexual abuse	years	private use	16 years in penitentiary
-	downloading and storing child pornographic material	months	private use	8 years in penitentiary
visiting child pornographic sites	downloading and storing child pornographic material, and distributing them in chat rooms	probably years	private use	6 months in prison

Ivana STEPANOVIĆ, PhD*
Research Fellow
Institute of Criminological and Sociological Research, Serbia
Institute of Advanced Studies Kőszeg, Hungary

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THE TRUE COST OF TECHNOLOGY: DOUBLE EXTRACTIVISM AND GREEN CRIMINOLOGY IN SERBIA

The so-called green transition that relies on battery-powered technology dramatically raises demands for lithium and other minerals. The same resources are used to produce batteries for phones, computers, electric cars, and other devices with internet connectivity that simultaneously extract personal data. While research projects in natural sciences warn of ecological and human health implications of extracting minerals, social sciences emphasise the dangers of electronic transparency. The true cost of green transition and digitalisation turns out to be very high, especially because these processes are based on the extraction of both material resources and behavioural data. This paper argues that the mining of lithium and other minerals is not a local or national issue, but rather an international concern. Using concept analysis and digital ethnography, it analyses lithium mining narratives in Serbia and challenges the idea of "green transition" with notions of double extractivism and digital and green criminology.

Keywords: technology, extractivism, lithium, green criminology, digital criminology

* E-mail: ivana.stepanovic@iask.hu

1. Introduction: Extracting Lithium, Extracting Personal Data

Traditionally, the concept of extractivism is understood as a "mode of accumulation", and it is primarily used in the sphere of political economy since it is related to the practices of exploiting natural resources for economic growth (Scott, 2020). From fossil fuels, timber and coal to lithium and other minerals that are used for the so-called "green transition", extracting leads to the depletion and destruction of "entire ecosystems, streams, rivers, wildlife, and the lives of the people" (Willow, 2019). Utilised to create batteries that power modern smart technologies, lithium has become a metaphor for the "green transition" that is to pave the way to carbon neutrality and bring about optimistic prospects with new means of power supply that should contribute to sustainability and the mitigation of climate change effects. In Serbia, however, lithium has become a metaphor for the dark futures as the mining plans threaten to contaminate the environment and endanger human lives.

Lithium is considered as 'the white gold' even though there are considerable environmental and social costs of its extraction (Lefiker et al., 2018). Impacts of sourcing and producing it include the release of toxic chemicals that harm ecosystems and communities through the contamination of water, soil and air, ozone depletion, extensive groundwater usage, significant GHG emissions, human health risks which involve cancer caused by cyanide and many others. Due to the lack of relevant environmental impact studies, Portugal has cancelled the licence for the Montalegre project (Hernandez-Morales & Diogo Mateus, 2021), which shows how the plans for "green transition" based on the exploitation of lithium and other minerals used in batteries can backfire. Additionally, massive protests in Serbia dubbed the 'ecological uprising' aimed against Rio Tinto and other mining companies eventually resulted in halting the plans for lithium extraction in this country. The Serbian scientific community has reacted to these events by conducting multiple research projects to assess the ecological and health implications of lithium mining (Ristić et al., 2021). The costs of "green transition" that relies on lithium extraction, therefore, includes "permanent change of the landscape character, degradation of biodiversity, soil, forests, water and groundwater, displacement of the local population, termination of sustainable and profitable agricultural activities and permanent risk to the health" (ibid.).

The extraction of natural resources which poses a great threat to the environment as well as the health of humans and animals complements the extraction of personal data incorporated into modern technologies. Lithium-ion batteries are not used only to replace fossil fuels, but also to power mobile phones, computers, digital cameras, other communication technologies and portable devices with

internet connectivity. The second type of resource used for these technologies is personal data that are becoming increasingly granular as they include information about behaviour, daily activities and even thoughts and emotions measured through facial muscles, retina, or tone of voice. Privacy violations go beyond traditional data collection to include deeply intrusive practices such as "eye tracking" (Klaib et al., 2021) or emotion recognition through voice data (Haritha et al., 2021). Algorithmic surveillance and user profiling based on data extraction can "break behaviours down into subcategories and even into small behavioural units, syllables or motifs", (Zeigler, Sturman & Bohacek, 2021: 33). This machinic vision appears as a kind of a magnifying glass that strives to go inside of the human brain to be able to predict behaviour and alter it. Since these processes are jeopardising a whole family of human rights, including the right to privacy, freedom, and dignity, algorithmic surveillance expands the field of digital criminology far beyond the so-called cybercrime (Nosthoff & Maschewski, 2022).

The commodification of privacy through data mining intensifies as the demands for battery-powered devices grows, which means that digital extraction reinforces the extraction of natural resources. And if data and lithium are the new oil or the new gold, then the question is whether the extraction processes can really be "green" or whether they can truly offer solutions to ecological problems. If we consider green criminology which defines offence against natural ecosystems as a type of crime, then simple replacement of old resources with new ones does not solve the interlinked crises of the world. As Srećko Horvat writes, Covid-19 was a kind of an X-ray as it unveiled the global system and its vicious circle of "extraction, exploitation and expansion" which leads to multiple ends of the world (Horvat, 2021:19). Although social distancing (through the communication technologies) as a type of new normality has been established long before the pandemic, Covid-19 has exacerbated processes of digitalisation and convergence of physical and digital, but the real price of this transformation involves the eradication of privacy, normalisation of algorithmic profiling practices and ecological disasters that inevitably accompany extraction of lithium and other minerals required for batteries.

2. Lithium Mining as a Trans-Border Issue

Can lithium really be a solution to environmental issues? Is mining simply a local and national issue if contamination can travel through air and water across borders? It is estimated that the global demand for lithium will rise rapidly and the mining industry is expanding across the globe and expanding beyond the so-called "lithium triangle" or the deserts of Australia to the very heart of Europe

and densely populated areas, with Austria, the Czech Republic, Portugal, Serbia, and other countries announcing to start with the lithium extraction business. Worryingly, scientific studies about the impact of lithium mining on health and the environment are very scarce. While it is difficult to find any research on the health and the environmental risks of lithium mines in European countries (Chaves et al., 2021), it is surprising that there is very little information on the impacts of the mining of lithium raw material in general (Kaunda, 2020). According to some researchers, lithium extraction and fabrication can contaminate air, water and soil which can cause ecological disasters and negative effects that traverse borders and last for decades. Dangerous particles can travel through the atmosphere and water streams and affect not just local towns and villages that are surrounding the mines, but also other countries and entire regions (Trpeski, Šmelcerović & Jarevski, 2021: 457).

In Serbia, the project Jadar which was supposed to be conducted by the company Rio Tinto was paused because the affected locals together with activists and members of the scientific community in Serbia raised awareness about the dangers of lithium mining and possible implications on health and the environment. The planned extraction projects are currently on hold not because of the legal reasons related to poor ecological standards, but because of the grassroots initiatives as citizens themselves realised the life-threatening dangers of mining. Protests initiated by the local population in the Jadar Valley spread to the big cities across the country. The news about the uprising in Serbia travelled across Europe and the rest of the world, but the problem was mainly discussed as a local or national rather than cross-border issue even though many researchers warn of possible contamination of much larger territories.

The Serbian case has shown that "green ideology" is entangled with "green criminology" and that it is in fact a transnational, interregional and ultimately a global problem rather than just a local issue. Green criminology that recognises crimes against ecosystems could treat these problems as international and reveal a broader perspective. The key question is whether battery-powered devices truly are environmentally friendly or whether they show inherent paradoxes in international treaties and policies such as Kyoto Protocol[1], Paris Agreement[2], UN Sustainable Development Goals[3] or a European Green Deal[4].

1 The Kyoto Protocol: unfccc.int/process-and-meetings/the-kyoto-protocol/history-of-the-kyoto-protocol/text-of-the-kyoto-protocol, accessed on 10.02.2022.

2 The Paris Agreement: unfccc.int/files/meetings/paris_nov_2015/application/pdf/paris_agreement_english_.pdf, accessed on 17.02.2022.

3 Sustainable Development Goals: sdgs.un.org/goals, accessed on 17.02.2022.

4 A European Green Deal: ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en, accessed on 17.02.2022.

Examples from Portugal and Serbia show that local communities who stood up against lithium mining companies through activism can impact the decision making and influence policies. The protests have mobilised scientific communities who raised awareness about the devastating implications of mining on human health and the environment. Moreover, they have pointed out that problems associated with lithium mining are not simply contained within Serbian or Portuguese borders. Several mining companies are nevertheless still planning to start with the lithium extraction business in multiple countries in Europe. With toxic pollution of water, soil and air being able to traverse national borders, the question of lithium extraction on the European continent requires a tighter collaboration of both EU and non-EU countries. Should Bosnia and Herzegovina or Croatia be concerned about lithium mining in Serbia, and should they require environmental impact assessment for their territories? Or should Slovenia and Hungary inquire into the environmental impact of the Wolfsberg mine in Austria?

3. #Neocolonialism: Narratives on Lithium Mining in Serbia

Analysing the narratives on lithium extraction in Serbia is crucial for understanding the scope and the nature of the systemic problem of extractivism and green criminology linked to the mining industry. It is also important to know the key narratives to be able to investigate how online and offline activism strives to impact policy-making processes.

On the one hand, political actors in Serbia are imposing narratives about the financial benefits of lithium mining. They focus on the concepts of economic growth and development while emphasising that Serbia can become an important player in the world's struggle for the "energy transition"[5]. On the other hand, citizens, activists, ecological organisations, and members of the scientific community that support protests against lithium mining are using different narratives. These narratives are opposing each other as the officials are supportive of the mining projects while the protesters are criticising them.

Actors who are campaigning against lithium extraction in Serbia include locals from potentially endangered rural areas that will be affected by the future mines along with the citizens from other parts of Serbia, activists, members of environmental organisations and movements as well as experts who support the protests. Their activities include street protests, digital activism and various campaigns aimed at political actors and larger communities in and outside of Serbia. Protest

5 Ministarstvo rudarstva i energetike, www.mre.gov.rs/lat/aktuelnosti/vesti/projekat-„jadar"-razvojna-sansa--odluka-kad-se-zavrse-sve-studije-i-gradjani-iznesu-svoj-stav, accessed on 17. 02. 2022.

slogans are of vital importance to understand the activists' narratives about lithium mining. They combine patriotic narratives with ecological, economic, and political messages. The key slogans include "Srbija nije na prodaju" (Serbia is not for sale), "Rio Tinto marš sa Drine" (Rio Tinto get off the Drina) and „Ne damo Jadar" (We won't give away Jadar). The majority of slogans are focusing on Serbia in general or the river Drina or Jadar Valley in particular. However, since most of these slogans are written in both Serbian and English versions, it seems that the protesters are sending messages to the whole world and not just to the decision-makers in Serbia. The slogans from the street protests often coincide with hashtags on Twitter, and the keywords such as #SerbianLithium or #RioTintoGoHome are often paired with concepts such as #neocolonialism. One of the most prominent slogans from protests "Ne damo da Srbija bude kolonija" (We won't allow Serbia to become a colony) inspired numerous Tweets that are placing ecology in the centre of the new patriotic and nationalist narratives. Locals from the villages surrounding the mining sites are speaking about concerns for health and the environment while emphasising that they will be forced to leave their land, their homes, and their jobs.

Serbian protests against lithium extraction are often blending national and international perspectives because the slogans are bilingual and because many of the activists stress out the fact that lithium mining is a global problem. One of them is the Hollywood actress of Serbian origin, Bojana Novaković, who is leading one of the most prominent ecological movements „Marš sa Drine". In one of her interviews, she says that „there are activists in Europe who are supporting us and we collaborate with them; since this has become a global problem, we are finding friends all over the world"[6]. In the same interview, Bojana is focusing solely on Serbia and says: „we are hospitable people, and you can drink our rakija, have a coffee, have some kajmak and burek, but we are not giving you that lithium, so take your extraction somewhere else". Along with other activists, she is warning of the dangers of extractivism and consumerism while juxtaposing „us" with „others". One of the slogans emphasises this contrast in a message „vama litijum, nama otrov" (lithium for you, poison for us). They speak about the colonial practices and imply that Serbia is seen as a colony where lithium can be cheaply extracted and processed before it is shipped to the developed countries.

Activists in Serbia are implying the criminal nature of lithium mining that is not defined by the law. Many of the protest slogans and Twitter hashtags such as #ecocide and #pollution or „ecology or oncology" imply that the devastating

6 Nova S (21. 01. 2022.) Bojana Novaković: Tek sam počela, borba za prirodu se nastavlja, www.youtube.com/watch?v=Z-VdNVpknPE&list=PLZXr2RpggkrydaN61S8j8zx6DyBc22PgX&index=16, accessed on 17. 02. 2022.

implications of this extractivism should be recognised as green crimes even though they are not recognised or sanctioned. The patriotic narratives are dominant but there is a deeper understanding that the problem is endemic and global. The protesters are emphasising that the problem of lithium mining is not confined to a single mining company, political party, or particular territory. They demand the annulment of the licences and permits to all the companies, and they request a new law that should permanently prohibit exploitation, exploration and the processing of lithium and other minerals in Serbia as this would be the only durable legal solution to the problem.

4. Towards the Concepts of Double Extractivism and Green Criminology in Serbia

The concept of green criminology recognises different living entities as possible victims of crimes, including plants and ecosystems. It expands beyond the traditional scope of criminology that focuses solely on human victims (Lunch & Long, 2021) and therefore breaks away with the anthropocentric view of nature which assumes that the environment is nothing but a resource available for humans to exploit. Nigel South writes that the concept of green criminology is helpful because it provides a different "perspective" and shifts the focus to vital concerns such as climate change, pollution, and public health (South, 2021: 114). He emphasises that the concept of green criminology connects the Covid-19 pandemic with issues of global health but also the problem of human impact on nature that causes such viral infections (ibid.).

As the pandemic paralysed the planet and imposed the new rules of social and physical distancing, it has become clear that the world's economy heavily relies on new communication technologies and battery-powered devices that are raising demands for lithium, boron, and other minerals. In other words, the vicious circle of digital "prosumption" (Gerbaudo 2015: 81; Dyer-Witheford 2015: 92; Duffy et al 2021: 1; Fuchs 2014: 245) and data surveillance is directly related to digital and green crimes that fall outside the scope of traditional criminology.

The problem of legal and illegal e-waste is also related to the consumption of technology. It is noteworthy that electronic waste that includes discarded electronic devices contains many dangerous elements and toxic compounds, including heavy metals that can contaminate and heavily impact plants and microbes, but also harm humans (Ankit et al. 2021). It is also known that large quantities of e-waste are either legally or illegally transported to low-income and underdeveloped countries where toxic materials are improperly handled – either burned on an open

fire or recycled by small, privately-owned shops that don't adhere to any regulations (Adam et al. 2021). Some research projects have shown that the illegal e-waste trade has been detected in the Republic of Slovenia, which is considered as a "transition zone" between Eastern and Western Europe and the non-EU countries like Serbia (Rožnik, 2018). As it is suspected that much of Europe's e-waste is shipped to Serbia illegally, the question is what the impact of these practices on the environment is. Since Serbia does not have a developed waste management system and most landfills do not meet the basic ecological or sanitary standards (Pavlovic et al. 2021), it is possible that illegal e-waste significantly contributes to the contamination of the soil, water and air while endangering the lives of humans as well as plant species and animals.

Adverse consequences of technology development and rapid prosumption and data surveillance are intertwined with policies on carbon neutrality and green transition. This is why concepts of double extractivism and green criminology help unveil the systemic problem. The notion of extractivism has expanded to include phenomena other than natural resources. The concept is related to that of exploitation which can be linked to surveillance practices of personal data utilisations within the sphere of social media and other online platforms. Namely, as traditional consumers become prosumers, extractivism reveals itself as a type of "logic" (Chagnon, Hagolani-Albov & Hokkanen, 2021: 176). Human actors have multiple roles in the production process because they are at the same time a resource, the consumers and the final product ready for consumption. In the digital realm, consumer goods always have their immaterial or semiotic form, including the online self or the data double composed of behavioural information. However, these practices are increasingly considered digital crimes. New legislation such as Artificial Intelligence Act[7] and Digital Services Act[8] define the new types of digital crimes that are not limited to cybercrimes as they treat algorithmic profiling practices and other misuses of AI as potential threats not only to privacy but also to freedom, dignity and other human rights.

Extractivism can be seen as an economic strategy, regardless of whether the resources are material or immaterial and whether they are in the form of natural elements such as lithium and boron or personal data extrapolated from individuals. However, this strategy is problematic because of the invasive nature of extraction processes that incorporate various forms of violence. Couldry and Mejias speak about the non-physical violence associated with data extraction while establishing a new concept of "data colonialism" (Couldry & Mejias: 2020:

7 Artificial Intelligence Act, eur-lex.europa.eu/legal-content/EN/TXT/?uri= CELEX:52021PC0206, accessed on 17. 02. 2022.

8 Digital Services Act, eur-lex.europa.eu/legal-content/en/TXT/?uri=COM%3A2020%3A825%3AFIN, accessed on 17. 02. 2022.

9). They are emphasising that the practices of "data appropriation and processing" are simply the continuation of the traditional colonialism which focuses on immaterial as well as material resources which can be located anywhere and not just in the traditional sites of colonial extraction (ibid. 10). In the case of Serbia, the extraction of lithium has usually been discussed among the protesters and various activists precisely as a form of neo-colonialism. With its rich reserves of lithium and boron, Serbia is seen as a new colony where the western countries will be extracting minerals required for batteries. Namely, the "green transition" is happening at the expense of the undeveloped countries. However, the fact that some of the EU countries plan to open mines too, it is more appropriate to talk about this new extractivism as a new type of colonial practice where colonies are no longer located only in exotic, underdeveloped and faraway countries. Colonial practices are now present even in the very heart of Europe and in some of the most developed countries across the world. This does not mean that traditional colonialism does not occasionally overlap with the modern one and that the underprivileged "Global South" does not remain to be exploited by the "Global North". It simply means that the double extractivism of data and minerals needed for the production of technology should be seen as a global rather than a local problem and that the new colonialism is decentralised, dispersed and omnipresent.

5. Conclusion

While underdeveloped countries such as Serbia might be paying the biggest price of technology because they import electronic waste and extract lithium and other minerals, the problem is not simply local but, in fact, transnational and global. The narratives around lithium mining in Serbian traditional and social media as well as scientific communities focus on local issues while failing to recognise wider implications. The concepts of double extractivism and green criminology help understand the bigger picture and reveal how the practices of lithium mining and illegal e-waste transfers are related to the practices of data surveillance. All these practices involve certain types of violence, but many of them are not recognised as criminal activities and are therefore not sanctioned. Most importantly, the dispersion of the extraction sites outside the traditional colonial locations calls for new approaches to the protection of the environment as well as natural and human resources.

The new colonial practices of extraction are revealing new power constellations and new types of crimes associated with these practices. The case of Serbia shows how local environmental problems should be seen from a different

perspective. The initiative against the mining of lithium and boron in Serbia has come from the local community of Jadar Valley who were concerned for their future, but the grassroots movement that emerged later has mobilised larger communities including academic researchers who have raised the questions of the spread of contamination beyond the mining areas and the immediate surroundings. With several mines planned in different locations throughout Europe, the question is not just how does this type of extractivism impact certain regions or even nations, but also what are the wider implications of "green crimes" related to these processes.

The criminality of contemporary extractivism lies in the vicious circle of the two interconnected processes. The depletion of natural resources and ecocides are conducted to achieve carbon neutrality and produce green energy which is then used for data extractivism through data surveillance and violations of human rights, including the right to privacy, dignity, and freedom. This paper aimed to raise the questions of the price of this economic and ecological production and whether these processes are truly green and sustainable or whether they should rather be considered in the context of digital and green criminology. The case of Serbia shows how the seemingly legal processes of extraction conceal criminal activities and how online and offline activism has helped uncover the green crimes of lithium mining. Even though the dominant narratives are addressing the problems of lithium mining as local and confined to Serbia, some research findings clearly show that this is a cross-border issue and a global problem. It is also a point in which green and digital criminology intersect.

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Jan HOEKMAN*
Senior Public Prosecutor
Public Prosecutor's Office
North-Netherlands in Groningen

Gordana KRSTIĆ**
Deputy Public Prosecutor
Second Basic Public Prosecutor's Office., Belgrade
PhD candidate at the Belgrade University Faculty of Law.

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CONDITIONAL RELEASE: POSSIBILITIES AND OBSTACLES IN SERBIA AND THE NETHERLANDS

This paper analyses the concept of conditional release in the Netherlands and Serbia, to provide a comparative overview of the two legal systems, and to suggest how legal solutions could be improved. Conditional release is functionally correlated with imprisonment as the main criminal sanction, entailing the deprivation of liberty, whilest, it is also an alternative to imprisonment. It creates the possibility for the convicted person to be released from prison before they have fully served their sentence, provided that certain conditions are met. While serving the sentence, the convicted person is obliged to act upon the individual plan to rehabilitate, focus on work, and minimize the risk of re-offending. Since there are different categories of convicted persons in the penal environment, this paper will also examine whether all these categories of convicted persons deserve to be released on parole or whether perhaps conditional release is reserved only for privileged ones.

Keywords: conditional release/parole, imprisonment, criminal proceedings, court, public prosecutor.

* E-mail: J.Hoekman@om.nl

** E-mail: grkrstic@gmail.com

1. Introduction

At first glance, as a specific concept of criminal law, conditional release has secondary importance because it is used after the criminal proceedings have ended in a final judgment and after the offender has served a certain part of his/her sentence of imprisonment. However, this concept has a multidimensional role and importance from both the perspective of the offender being given a chance to be released before the expiry of his/her sentence and from that of competent judicial authorities that need to perform a detailed and valid risk assessment to be able to decide whether to give the offender an opportunity to return to life in a free society, as well as from the perspective of the goals of the state concerning suppressing crime.

There are various trends in the practical application of conditional release, which also raise certain dilemmas of normative and practical nature. This concerns variable conditions that a convicted person needs to fulfil to be eligible to apply for conditional release on parole. These conditions are the function of parole; subject-matter jurisdiction of the adjudicating judicial authorities and their role in the procedure; supervision of the process of monitoring the convicted person's conduct during the serving of a sentence; reliable criteria indicating that the convicted person has rehabilitated to such extent that he/she will no longer manifest criminogenic behaviour; as well as the purposefulness of imposing certain obligations that the offender would need to fulfil while on parole; and his/her adequate social reintegration.

This paper analyses all of the above dilemmas and aims to address relevant issues concerning conditional release in the Dutch and Serbian legal system. Furthermore, this paper provides an insight into how conditional release is governed by both legal systems, identifying the advantages and disadvantages of both systems while determining improvements on legal provisions and jurisprudence.

2. Normative framework in The Netherlands

2.1. Overview of the historical development of conditional release: from conditional release to early release and back again[1]

The conditional release dates back as far as the Code of Criminal Procedure (1886) itself does. However, over the course of over a century, the views on punishment and a subsequent return to society have constantly shifted in the Netherlands.

1 This part of the article is an updated version of an article that previously appeared in *Strafblad 3*, July 2017, p. 241 et seq.

Whereas the practice of attaching conditions to the conditional release with regard to behaviour, gradually dissipated up until 1987 and even led to a system of early release without conditions. In recent years, there has been a move towards imposing more and more conditions, as well as increasingly stringent ones. As a result, conditional release has become a system that in the first place attempts to protect society; while the gradual return of detainees to society is becoming a second-place concern.

This chapter deals with the history of the conditional release and the establishment of the *Centrale Voorziening voorwaardelijke invrijheidstelling*[2] as part of the Public Prosecution Service, which imposes conditions and supervises the adherence to these. The conditional release in practice is also briefly discussed, based on a few examples.

In 1886, the Criminal Code stipulated that a convicted person, who had been given a custodial sentence of at least three years and had served three-quarters of that sentence, could be released subject to certain conditions. Almost 30 years later, the regulation was applied to sentences of 9 months and over, while anyone who had served two-thirds of their sentence could be released on parole. When the conditional release was introduced, the number of suspects who were indeed released earlier, subject to certain conditions, increased steadily, as Dutch parliamentary history shows. In the 1950s, this applied to over half of the cases, while in 1970, the percentage was as high as 90 per cent. In 1976, the law included the possibility of appealing against the decision to refuse, suspend or revoke release to the Parole Appeals Division of the Arnhem Court of Appeal. The case law of that court subsequently only made it possible to refuse release in exceptional cases.[3] In 2005, the government noted that 'conditional release had effectively changed from a favour to a right of the detainee.' In addition, the Dutch Probation Service did not consider the supervisory task to be compatible with the relationship of trust with a convicted individual, and the Public Prosecution Service gave little priority to revocation in the event of a violation of the conditions.

This prompted the legislator to bring the law into line with practice, and thus early release (*vervroegde invrijheidstelling*) was introduced in 1987.[4] This did not happen without a struggle – the votes in the Senate were 31 in favour and 30 against – and early release has never been fully accepted since its introduction. In 1992, a motion was passed in the House of Representatives calling for a review of the regulation.[5] A year later, the Minister and State Secretary of Justice indicated

2 CVvi; i.e. the central facility for conditional release.

3 Parliamentary Papers II 2005/06, 30 153, No. 3, p. 4.

4 Act of 26.11.1986, Bulletin of Acts and Decrees 593.

5 *Parliamentary Papers II*, 1991/92, 22 536, 2.

that they were considering replacing the automatic 'Yes, unless' with 'No, unless' for certain groups of detainees.[6] In 1994, as a result of several violent escapes and escape attempts, attempting to avoid a custodial sentence was included in the law as a ground for postponing or denying early release.[7] Three years later, the Minister promised a policy memorandum that would address early release.[8] This memo, *Sancties in Perspectief* (Sanctions in Perspective), was published in 2000[9] and called for the renewed introduction of the conditional release. Two committees were created to implement this, the *Commissie Herziening Vervroegde Invrijheidstelling* (or Vegter Committee; i.e. the 'Committee for the Revision of Early Release') and the *Commissie Vrijheidsbeperking* (or Otte Committee; i.e. the 'Restriction of Freedom Committee'). Their reports from 2002 and 2003[10] gave rise to the legislative proposal entitled *Wijziging van het Wetboek van Strafrecht en enige andere wetten in verband met de wijziging van de vervroegde invrijheidstelling in een voorwaardelijke invrijheidstelling* (Amendment of the Criminal Code and a number of other laws in connection with changing early release into conditional release), which became law in 2008. The early release thus ended up being a short-lived initiative.

2.2. Purpose of conditional release

With the reintroduction of conditional release, the legislature intended to contribute to an increase in social safety, partly by reducing the risk of recidivism due to convicted individuals being under the supervision of the judicial system.[11] '*The government now wants to restore the significance of early release as an instrument for protecting society and preventing recidivism. By making early release conditional again, the return to society can take place in a more controlled manner, and the risks sometimes associated with release can be better*

6 *Parliamentary Papers II*, 1993/94, 22 999, 11, p. 8.

7 Act of 4.4.1994, Bulletin of Acts and Decrees 593.

8 *Parliamentary Papers I*, 1997/98, 24 263, 62f.

9 *Parliamentary Papers II*, 2000/2001, 27 419, 1.

10 Report of the Restriction of Freedom Committee, *Vrijheidsbeperking door voorwaarden. De voorwaardelijke veroordeling en haar samenhang met de taakstraf, de voorlopige hechtenis en de voorwaardelijke invrijheidstelling* (Restricting Freedom through Conditions. The conditional sentence and its relationship with community service, pre-trial detention and conditional release), Ministry of Justice, The Hague, 2003, and the Report of the Committee for the Revision of Early Release, entitled *Voorwaarden voor een veilige terugkeer* (Conditions for a safe return), Ministry of Justice, The Hague, 2002.

11 *Parliamentary Papers II*, 2005/06, 30 153, 3, p. 1.

reduced. '[12] The main features of the new regulation are that conditional release will apply to sentences in excess of one year, it will not apply to partially suspended custodial sentences, it will take place after completion of two-thirds of the sentence.[13] It will always be subject to the general condition that the convicted person does not commit criminal offences and, if necessary, it will also be subject to special conditions. The probation period is equal to the period for which the release is granted, but shall be at least one year concerning the general condition imposed. Release may be postponed or denied, and it may be revoked if the conditions are breached.

The proposal received a lot of political support, although there was also criticism. For example, the proposal was not considered far-reaching enough, especially according to the CDA (right-wing Christian Democrats) and the VVD (a right-wing Liberal party). The CDA, for example, wanted longer probationary periods and a lighter criterion for postponing or denying conditional release. More importantly, however, in the view of the CDA and VVD, a convicted person would need to earn their release: the 'Yes, unless' principle should be replaced by 'No, unless'. This would mean a regulation, therefore, that allows conditional release in case of good behaviour. The legislature, however, disagreed. Reference was made to the opinion of the Vegter Committee from 2002: '... having matters informed by the behaviour during detention is, however, not a goal of the conditional release regime. To design the regulation in this way could lead to detainees artificially adapting their behaviour, which would have no relevance for behaviour after detention.' It was also pointed out that behaviour during detention already has consequences in the form of disciplinary punishments and consequences for the course of detention and leave. If the conditional release subsequently is not imposed, in part due to behaviour during detention, this group of prisoners would be back on the street without any form of supervision or any means of corrective intervention once the (full) sentence was completed. The 'earn your conditional release model' could also lead to the imposition of lower sentences, since at the time of sentencing or judgment, the courts would not (or no longer) be able to foresee whether the convicted individual would be eligible for conditional release. Therefore, to avoid a significant increase in the sentence, a lower sentence might be imposed that, if the convicted individual were to behave well, would nevertheless lead to a conditional release. This would be undesirable, according to the legislature's final verdict. Even today, when there are renewed calls to grant

12 *Parliamentary Papers II*, 2005/06, 30 153, 3, p. 5.

13 More precisely: for sentences between one and two years, the release will take place if the convicted individual has served one year and a third of the then remaining sentence.

conditional release only if the inmate has earned it, these arguments seem to be valid ones for not doing so.

The SGP (a conservative Protestant party) also voiced some criticism, albeit of an entirely different nature. The party wanted to know how to avoid history repeating itself, that is, how to avoid the conditional release once again being automatically conferred and thus becoming a right instead of a favour. The PvdA (the Dutch Labour Party) expressed a similar opinion and wondered how to prevent the Public Prosecution Service from giving too little priority to revoking conditional release if conditions were breached, as was the case before. They contended that this was one of the reasons why it went 'wrong' last time round. The Public Prosecution Service has taken on the challenge, this will be discussed further in the paper. First, a brief outline of the legal regulation is detailed.

2.3. The legal regulation of conditional release

The conditional release may be granted after two-thirds of the sentence has been served, on the understanding that the conditional release period may not exceed two years.[14] For example, someone who is convicted to a three years prison sentence will be released after two-thirds, i.e. two years served. Someone who is convicted to a nine years sentence, however, will not be released after two-thirds since that would mean the period of conditional release would be three years; he or she will have to serve seven years before being eligible for conditional release. However, it is possible to postpone or even abandon the conditional release.[15] If the conditional release is granted, it is always subject to the legal condition that no new criminal offences are committed. In addition, special conditions may be attached to the conditional release.[16] These conditions include an obligation: not to make contact with certain persons or institutions or to have others make such contact; not to be at or in the immediate vicinity of a certain location; to be present at a certain location at certain times or for a certain period; to report to a certain authority at certain times; to abide by a prohibition on using

14 Section 2:10 of Book 6 of the Code of Criminal Procedure. The situation is somewhat more nuanced, however. For sentences of up to one year, there is no conditional release. If part of the sentence is imposed conditionally, no conditional release is allowed, and foreigners without legal residence will not be eligible for it. The system of conditional release does not apply for juveniles, the rationale being that their incarceration is all about reintegration anyway (school, therapy etc. are integral parts of the incarceration.

15 Sections 2:12 and 2:13 of Book 6 of the Code of Criminal Procedure.

16 Section 2:11 of Book 6 of the Code of Criminal Procedure.

narcotics or alcohol; to cooperate with blood or urine tests to ensure compliance with this prohibition; to agree to being admitted to a care institution; to undergo treatment by an expert or care institution; to stay in an assisted living facility or social care institution; to participate in a behavioural intervention; to abide by a prohibition to perform voluntary work of a certain nature; to abide by having their right to leave the Netherlands restricted; to provide full or partial compensation of the damage caused by the offence or to make an arrangement for the payment of the compensation in instalments; to move out of a certain area; and to agree to other conditions concerning their behaviour.[17] The latter condition makes it clear that the law gives the Public Prosecution Service a great deal of latitude in setting conditions. The Dutch National Board of Prosecutors-General has also installed an advisory board to assist the Central Facility for Conditional Release in making their decisions. This board consists of behavioural experts. Their advice is obligatory in complex cases, but not binding. Complex cases are defined to be any case with an aspect of terrorism, cases of sex offenders sentenced to two years or more, cases in which during the criminal proceedings that led to the conviction, the convicted has refused psychological evaluation and cases in which the judge has imposed a special measurement to protect the safety of others or the general safety of property[18] *and* the sentence is six years or more.[19]

If a probationer does not comply with the conditions, the Public Prosecution Service has three options for responding: by changing the conditions, by issuing a warning or by revoking the conditional release.[20] This could concern the entire period or part of it. The latter is preferable since once a conditional release has been partially revoked, a new conditional release will be granted, which means that conditions can once again be imposed that promote a gradual return to society. If there are serious reasons to suspect that the convicted individual has behaved in such a way that the conditional release will be revoked, the Public Prosecution Service may order their arrest and suspend the conditional release.[21]

Convicted individuals can lodge an objection with the court that adjudicated in the first instance concerning the Public Prosecution Service decisions on postponing, denying or revoking a conditional release.[22]

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17 Section 2:11(3) of Book 6 of the Code of Criminal Procedure.

18 Section 38z of the Code of Criminal Procedure.

19 Directive of the National Board of Prosecutors-General concerning conditional release, stcrt-2021-33409.

20 Section 2:13a of Book 6 of the Code of Criminal Procedure.

21 Section 2:13b of Book 6 of the Code of Criminal Procedure.

22 Section 6:8 of Book 6 of the Code of Criminal Procedure.

3. The Central Facility for Conditional Release and Practice

As previously stated, the Public Prosecution Service has taken the task of implementing and enforcing the conditional release seriously, and it has set up a department that is fully dedicated to making conditional release decisions, including requests for postponing or denying conditional release. It also supervises compliance with the conditions and, where necessary, issues warnings or requests for suspending or revoking the conditional release. That department is the *Centrale Voorziening voorwaardelijke invrijheidstelling* (CVvi), which has existed since mid-2008. The CVvi handles around 1,150 cases annually. In about 800 cases, special conditions are imposed. In the other cases, only the general condition of not committing criminal offences applies.[23]

In the context of this article, an outline of the possible conditions is particularly important. Therefore, the reasons for postponing or denying conditional release, as well as the options for revoking conditional release, are not discussed. If there are no grounds for postponing or denying the conditional release, the CVvi decides whether special conditions should be imposed, and if so, which. It uses advice from the prison where the detainee was being held, from the probation service and from the section of the Public Prosecution Service where the criminal case was originally heard. In the light of the legislative history, the conditions must be aimed at reducing recidivism and protecting society. The position of the victim is given particular importance.

<Example: special conditions in connection with reoffending>

During his detention is is clear that mr. Z. really benefits from clarity and structure. Concerning the problems he experiences in various areas of his life (Z. hardly has any work experience, has a low IQ, has financial problems, lacks a (positive) social network and has a history of substance abuse), the probation service indicated in its advice that imposing special conditions is necessary. The risk of recidivism is judged to be high. The CVvi decision includes their prohibiting his substance abuse, imposing outpatient treatment and the obligation to stay in an assisted living facility. This is how an attempt is made to successfully reintegrate the probationer by providing him with structure.

<Example: a special condition in connection with the interests of victims>

In the criminal case on which the aforementioned conditional release case is based, the matters Z. was convicted of included extortion and robbery. The

23 CVvi's own data (2017), unpublished.

Public Prosecution Service has informed the victims about the imminent release. They were also asked if they would like to express any wishes they may have about that release. In response to this request, one of the victims stated that she was very afraid of Z. A location ban was therefore included in the conditional release decision.

On behalf of the Public Prosecution Service, the probation service supervises compliance with the conditions. If a condition is breached, the probation service can issue an official warning, but this can also be a reason to inform the CVvi, especially if the breach is a serious. For example, in the case of a one-off, such as a late arrival at a mandatory interview with the probation service, than a warning from the probation service may suffice. However, if there is a violation is more serious such as that of a substance abuse ban, this must be reported to the CVvi. As indicated above, the Public Prosecution Service can respond to a breach of conditions in three ways, one of which is by changing the conditions.

<Example: changing conditions after a breach>

Convicted individual I. left the house after an argument with his partner and cut off his ankle bracelet. Subsequently, he could not be reached by the probation service by phone. A day after sabotaging his electronic ankle monitor, he reported to the probation service saying that he realised that he had made a big mistake. The probation service contacted the CVvi and said that it would like to continue the supervision, but that this was not possible under the current special conditions. I. wanted to continue living with his partner, but the probation service felt that the condition 'admission to an assisted living facility or social care institution' should be added to the conditional release decision. Because I. had adhered to his conditions right up to when he sabotaged his ankle bracelet and a firm warning seemed sufficient at this point, the CVVI amended the decision and added assisted living.

4. The normative framework in Serbia

4.1. The conditions for release on parole

The normative framework governing release on parole in Serbia has been changed several times through the amendments to the Criminal Code,[24]as well as through the ancillary criminal legislation based on the principle of casuistry. Even

24 The Criminal Code (CC), Official Gazette RS, No.85/05, 88/05, 107/05, 72/09, 111/09, 121/12, 104/13, 108/14, 94/16, 35/19.

though modern trends in criminal law calls for the introduction of more lenient conditions for release on parole, by analysing relevant provisions of substantive law, it is found that Serbian lawmakers have resorted to an opposite method of tightening these conditions. According to the original text of the Serbian Criminal Code, in order to be released on parole, it used to suffice that the convicted person had served one half of the sentence. In addition to the modification of the formal condition, prohibition of release on parole was gradually introduced in particular cases, for instance, if a convicted person had attempted to escape or had escaped from prison while serving the sentence,[25] or in cases of serious criminal offences,[26] along with an itemized list of criminal offences where release on parole is not allowed.[27]

Release on parole is subject to restrictions in terms of fulfilment of formal and substantive conditions. The formal condition refers to the time already served in prison, i.e. the convicted person is required to serve two-thirds of the sentence, whereas the substantive condition refers to an expert evaluation of whether the criminal sanction has served its general purpose relative to its impact on preventing the convicted person from re-offending in the future. This evaluation is, in fact, a qualified report on the convicted person's conduct in the penal environment during serving of sentence, and a prediction that he/she has rehabilitated to such extent that it may be reasonably assumed that he/she will conduct himself/herself properly at liberty, and particularly that he/she will not commit a new criminal offence prior to the expiration of the time to which he/she was sentenced. It is hard to establish with certainty whether this condition has been met, and, therefore, this insufficiently precise criterion gives room for arbitrariness and unequal treatment (Sokolović, 2014:42). It is a well-known fact that excellent conduct of a convicted person during serving of sentence may not necessarily have anything to do with his/her rehabilitation and it often serves the purpose of maintaining prison discipline, to ensure that the inmates are obedient, rather than being a means of stimulating them to participate in their resocialization and rehabilitation (Stojanović, 2015:10). Therefore, the following statutory parameters in evaluating a convicted person's good conduct and predictability are taken into consideration.[28] As an explicit exemption, a convicted person who during serving

25 The Law on the Amendments to the Criminal Code, Official Gazette RS, No.72/09.

26 The Law on the Amendments to the Criminal Code, Official Gazette RS, No.121/12.

27 The Law on the Amendments to the Criminal Code, Official Gazette RS, No.35/19.

28 According to the Article 46, paragraph 1 of the CC, these are the parameters: the conduct of the convicted person during serving of sentence, the performance of the work duties, as well as other circumstances indicating that the convicted person will not commit a new criminal offence while on parole.

of sentence has been disciplined twice for serious misconduct[29] and had his/her privileges revoked[30] may not be released on parole.

Apart from these general rules, activation of conditional release is envisaged for certain categories of convicted persons depending on the type of penalty, the severity of the offences they were convicted of, and the number of final convictions.[31] The court has the discretion to deny the petition for release on parole even if the convicted person has fulfilled the formal and substantive conditions, i.e. even if the penitentiary where he/she is serving the sentence has provided a positive pre-release report if the court finds in its rationale that the progress achieved in the convicted person's rehabilitation in the penal environment is dissatisfactory.

Unlike the above cases, the prohibition of release on parole is envisaged if the offenders are convicted of the most serious criminal offences, which carries a sentence of at least ten years of imprisonment or life imprisonment.[32] One may note that the provisions on the conditional release are contradictory because, on the one hand, the conditional release may be applied when a person is sentenced to life imprisonment, while, on the other hand, it is excluded in case of qualified forms of criminal offences against life and limb and those against sexual freedoms. This catalogue of criminal offences was expanded by

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29 Article 157, paragraph 1, subparagraphs 1-23 of the Law on the Execution of Criminal Sanctions, Official Gazette RS, No. 55/14, 35/19.

30 Pursuant to Article 129, paragraph 2 of the Law on the Execution of Criminal Sanctions, the privileges include: free pass into town; a visit to the family members and relatives on weekend and holidays; an incentive leave from the penitentiary institution up to seven days during a year; the use of annual vacation outside of the penitentiary institution. The privileges shall be granted or revoked by the prison warden.

31 According to the Article 46, paragraph 2 of the CC, the court may release on parole life-sentence prisoners after they have served twenty-seven years, as well as prisoners convicted of the following criminal offences: crimes against humanity and other goods protected by international law as referred to in Articles 370-393a of the CC; criminal offences against sexual freedoms as referred to in Article 178-185b of the CC; qualified forms of a criminal offence of domestic violence as referred to in Article 194, paragraphs 2-4 of the CC; unlawful production and putting in the circulation of narcotics as referred to in Article 246, paragraph 5 of the CC; criminal offences against the constitutional order and security of the Republic of Serbia; giving or receiving a bribe, those convicted by the judgment of competent courts and their special departments for combating organized crime, corruption and terrorism, as well as those finally convicted more than three

32 times to unconditional prison sentence and no expunction was made or there are no conditions to expunge any of the sentences.
These criminal offences are the following: aggravated murder as referred to in Article 114, paragraph 1, subparagraph 9 of the CC; rape as referred to in Article 178, paragraph 4 of the CC; sexual intercourse with a helpless person as referred to in Article 179, paragraph 3 of the CC; sexual intercourse with a child as referred to in Article 180, paragraph 3 of the CC; and sexual intercourse through abuse of position as referred to in Article 181, paragraph 5 of the CC.

Article 5, paragraph 2 of the Law on Special Measures to Prevent Criminal Offences Against Sexual Freedoms of Children,[33] which casuistically refer to adult perpetrators of sex crimes.[34]

From the human rights perspective, the prohibition of release on parole of persons convicted of the above mentioned criminal offences raises *prima facie* doubt concerning the equality of all citizens before the law (Ilić, 2019, 157). From the international law perspective, such a solution is in contravention of the Recommendation of the Council of Europe Committee of Ministers on conditional release,[35] whereby conditional release should be made available to all sentenced prisoners, including life-sentence prisoners. Caution should be exercised with respect to the statutory prohibition of conditional release also due to the prohibition of torture and inhuman and degrading treatment as guaranteed under Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which safeguards the right to human dignity. In its judgment in *Vintner and others v. UK*[36], in the context of examining inhuman punishment, the European Court of Human Rights found that it was important for the national legislation to regularly and effectively re-examine the grounds for further detention of such prisoners and that the requirements for their conditional release cannot be restrictive without justified reasons (Beširević et al., 2017:86).

On the other hand, when juvenile offenders are sentenced to juvenile prison, the conditions for their release on parole are not as rigorous as those for adults. Thus, juvenile offenders may be released on parole if they have served one-third of the sentence, but not before the expiry of six months if, subject to success in enforcement of the sanction, it may be reasonably expected that they will conduct themselves properly upon release on parole and will refrain from committing

33 *Official Gazette RS*, No.32/13.

34 To that effect, prison sentence may not be suspended for persons convicted of the following criminal offences: rape as referred to in Article 178, paragraphs 3 and 4 of the CC; sexual intercourse with a helpless person as referred to in Article 179, paragraphs 2 and 3 of the CC; sexual intercourse with a child as referred to in Article 180 of the CC; sexual intercourse through abuse of position as referred to in Article 181 of the CC; prohibited sexual acts as referred to in Article 182 of the CC; pimping and procuring as referred to in Article 183 of the CC; mediation in prostitution as referred to in Article 184, paragraph 2 of the CC; showing, procuring and possessing pornographic material and abuse of a minor for pornographic purposes as referred to in Article 185 of the CC; inducing a minor to attend sexual acts as referred to in Article 185a of the CC; abuse of computer networks or other means of technical communication for committing criminal offences against sexual freedom of a minor as referred to in Article 185b of the CC.

35 Rec. (2003) 22 of 24.9.2003: https://rm.coe.int/16800ccb5d, accessed on 27.4.2021.

36 Nos.66069/09, 130/10, 3896/10, 3896/10, 9.7.2013, http://hudoc.echr.coe.int/eng?i=001-122664, accessed on 27.4.2021.

criminal offences.[37] Educational measures may also be imposed on them, such as enhanced supervision and special obligations they have to fulfil.

4.2. The procedure

The procedure for release on parole shall be initiated by a petition filed by the convicted person or his/her defence counsel with the court which is adjudicated in the first instance.[38] The public prosecutor does not have the legal capacity to file a petition for release on parole. In addition to his competence to prosecute perpetrators of criminal offences, the public prosecutor also has the competence to protect the constitutionality and legality, and, upon initiative of the penitentiary institution in which the convicted person is serving his/her sentence, the public prosecutor should also have the competence to review the fulfilment of conditions for release on parole and initiate the procedure *ex officio*. Neither is this power delegated to the penitentiary institution, which is unfavourable from the perspective of the protection of the rights of convicted persons, obligations of the state authorities to take care of the essence of the restricted right, the importance of the purpose of this restriction, the nature and scope of the restriction of human rights,[39] and both general and individual purposes of execution of criminal sanctions in the form of successful social reintegration of convicted persons,[40] even though the penitentiary institution keeps the records of convicted persons[41] and monitors the process of their reformation.[42]

Once the petition for conditional release has been filed, the non-trial chamber of the court shall perform a preliminary review of the formal conditions and should it find that the petition was filed by an unauthorized person, or that the convicted person has not served two-thirds of the sentence,[43] or that

37 Article 32 of the Law on Juvenile Criminal Offenders and Criminal Justice Protection of Juveniles, Official Gazette RS, No.85/05.

38 Article 563 of the Criminal Procedure Code, Official Gazette RS, No.72/11, 101/11, 121/12, 32/13, 45/13, 55/14, 35/19, 27/21, 62/21.

39 Article 20, paragraph 3 of the Constitution of the Republic of Serbia, Official Gazette RS, No.98/06.

40 Article 2 of the Law on the Execution of Criminal Sanctions.

41 Articles 9 and 10 of the Law on the Execution of Criminal Sanctions.

42 Rulebook on the Treatment, Individual Treatment, Classification and Re-classification of Convicted Persons, Official Gazette RS, No.66/15.

43 The Special Department of the Appellate Court in Belgrade in its Ruling Kž Po1-Uo.br.46/18 of 5.7.2018. rejected the defence counsel's appeal to the ruling of the trial court to dismiss a petition for release on parole because the court found that the defendant had not served two-thirds of his prison sentence, and the fact that he was pardoned by the President of the Republic and thus released from serving a part of his sentence does not mean that the said part of the sentence of imprisonment for which the defendant was released should be credited to the time served because his sentence had not been commuted.

the convicted person attempted to escape or did escape from prison during serving of sentence, it shall issue a ruling rejecting the petition. Otherwise, the non-trail chamber of the court shall seek from the penitentiary institution in which the convicted person is serving the sentence to submit a report on the conduct of the convicted person and on other circumstances indicating whether the purpose of the punishment has been achieved[44] or a report by a commissioner of an administrative authority responsible for the execution of non-custodial sanctions.[45] Once the penitentiary institution has submitted its report, the presiding judge of the non-trial chamber shall issue an order to schedule a hearing to decide on the petition for release on parole. The following parties shall be summoned to the hearing: the convicted person if the presiding judge deems that his/her presence is necessary, the defence counsel, the public prosecutor and, in case of a positive report, a representative of the penitentiary institution in which the convicted person is serving the sentence.[46] Since the presence of the defence counsel is not required, the hearing may be held even if the council fails to appear.

The hearing on the petition for release on parole shall commence with the presentation of the defence counsel's or the convicted person's arguments in favour of release on parole, and if they are not present, it shall commence by the presiding judge briefly explaining the reasons for which the petition was filed. Thereafter, the public prosecutor shall state his/her position on the convicted person's petition, by explaining the fulfilment of statutory requirements for release on parole, and propose that the petition be granted or denied. The public prosecutor's opinion and proposal are not binding on the court, as they are simply an additional element for consideration. After that, the representative of the penitentiary institution shall explain the report on the conduct of the convicted person and provide argumentation for his position regarding compliance with the individual treatment programme and justification of conditional release. Although the penitentiary institution's report is not binding on the court either, it is relevant for an appropriate and effective evaluation of success and progress in the convicted person's conduct during the treatment programme in the penitentiary institution.

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44 Article 47, paragraph 2 of the Law on the Execution of Criminal Sanctions.

45 Article 1, paragraph 2 of the Law on the Execution of Non-Custodial Sanctions and Measures, Official Gazette RS, No.55/14, 87/18.

46 The Criminal Department of the Supreme Court of Cassation, at its session held on 4.4.2014, in its replies to the disputed issues of law which were raised by lower courts, took the position that a hearing to decide on the petition for release on parole may be held even if the representative of the relevant penitentiary institution is not present if the representative was duly notified and if the motion on the justifiability of the reasons for release on parole is fully and clearly reasoned, and this shall be deemed appropriate from the point of view of procedural economy; https://www.vk.sud.rs/sites/default/files/attachments/3%20KO%204.04.2014..pdf, accessed on 22.6.2021.

Immediately after the hearing is over, the chamber shall issue a ruling denying or granting the convicted person's petition for release on parole, especially taking into consideration the risk assessment concerning the convicted person, the success in the implementation of his/her treatment programme, prior convictions, life circumstances, family post-penal care and expected impact of the parole. In its ruling to grant the petition, the court may order that the convicted person must fulfil certain obligations that are subject to protective supervision, whereby support is given to the convicted person with his/her active participation[47] and obligations[48] to restore material gain acquired through the commission of the offence, compensate the damage, etc. The convicted person may be placed under electronic monitoring,[49] although it is elusive what a professional in charge of handling the remote monitoring device is supposed to supervise (Vuković, 2016:191) because such an offender is not subjected to the same regime as those who are placed under house arrest either before or after sentencing. An appeal to the ruling of the first instance court on the petition for release on parole, which may be lodged by the public prosecutor, the convicted person and his/her defence counsel, shall be decided by a higher court.

In case of release on parole from juvenile prison, a juvenile offender may file such a petition with the juvenile council of the trial court which had adjudicated his/her case. Before rendering the decision, the president of the juvenile council shall, as appropriate, orally question the juvenile offender, his/her parents, representatives of the guardianship authority and other persons, and shall obtain a report and opinion from the juvenile correctional facility concerning the justification of release on parole. Oral questioning of the juvenile offender shall be mandatory if the matter at hand is the release on parole after the offender has served two-thirds of the sentence, unless the juvenile council finds, based on available documentation, that the conditions for release on parole are fulfilled.[50]

5. Serbian jurisprudence

Even though it does not have the status of law, in the Republic of Serbia, jurisprudence is very relevant because court decisions establish guidelines that may impact the disposition of similar cases. Decisions on granting parole are

47 Article 73 of the CC.

48 Article 65, paragraph 2 of the CC.

49 Article 46 of the Law on the Execution of Non-Custodial Sanctions and Measures, pursuant to which electronic monitoring may not be longer than one year or longer than the duration of the parole itself.

50 Article 144 of the Law on Juvenile Criminal Offenders and Criminal Justice Protection of Juveniles.

rendered in a separate procedure, leading to some sort of modification of a final judgment. Each of these decisions is inherent to the circumstances of a particular case, the type of criminal offence, the defendant's personality and the achieved level of resocialization. One may say that the decisions of both the trial court and the appellate court when deciding on appeal, is a factual issue that is evaluated differently on a case by case basis, which is sometimes conducive to the lack of uniformity of jurisprudence and, therefore, to inequality of convicted persons before the law, (Đuričić, 2021: 240) whereby legal certainty is affected.

When evaluating fulfilment of conditions for granting parole, competent authorities should establish whether the convicted person during serving of the prison sentence has rehabilitated to such an extent that it may be reasonably expected that he will conduct himself properly at liberty, rather than review the facts due to which he was convicted (Pantelić, 2018:43). The trial court denied a defence counsel's petition for release on parole for grave offences against traffic safety[51], and that of failure to render aid to a person injured in a traffic accident[52] because it was impossible to find whether the impact of the punishment was such that the convicted person would conduct himself properly at liberty and that he would not commit a new criminal offence given the fact that this particular case was about a person who had been convicted by final judgment of two criminal offences and having in mind the nature and severity of the criminal offences he had committed, the sentence imposed on him and the planned expiry of his sentence. However, the appellate court overturned this ruling because the finding of the trial court was presumptive and without proper evaluation of the penitentiary institution's report from which it transpired that the offender was a person with low-risk behaviour, that during his serving of sentence he had progressed to open group, that he had manifested adapted behaviour, that he had not been disciplined, that he had treated the officials with respect, that no inclination towards embracing the norms and values of criminally oriented convicted persons had been observed in him, that he had achieved individual goals which had been set for him, that he had had good interpersonal relations with other inmates, that he had been very responsible in performing his work duties, for which he had even been rewarded, that he had confessed to having committed the criminal offences and expressed remorse, that he had correctly used non-custodial rights and vacations, and also that he was not a manipulative personality.[53]

51 As referred to in Article 297, paragraph 4, taken in conjunction with Article 289, paragraph 3 of the CC, and in conjunction with paragraph 1 hereof.

52 As referred to in Article 296, paragraph 1 of the CC.

53 Ruling of the Appellate Court in Niš, Kž-Uo.br.77/16 of 11.10.2016, http://www.ni.ap.sud.rs/pretraga/%D0%9A%D0%B6-%D0%A3%D0%BE/77/2016, accessed on 23.6.2021.

Moreover, neither the defendant's prior convictions for criminal offences against life and limb and property crimes nor the fact that he had previously also served time in prison, may not serve as arguments to the effect that during his serving of sentence he had failed to rehabilitate and that he would not re-offend, given the fact that the report of the penitentiary institution in which he served his sentence indicated that he had voluntarily arrived in prison to serve his sentence, that he had behaved in line with applicable penal rules and that he had functioned properly with other inmates and achieved all individual goals that had been set for him.[54] When deciding on the petition for release on parole, the trial court is not obliged to evaluate whether the purpose of the punishment has been achieved both in terms of special and general prevention, but should rather review the facts and circumstances whereby it can conclude that the convicted person will not commit a new criminal offence while on parole. The allegations that the convicted person is a special kind of re-offender, that other criminal proceedings for the same criminal offence of unlawful production and circulation of narcotics[55] are being conducted against him, that the risk was assessed to be medium and that the penitentiary institution's report on his conduct is positive, are not applicable parameters to deny his petition for release on parole.[56]

However, irrespective of compliance with the formal requirement concerning the length of the sentence already served - three years and ten-month for the criminal offence of aggravated theft,[57] no reasons have been found that would justify release on parole of a convicted person who is a re-offender and for whom a high risk of re-offending was established, he was assigned to group B1 of a prison ward of closed type, and his treatment programme in the penal environment has not been finalized, while implementation of the set goals is ongoing.[58] Also denied was a convicted person's petition for release on parole from serving a one-year sentence of imprisonment for the criminal offence of unauthorized possession of narcotics,[59] following a hearing which was not attended by the convicted person or by the representative of the penitentiary institution because the pre-release report was negative. Such a decision of the trial court was based on the assessment that, for the time being, there were no reasons that would justify the conditional release of the convicted person as it transpired from the pre-release report that he

54 Ruling of the Appellate Court in Kragujevac KŽ-uo-269/20 of 28.12.2020.

55 As referred to in Article 246, paragraph 1 of the CC.

56 Ruling of the Appellate Court in Kragujevac KŽ-uo-242/20 of 25.11.2020.

57 As referred to in Article 204, paragraph 3 of the CC taken in conjunction with paragraph 1, sub-paragraph 1 hereof.

58 Ruling of the Second Basic Court in Belgrade Spk.br.133/17, Kuo br.21/20 of 31.3.2020.

59 As referred to in Article 246a, paragraph 1 of the CC.

had been assigned to semi-open group of a prison, he had no work engagement, a high risk of re-offending was established, he was partially motivated to change his criminogenic behaviour, implementation of individual goals was underway, he was adapted to functioning in the penal environment, he had neither been disciplined nor rewarded, his attitude towards other inmates and officials was correct, and after the security measure of compulsory treatment for drug addiction had been lifted he was transferred from the Special Prison Hospital to prison to continue serving his sentence, which was the reason why the implementation of his treatment programme in the penal environment had only just begun.[60]

There is a dilemma as to the method of evaluation of the fulfilment of the substantive requirement for conditional release of convicted persons whose two-thirds of prison sentence had expired while they were still in detention due to the length of the criminal proceedings against them for the criminal offence of money laundering as referred to in Article 231, paragraph 2 of the CC taken in conjunction with paragraph 1 hereof. It is beyond dispute that time spent in detention shall be credited to the prison sentence,[61] but the question is how to assess the risk of re-offending and the convicted person's conduct in the penitentiary institution during the serving of sentence, which did not occur? In the above situation, the penitentiary institution is unable to submit a report on the level of achievement of the treatment programme or justify a conditional release. The court held that these facts had no impact on the powers of the court to conclude based on the report on the offender's conduct while in detention, according to which the offender had complied with the house rules and had not infringed disciplinary rules, that it might be reasonably expected that the convicted person would conduct himself properly at liberty and that he would not commit a new criminal offence until the expiry of his sentence and even though he had demonstrated exemplary behaviour and had not committed other criminal offences, no other criminal proceedings were conducted against him, particularly bearing in mind his poor health and family circumstances, i.e. the fact that he was a father of three underage children.

The courts are not too strict when it comes to conditional release in the context of non-custodial sanctions. Thus, the court granted a petition for release on parole from a sentence of eight months of house arrest without electronic monitoring for the criminal offence of reset as referred to in Article 221, paragraph 1 of the CC because the offender had served two-thirds of his sentence, and while he was serving the sentence he accepted his obligations, realized the consequences of his criminal offence and had so far behaved properly during the

60 Ruling of the Second Basic Court in Belgrade K.br.347/20, Kuo br.3/21 of 22.1.2021.

61 Article 63, paragraph 1 of the CC.

enforcement of his sanction, he had complied with the rules, sanction enforcement programme and his agreements with the Probation Service, he had successfully completed his resocialization programme and had achieved everything that he could during the service of his sentence of house arrest.

6. Conclusions and recommendations

The comparative analysis presented in this paper indicated the significance of conditional release for society, public safety and prisoners. Convicted persons are given a chance to be released back into society, conditionally, to continue or rebuild their lives. The normative framework, which prescribes formal and substantive conditions, is just the first step in establishing an efficient system of conditional release. The second step refers to the development of the programs to reduce recidivism and to minimize the criminal risk.

In the Netherlands, the Public Prosecution has an active and important role in making conditional release decisions. This competence lies with the special department of the central facility for conditional release. The department decides the requests for granting, postponing or denying conditional release and supervises compliance with the conditions for every person who is released on parole. The absolute majority of probationers are obliged to comply with conditions that are specially designed for them and examined in detail. During the conditional release period their behaviour is under surveillance and there are efficient procedural mechanisms in case that the probationer violates conditions of release. Unfortunately, that's not the case in Serbia, where almost all probationers, whom the court granted release on parole, are not controlled by authorities and this system should be provided for. For a future analysis it could be interesting to examine if the Serbian Probation Service might play a role in observing the probationers behaviour, as it does in the Netherlands.

The Dutch system also takes care of the victims, and people who decide on conditional release are always mindful of the crimes that were committed by probationers. Following the analysis, it is the author's opinion that this is not the focus in Serbia. Serbian authorities focus on incarceration. In contrast to this, the Dutch approach shows an alternative aim of exterminating the substantial cause of the crime, including contributions made to support probationers and a focus on reintegration into society. It is the author's opinion that the possibility to change the condition and coherent methods can guarantee effective rehabilitiation.

On the other hand, one could argue that the Dutch system places too much power in the hands of the prosecutors, as has been argued by defence lawyers.

The courts are granted almost no room to manoeuvre; as long as the decision of the Central Facility for conditional release is deemed 'not unreasonable' it will stand. The question of whether a better decision could have been made is not of any relevance. In Serbia, courts play a significant role in the proceedings, as courts used to do in the Netherlands as well. It has been a deliberate choice of the lawmaker to change this, whether or not that was a sensible choice from a human rights point of view remains to be seen.

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Milana PISARIĆ, PhD [*]
Assistant with PhD
Faculty of Law, University of Novi Sad

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COMMUNICATIONS ENCRYPTION AS AN INVESTIGATIVE OBSTACLE

Due to novel technology solutions, primarily peer-to-peer, encryption and service providers located abroad, the ability of the law enforcement agencies to execute legally authorized traditional (even special) investigatory means is becoming increasingly problematic. Communication encryption, particularly end-to-end encryption in smartphone applications hinders law enforcement authorities' practical ability to wiretap communications, although in a legal position. This phenomenon is globally recognized as "Going Dark" problem. All these challenges have necessitated legislative action. So far two different approaches have been recognized in addressing this problem: mandatory exceptional access and legalized hacking of target. In this paper we explore the viability and implications of both of them, in order to identity the most viable solution for overcoming investigative barrier, i.e. enabling the authorities to conduct surveillance of electronic communications.

Keywords: electronic communication, surveillance, encryption, lawful hacking.

[*] E-mail:mpisaric@pf.uns.ac.rs

1. Introduction

One of the most commonly used type of smartphone application are instant messaging applications (e.g. WhatsApp, Viber, Signal). Communication through such a messaging service is very popular nowadays, since it is cheap, fast and simple. Unlike short message system (SMS) which are sent within the mobile telephony network, the exchange of instant messages (IM) within these applications is based on the connection of the devices, in which they are installed, with computer network. In this process, communications transmitted across a network are sent in packets: a message is first broken up into smaller segments, which contain the destination address, the source address, and other information, such as the number of packets and reassembly order of packets, and after packets arrive at the destination device, they are reconstructed again. If not hidden on the path over the network, the content of packets is not resistant to surveillance - a number of security threats exists, like packet sniffing and man-in-middle attack. That is the reason why the computer security community has been advocating widespread adoption of secure communication tools, the so-called privacy-enhancing technologies (PETs). [1] In order to protect the communication of their users, IM application developers have been implementing different PETs, including disappearing messages and end-to-end encryption.

Although this kind of protection is legitimate, it goes also in favor of criminals, since it supposedly makes communications bullet-proof for wiretapping, hence authorities, although in legal, are not in technical position to surveil them. Thereby, the encryption of communication, particularly end-to-end encryption, is nowadays a major cause of problem in the investigative process. In order to overcome this problem, some states have implemented, or are contemplating about implementing legislation that would require communication service providers and IM application developers to make their products and services "wiretap-friendly, by inserting wiretapping capabilities into communications infrastructure and applications. There is yet another possibility – not to create new vulnerabilities, but to exploit existing weaknesses.

In the first part of this paper the author examines the problem for law enforcement agencies posed by encryption of communication, in the second part possibilities for overcoming this problem are analyzed, while the third part is devoted to the malware enabled surveillance, i.e. lawful hacking.

1 There are different ways to protect communications – e.g. by using anonymizing services, like the Tor, i2p or GNUnet networks and secure services for logging in remotely (i.g., virtual private networks).

2. The problem

For several years the law enforcement agencies (the LEA) throughout the world have been warning that changes in telephony and some of newer communication technologies have hindered their practical and technical ability to conduct electronic surveillance and access the criminals' communications. Since the core of the problem is technology itself, mainly the encryption, the problem might be solved by addressing that very technology. This may seem as a reasonable request, nevertheless, before accepting it as such, one must first be acquainted with the nature of encryption in order to consider whether such a weakening of communication infrastructure is even possible without endangering encryption at whole.

2.1. Communications Encryption

Mobile phones were primarily designed to serve as a means of communication, and although a modern smartphone has been additionally equipped with numerous features, the communication is still its main function. Since more and more people use them, while expecting a reasonable amount of privacy, the importance of securing communications has become imperative for hardware and software producers, as well as different service providers. The primary protective technology is cryptography (as it has been for centuries), as a way to transmit messages that are only decipherable to the intended receiver, hence indecipherable to an interceptor. Encryption, as a cryptographic method, by which individuals can securely store or communicate data, is a mathematical process in which an algorithm uses a specific key to encrypt data, i.e. to translate it from plain text into unreadable, incomprehensible form. Once encrypted, the data can be securely stored on a device or transmitted across computer network.[2] That means that only a party with a proper key[3] may decrypt and read the encrypted data, and even in a case the data is accessed, intercepted or otherwise compromised, unauthorized third party only sees the data in its unintelligible form. Encryption of electronic communication is a type of data-in-transit, asymmetric encryption.

Modern encryption technology is an essential cybersecurity tool, which aims to keep electronic communications safe, by enabling users to communicate

2 Encryption may be used for data-at-rest (data stored on hardware of a device or on a remote cloud server) or for data-in-transit (data transmitted in computer network from one device to another) (Pisarić, 2020: 1085).

3 Regarding the key used, there are two main types of encryption: symmetric (typically used to protect data-at-rest) and asymmetric (commonly used in secure web-browsing, emailing, and messaging) (Pisarić, 2020: 1082).

without fear that third party without a key could understand their communications. In past few years, especially following Snowden's surveillance revelations, the public became significantly more aware of privacy and information security and the need to protect them. In order to meet these expectations, technology industry has increasingly introduced built-in and easy-to-use encryption to meet customer requirements and address evolving cybersecurity risks. Nevertheless, certain forms of encryption, particularly end-to-end encryption of data in transit, exclusively used in instant messaging applications, create problems for the LEA.

2.1.1. End-to-end encryption

End-to-end encryption (E2EE) refers to a form of encryption of data in transit, which facilitate that only the sender and intended recipient (end users) can read/see the message in plaintext, since only they (i.e. the applications on their devices) hold the keys to decrypt the message. E2EE takes place on either end of a communication - data is encrypted (made incomprehensible) on a sender's device before being sent, then transmitted over the network via the server of a service provider, still in an unreadable form, and finally is decrypted (made comprehensible) at a recipient's device. To be more precise, only the communicating users, i.e. endpoint devices, hold the cryptographic keys, while the server of the (communication) service provider acts only as messenger, passing along communication, that it can't decipher itself. In other words, E2EE makes it impossible even for the service provider to access or grant access to the plaintext of encrypted communication.

Except E2EE, encryption of communication may occur in different stages of communication process (Koops, Kosta, 2018:891): a) connection encryption, by service provider, or (b) transport encryption by service provider,[4] (c) E2EE is performed by provider of communication software (e.g., WhatsApp) on top of the channel managed by traditional telecommunication companies, or (d) E2EE performed by end users.[5] Since in first two cases the providers hold the cryptographic

4 In both of these types communications are encrypted on the sender's end, delivered to the server of provider, decrypted there, re-encrypted, and then delivered to the recipient, and decrypted on their end – meaning that the communication is actually in plain text on a provider's server. In a case of gaining the access to the server, one would be able to read, modify, delete, add, or delay any message between the server and all connected clients' devices.

5 If the communications are E2EE encrypted by the user, the LEA are allowed to use whatever technologies they have at their disposal to unlock lawfully intercepted and transmitted encrypted communications. However, there is a question of *nemo tenetur* principle with regard to compelling the user to turn over an encryption key (Pisarić, 2021: 402).

key, the encryption might be removed upon a court order or the providers might have to make the initial key available to LEA. However, in case of E2EE, this is not possible, because neither service providers nor providers of communication software have a capacity to decrypt communication since they do not possess keys.

2.2. Investigative barrier

The LEA have been traditionally authorized to lawfully access, intercept and record communication. These powers make sense only if the LEA are able to sensually perceive intercepted content data by listening or reading. With E2EE this is not the case.

Although the first free, widely used E2EE encrypted messaging software, Pretty Good Privacy (PGP), was released in 1991, until recently most communication applications did not provide any E2EE protection. However, ever since 2013 the share of unrecoverable encryption as a share of total communications traffic has been growing, as IM becomes increasingly dominant mode of communication and many popular IM applications have implemented E2EE by default (meaning there is no need for any type of user opt-in, activation, manual installation, nor any kind of in-depth technical knowledge of encryption techniques[6]).[7]

The use of such applications prevents unauthorized parties – including, telecom providers, Internet providers, and even that provider of the communication service (WhatsApp, for example) – from being able to access the cryptographic keys needed to decrypt the conversation and read messages in plaintext (they only see encrypted data). That led the LEA to claim that they are, although legally in power to intercept, practically powerless - since the interception of content data encrypted in transit is worthless without the corresponding possibility of decryption.

But how serious is this Going dark" problem? There are only few publicly available data which could demonstrate the LEA's inability to access content data. For example, in USA the number of state wiretaps reported in which encryption

6 Other E2EE tools that may be deployed by user are: OTR ('Off the Record', for secure instant messaging), Internet telephony applications, like SilentPhone, Signal, or DIME (aka Dark Mail) and specific plug-ins for Chrome, Firefox and other browsers. *FlyByNight* is a system that hides sensitive information posted on Facebook through a client-side JavaScript based encryption. OpenPGP and S/MIME encryption schemes, as well as MIME and HTML email are used for E2E cryptographic protection of e-mail (Müller et al, 2019, 24).

7 Signal, launched in 2013 have allowed encrypted communications via text messages. WhatsApp adopted Signal technology to provide encryption by default for its users starting in 2014 on Apple devices, and extended to all users by 2016.

was encountered decreased from 343 in 2019 to 184 in 2020, of which 183 the LEA were unable to decipher the plain text of the messages; as for federal wiretaps a total of 214 federal wiretaps were reported as being encrypted in 2020, of which 200 could not be decrypted (Administrative Office of the Courts, 2020)- However, these numbers are not representative nor sufficient, especially since they are used for describing the "Going dark" problem and for justifying some questionable approaches to E2EE as a way to "brighten the situation".

Although the use of E2EE present a barrier, it has some limitations, since there are many ways to implement it incorrectly, and other weaknesses that are exploitable exist, so the LEA can find ways around encryption, by employing existing techniques to collect evidence that is inaccessible otherwise - for example, access to communications metadata,[8] access to non-encrypted data stored in cloud services. These workarounds are prosperous in most cases (Pisarić, 2021:396).

One cannot dispute that encryption, particularly E2EE, hinders the investigation process, and in a near future, if present conditions persist, this adverse impact is expected to grow. Thus, there is a serious question of what is to be done.

3. Possibilities to overcome the problem

There are two different normative approaches to handle the problem of E2EE hindering the surveillance of communications: 1) Mandating technology companies and communication service providers to build in security flaws that could enable the LEA to enter encryption system (Back door option), and 2) Authorizing the LEA to hack into a target device through existing vulnerabilities in end-user software and platforms (Front door option).

3.1. Back door option – mandatory exceptional access

Legislators have forced traditional communications services providers to provide the LEA lawful interception, mandating them to embed a security weakness into their product or service, which could be used in the event of a criminal investigation, pursuant to a court order. With encryption, in order to remain decryption capability, this would mean mandating producers of encryption hardware/

8 The fact that a message is sent to a certain person (or received) on a certain day and at a certain time will be apparent – and these metadata are useful for investigative process as well. Newer E2EE tools do not only encrypt data, but also encrypt metadata (e.g. DIME and ProtonMail) and information shared.

software and communication service providers to deliberately integrate a wiretap interface and control system, in order to be able to act upon a surveil and monitoring request of a state's authority (Mandatory Exceptional Access). This idea may be implemented through key escrow or recovery agents - key escrow refers to the case in which a trustee holds a key for each user, while recovery agent hold a master key that could decipher data of all users of a specific encryption algorithm (Schuster at al, 2017:81). The US government unsuccessfully attempted to introduce a key escrow system via Clipper-chip in the 1990s, meaning that the government would have the access to decoding keys beforehand (Pisarić, 2020: 1092). This idea was debated within so-called "First Crypto war". As for recovery agents, law might create the mechanism of accessing the keys afterwards, meaning that all communication service providers are required to remain the capability to enable communication interception in plain text (decrypted). This idea is being debated within so-called "Second Crypto war", since several countries (mainly the Five Eyes counties) have recently opted for back door option.

There are at least two reasons in favor of this approach: a) it provides direct access to plaintext, by removing the additional decryption steps, and b) it is less expensive compared to identifying and exploiting existing vulnerabilities in encryption software, or even creating the new ones. While this type of mandate may sound easy, there are some important issues that must be taken into consideration. Not only it is problematic to statutory define the telecommunications carrier in a way to comprehensively include all providers of electronic communication (for example, to oblige communication applications providers - like WhatsApp), they are over-the-top services, rather than communications channel providers, hence often beyond the scope of traditional wiretapping obligations. There is also the serious issue of mandating the intermediary beyond the national jurisdiction. Still, the greatest challenge is of technical and security nature.

A large number of researchers, technical and industry experts are opposing mandatory building vulnerabilities into technology and stressing out serious security concerns. Namely that insertion of these mechanisms will necessarily weaken the system as a whole, endanger its structural integrity and compromise the security of all users—including those not under investigation (Pisarić, 2021: 404). Also, this would be an expensive burden for IT companies, since a wiretap interface would have to be integrated over a wide range of services. For all these reasons, cryptography and information security experts believe that it is exceedingly difficult and impractical, if not impossible, to devise and implement a system that gives the LEA exceptional access to encrypted data without compromising security at the same time. There is another way for providing LEA the access to encrypted communications.

3.2. Front door option - targeted surveillance at end points

Although the content of communication is protected E2EE from surveillance, there are still two vulnerable points left in communication process: the ends (terminal devices). If the end would be compromised, that would enable access to keys, or communication in plain text (before encryption, or after decryption) in real time, ex nunc. This could be achieved by gaining access to a user device, which leads us to other solution, where the LEA act as hacker – i.e. use vulnerabilities in hardware and software of device to bypass security measures and access data.

Errors and flaws may be found in each and every software and hardware, which can be exploited. A number of vulnerabilities may be found in modern encryption software as well: mathematical errors in the encryption algorithm, flaws in the random-number generator that provides inputs to the algorithm, or gaps in the algorithm's integration into the broader software or operating system. A type of vulnerability that is of special importance is the one that is discovered and exploited prior to public awareness, or disclosure to the vendor (so-called zero-day vulnerability).

The vulnerabilities may be also used in order to overcome seemingly undefeatable encryption and access communication protected by it. The idea is to authorize the LEA to target a specific end device and gain access to it, i.e. hack into it, by employing malicious software based on some vulnerability that is exploited. In case of need for surveillance of electronic communication conducted via applications that provide E2EE, the LEA might use a mechanics of employing a vulnerability for accessing a target system, since even the most perfect encryption mechanism may have some flows, so a more viable solution to bypass and undermine encryption, compared to creating new vulnerabilities, is to use the existing ones.

4. A lawful hacking – a malware enabled wiretapping

Even in more and more complex technological environment the LEA needs to have an ability to execute authorized surveillance of electronic communication. Since most of IM services nowadays use E2EE and since interception through the service provider is therefore not possible, interception at the source before encryption, or at the destination after decryption, may be the only way to capture the contents of communications. So, instead of introducing new vulnerabilities to communications networks and applications, the legislator could enable them to use existing vulnerabilities in software and hardware and regulate this as a special investigation measure.

Although a malware enabled interception may resemble by the name to "ordinary" telecommunications surveillance, it is technically not to be compared - rather it should be regarded as a secret digital break-in into device. A term "hacking" is to be used because it reflects the core of this investigation measure, that is, non-consensual access to a device. Also, unlike the traditional interception which takes place somewhere along the line, interception and monitoring concerns unencrypted content data in conducted in a time point before communication even begin, i.e. before the data is sent and transmitted, or after communication is finished, i.e. after the data is received.

The main tool for lawful hacking is malware - malicious software installed surreptitiously by third parties on a computer system without the users' knowledge or consent. The use of malware by LEA is generally referred to policeware, govware, Trojan horses (Trojans), etc. The malware enables the LEA to remotely access a target device and may serve various purposes – to compromise a device's functions, circumvent its access controls, monitor the user's activity or appropriate, corrupt, delete and change computer data. The further discussion is limited to its use for the purpose of intercepting communications, and not for the purpose of remote search of a device (Pisarić, 2021:407). In case of communication surveillance enabled by malware, it will function as a wiretapping device, such as a packet sniffer or a keystroke logger (for messages).

The LEA's use of vulnerabilities to enable wiretapping involves more uncertainty than traditional approaches, hence raises a number of unique technical and legal issues that must be carefully taken into legal consideration.

4.1. Technical issues

There are five distinct steps in surveillance enabled by malware: 1) prephase, 2) gaining access to the target's device, i.e. hacking, 3) installation of monitoring software 4) malware execution, i.e. interception of communication, 5) reporting.

Since an operating system recognize malware as threatening, it cannot operate undetected unless it exploits a vulnerability in the target device. So, the pre-phase of information-gathering starts with identification of the proper target device and its scanning for common vulnerabilities. A malware sends information from the target's device to the LEA: e.g., target device's IP address, MAC address, operating system type and version, browser type and version, last URL visited, etc.[9]

9 Like a malware known as a Computer Internet Protocol Address Verifier ("CIPAV").

Since the exploits must be exquisitely tailored to particular versions, in order to execute a hack into a device, LEA must previously (in the pre-phase) find the proper vulnerability that is going to be used. There are several ways through which malware may be installed on or delivered to a target device: a) on a device (in situ), in case police have physical access to a device, most commonly via removable hardware (floppy, CD, USB etc.), b) remotely (drive-by), or c) covertly accessing a device using the user's username and password (Škorvánek et al, 2020: 1008). The most practical way of delivery is to perform the installation of malware over a remote connection.[10]

Once a malware successfully exploits a vulnerability and enters the device, after circumventing security protections and by undertaking a number of measures in order to remain undetectable, it begins to run with the user's file access rights and execute the task on a suspect's device, i.e. to collect information from the target's device or network, extract and transmit them to an external controlling entity, i.e. to a LEA server. For the purpose of communication surveillance, the police monitoring system may monitor the user's activity in real time, i.e. listen to their conversations and receive messages in plaintext before they are encrypted, or after they are decrypted on an end-point device. The malware resides on the hard drive until it is disabled, and it reports to a remote controller regularly or continuously, constantly updating a police dossier of what it has learned, or it might report at one point in the future, uploading a bundle of information acquired over time (Ohm, 2017, 323). Also, the integrity of the malware and the limitation of its functions to the purpose of enabling surveillance are a prerequisite and guarantee that the collected evidence could be used in the course of criminal procedure.

Having been introduced with possibility of LEA power to hack back, we must stress out the importance of legal implementation of technical requirements for the use of malware in criminal investigations.

4.2. Legal issues

Although lawful hacking is definitely a more desirable alternative to the restriction of encryption, the debate on how lawful hacking should be regulated, is still in its early stages (Liguori, 2020: 344). In recent years lawmakers in several

10 Remotely installation of malware may occur via web browser or via voluntary download, since there are different points for Trojans to target a device, including infected attachments in email, malware on *a particular* web pages, poor implementations of network protocols, or users downloading and voluntarily executing booby-trapped programs or opening a file containing a specific, vulnerable application, or even to intervene when a program is updated by transferring manipulated software.

countries have introduced into their law lawful hacking powers, as a way to overcome encryption. Explicit lawful hacking provisions on the use of such a hacking technique is given to of the LEA in several European countries, e.g. France, Germany, Italy, the Netherlands.

As the intrusion into a device, without the consent of the owner, could result in a significant infringement of the right to privacy of targeted individuals and/or third-parties, as well as the security of the data and information system, even if conducted by the authorities, lawful hacking legislation should respect at least the minimum safeguards and requirements (UN General Assembly, 2016). To be more precise, legitimacy and necessity of creating proper normative framework must be met (Pool, Custers, 2017:130). The first condition for legitimacy is the existence of a clear legal basis for the investigative power to hack back. The second condition - legitimate aim – is also met, since the use of hacking technic serves the fight against crime. The third condition - necessity in a democratic society- is assessed by the effectiveness, proportionality and subsidiarity of such measures. As for effectiveness there is a question would this investigative power help the authorities to overcome the problem– however, there are still not enough fact-based figures available on the cases in which use of malware would be a suitable, necessary or even indispensable. As for proportionality, the use of hacking techniques should be limited to crimes of a substantial gravity, i.e. only to the most serious offences. In this sense, it must be pointed out that exploiting zero-day vulnerabilities may not be regarded as proportional. As for subsidiarity, it remains to be seen if such an investigative power would be, and to which extent more efficient than their alternatives, since the LEA has more data and possible investigative approaches than ever before.

Therefore, although it is indisputable that the LEA have the interest to engage in such a hacking tactics, the use of it should be limited to situations where they are strictly and demonstrably necessary to achieve a legitimate the aim, which importance should be proportionate to the technique's impact on competing rights and freedoms. Also, other less intrusive means should first be exhausted where practicable.

Following legislative recommendations should be taken into consideration when the legal basis for this investigatory power is considered: complete transparency in the use and scope of surveillance techniques; independent supervision and oversight mechanisms; safeguards relating to the nature, scope and duration of possible measures, as well as the grounds for ordering them and the remedy; and notification of individuals that have been subjected to communications surveillance (UN Human Rights Council, 2013). Hacking practices have to be appropriately targeted, and the integrity of data must be preserved - for that reason an

appropriate tool have to be selected, and a process of certification of the relevant malware has to be established with appropriate verification systems ensuring impartiality and confidentiality.

5. Conclusion

In recent years, the rapid evolution of technology, especially the spread of easy-to-use, strong encryption of communication, and its criminal misuse has made criminal investigations more difficult and less efficient, by bringing the emergence of anti-forensic measures apt to hide, alter, destroy or render impossible to obtain evidence. Although E2EE protects legitimate interests, it also protects online criminal activities, as it hinders the ability of state authorities to intercept data transmitted via these applications, frustrating the LEA's investigations and prosecutions. This led the LEA to claim that they lost practical power to legally intercept and gain access to communications ("Going dark problem"). There has been a debate for some years between public officials requiring the mandate for companies to facilitate access to encrypted data for the LEA, and security and technology experts responding by pointing out that doing so is impossible without introducing irredeemable security flaws.

In proposing controls on the use of encryption, it is advocated that backdoors should be embedded in encryption systems for the purpose of law enforcement. Several countries have approached encryption through the lens of mandatory access. Under this approach, companies must build backdoors into their encryption software so that they can provide the LEA with access to plaintext when the information is lawfully requested. So, in a case a judge orders a warrant to them to hand over certain information in a decrypted format to the government, the messaging app or the government agency could use this "backdoor" to give decrypted information to the government.

However, as strong encryption's essential role in modern communication systems, the idea of diminishing and endangering it via backdoor solution should be considered dangerous.

The subject of debate should therefore be the question what legal and technical measures governments should implement to facilitate the LEA's access to encrypted communication and which safeguards are necessary to ensure that such access measures do not infringe civil liberties or weaken critical security architecture. One of the most suggested alternatives is to lawful hacking. The essence of this proposal is to envisage a new investigation power, which would enabling criminal investigations without compromising encryption. When traditional investigative

techniques do not work and if conditions envisaged by the law, there is no reason why LEA should not be able to hack back, i.e. to use a malware as an investigative tool. The idea is to enable the LEA to deploy hacking tools by exploiting security vulnerabilities that already exists in operating systems and applications to obtain access to communications of the targets of wiretap orders. In other words, authorities might hack into a target device and monitor electronic communication even it is protected by E2EE when transmitted, by using a malware that exploits some vulnerability, in order to obtain encryption keys or communications before they're encrypted or after they're decrypted on the target's device.

Lawful hacking seems to be a viable alternative to the restriction of encryption or the mandatory exceptional access: Instead of requesting technology companies to sabotage their own security systems and knowingly compromise the security and privacy of their users, this alternative focus on observing and exploiting preexisting (and often unintended) security holes.

Currently, the need for malware-aided investigation is nowadays connected to a target's use of encryption, especially with regard to E2EE in IM applications. When viewed in socio-technical context one cannot dispute that the need to use malware will increase with future technology developments which concern the use of encryption (5G, quantum computing etc.) since encryption, when applied properly, can render the LEA possibilities impossible, especially on the darknet. However, this investigative power to hack back must be regarded as a special investigative measure. This means the proper legal normative framework of lawful hacking comes with a complex set of issues that have to be addressed particularly by taking into account the legitimacy (i.e., accordance with the law and legitimate aims) and necessity (i.e., the effectiveness, proportionality and subsidiarity).

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Milica Kolaković-Bojović, PhD [*]
Senior Research Fellow,
Institute of Criminological and Sociological Research, Belgrade

Asst. Prof. Tihanyi Miklós, PhD [**]
University of Public Service Faculty of Law Enforcement,
Department of Public Service, Budapest, Hungary

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ANTICORRUPTION CHALLENGES IN SERBIA AND HUNGARY: IN(EFFICIENT) MONITORING OF THE ANTICORRUPTION POLICIES

Fight against corruption constitutes one of the main challenges to face with in the post-transitional, especially post-communist societies, as those who, like Hungary, have already joined European Union, as for the rest of them that, like Serbia, are still in the status of candidate for the membership. An efficient anticorruption measures include, not only preventive and repressive measures in the vital areas of the state and the society, but also a strong and vibrant monitoring mechanism developed at the national level to monitor overall anticorruption policies. Furthermore, in order to ensure an objective assessment of the anticorruption policies among members states and the candidate countries, such mechanisms need to developed also at the EU level. Considering all of this, this paper aims to analyse the current state of play of the monitoring of the anticorruption policies in Serbia and Hungary, focusing on the proliferation of the monitoring mechanisms and on the gaps and overlaps in the systems. The paper also tackles the EU fail to establish a uniform

[*] E-mail: kolakius@gmail.com
[**] E-mail: tihanyi.miklos@uni-nke.hu

and sustainable anticorruption monitoring mechanism, including the omission to apply it equally on the member states and the candidate countries.

Key words: monitoring, evaluation, anticorruption policies, EU integration, EU standards.

1. Introduction

The simplest, but the truest recognition of the corruption as a crosscutting issue which permeates all the vital parts of a state and a society, was given in the Criminal Law Convention on Corruption[1] which, in its Preamble underlines that "corruption threatens the rule of law, democracy and human rights, undermines good governance, fairness and social justice, distorts competition, hinders economic development and endangers the stability of democratic institutions and the moral foundations of society." There is no any doubt that a fight against is one of the main prerequisites in the strengthening the Rule of Law. In parallel, efficient control of the corruption, done through, institutional checks on government, protection of property rights and mitigation of violence are all in close correlation with economic performance. Especially in times of financial and economic crises solid State institutions based on commonly shared values play a key role in creating or restoring confidence and fostering growth. (EPRS, 2016) It could be said that the law corruption level reflects accordingly, stability and strength of the country.

The post-communist, Eastern Europe societies went through the intensive transitional period during the nineties, but also during the first years of XXI century. This, among others, included serious challenges associated to the need to prevent and combat corruption in the vital parts of the society, like police, judiciary, public administration, health care and education systems. On that way, they have faced with the internal needs and issues, but also with the external requirements to improve legislative and institutional anti-corruption mechanisms in the context of achieving and preserving the relevant international, especially EU standards. Their efforts to do that, was associated, at least with the doble goal: To strengthen their economies and foster competitiveness and economic growth, but also to fulfil criteria to join the European Union (hereinafter: EU)

1 Criminal Law Convention on Corruption, Strasbourg, 27.I.1999, available at: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/173, last accessed on May 16th 2021.

While Hungary joined the EU in 2004, Serbia is still underway to do it so.[2] At the first glance that could lead as to the conclusion that there is a significant difference in term of the current state of play in Serbia and Hungary in terms of their success in the fight against corruption, as from the perspective of the standards achieved, as from the angle of the monitoring mechanisms established to oversight anticorruption processes. However, this presumption also requires the uniformity of the criteria established to access the rule of law processes, as internally, at the national level, as from the perspective of the EU institutions and mechanisms.

Considering this, this paper shads a light to the main challenges that Serbia and Hungary are facing with in terms of the structure and the efficiency of the national monitoring mechanisms established to monitor, evaluate and access the progress achieved, but also reflects upon the EU attempts to establish its own monitoring mechanism in the field of anticorruption.

2. National anticorruption monitoring mechanisms

Establishing effective mechanisms for monitoring and evaluation of anticorruption reforms is one of the key preconditions to avoid that numerous strategic documents and concrete reform measures planned by these documents are only a "dead letter", but also to ensure their implementation in a way that produces the desired effects in society. (Kolaković-Bojović, 2019) However, it is of the great importance to make the clear difference between internal anticorruption mechanisms established in various sectors like a public administration, health care, police, judiciary or education and the monitoring mechanisms established at the national level to comprehensively monitor implementation of the anticorruption policies in various, above mentioned fields, as separately as in their synergy which is necessary for the overall success in this fight. Namely, this second point is in the focus of our analysis, since it is preconditioned by the development and the adoption of the national, anticorruption policy documents and it should

2 The Screening of Serbian normative and institutional framework with relevant acquis within Chapter 23 started in September 2013 with Explanatory Screening (presentation of the relevant acquis and EU standards to the Serbian institutions). This stage served as starting point for assessment of an alignment level of the Serbian legislative and institutional framework with the acquis and EU standards, during the bilateral screening in December 2013. The screening process resulted in publishing of the Screening Report which tackled various issues of the substantial importance for the justice reform and rule of law in Serbia. The negotiation process in Chapter 23 has started in July 2016, by the adoption of the Common Negotiation Position of Serbia and EU and the Action Plan for Chapter 23 which governs reform processes in the justice sector within the EU accession processes.

result in the comprehensive assessment of the situation, comparable with the results of the international monitoring mechanisms established on the global and/or on the regional level.

2.1. Monitoring and evaluation of the anticorruption policies in Serbia

Awareness of the need for long-term and systematic planning of reforms in the Republic of Serbia has matured slowly and gradually, and it seems that this process experienced a sudden expansion in the first years of the 21st century. There is no doubt that this sudden turn is directly related to the abandonment of the one-party system and the re-establishment of parliamentarism and multi-party system, as preconditions for, through clear manifestations of separation of powers, activities of each branch of government, as well as their cooperation, plans are drawn up through transparent and inclusive processes inherent in democratic societies and the need to hear the voice of all stakeholders. (Kolaković-Bojović, 2019)

The process of accession to the European Union also had an indisputable impact on strengthening the strategic planning as an approach to reforms. In the early stages, typical of the early 2000s, more in the form of a principled commitment to adopt European standards and good practices, as well as in the form of support from international experts, while, after the formal start of accession negotiations with the EU, the strategic planning process itself was formalized and regulated to, among others, ensure donor funded project support to reform processes. (Kolaković-Bojović, 2019)

A pioneering step in terms of addressing the need to monitor the situation and direct public policies in the field of anti-corruption was made in 2001, when the Anti-Corruption Council was established by the Decision of the Government of the Republic of Serbia. At the conceptual level, the Council for the Fight against Corruption (hereinafter the Council) is conceived as an expert, advisory body of the Government of Serbia. In the formal legal sense, the Council has the status of a permanent working body of the Government, established with the task of reviewing activities in the fight against corruption, proposing to the Government of the Republic of Serbia measures to be taken to effectively fight corruption, as well as monitoring their implementation and, programs and other acts and measures in that area.

As it is conceived as an expert, and not a purely expert body, it is envisaged that the Council has thirteen members appointed by the Government, among the members of the Government officials and the prominent domestic and foreign

scientists and experts. The work of the Council is managed by the President when elected by the members of the Council by a majority vote. The Council may, in order to perform its activities more efficiently, may establish permanent and *ad-hoc* expert teams. (paragraphs 3-5 of the Decision on the Establishment of the Council) (About the Council, 2021) In accordance with the pioneering status of the Council, but also the fact that, at the time of its formation, there were no strategic documents that would systematically regulate the fight against corruption, it is difficult to talk about the activities of this body in terms of monitoring and evaluation of reforms. There was no developed planning framework, nor a clear methodology according to which the Council would monitor and evaluate the results of the reforms.

The first serious indications of the commitment to systematically approach the monitoring and evaluation of the implementation of reforms in the field of the fight against corruption were made by the National Anti-Corruption Strategy (hereinafter: NACS 2005) adopted in 2005. The chapter entitled Implementation of the Strategy envisages that a special law will establish an independent body, whose powers, among other things, will include supervision over the implementation of the Strategy and the accompanying Action Plan. This strategic commitment is indeed reflected in a number of provisions of the Law on the Anti-Corruption Agency (hereinafter: The Law on the Agency) adopted in 2008. According to this law the Anti-Corruption Agency (hereinafter: ACA, Agency) has been established as an independent state body. The ACA was established as an institution with a strong preventive role that had been lacking in any authority which had theretofore dealt with corruption. Its main objective is improving the situation regarding this area, in cooperation with other public authorities, the civil sector, the media, and the public in general. Among other things, the ACA is authorized in this preventive sense to work on development of integrity plans for, and in cooperation with, state authorities. These plans – an innovation in our legal system – are aimed at reducing and eliminating risks of the emergence and development of corruption. The ACA was also given competence to oversee the financing of political parties. (ACAS Competences, 2021) In addition to this, according to law, the Agency is in charge of, inter alia:[3]

– monitors the implementation of the National Anti-Corruption Strategy and the Action Plan for the implementation of the National Anti-Corruption Strategy and sectoral action plans;

3 The law also stipulates that the Report on the implementation of the Strategy, Action Plan and sectoral action plans forms part of the Annual Work Report, which the Agency submits to the National Assembly, no later than March 31 of the current year for the previous year. (Article 26 of the Law on the Agency)

– gives opinions regarding the implementation of the Strategy, Action Plan and sectorial action plans;
– monitors and performs activities related to the organization of coordination of the work of state bodies in the fight against corruption;
– organizes research, monitors and analyzes statistical and other data on the state of corruption.

The adoption of the National Anti-Corruption Strategy for the period from 2013 to 2018 (hereinafter: NACS 2013-2018) brought, at the normative level, significant innovations in the field of monitoring and evaluation, but uncovered the problems in terms of the system of monitoring, caused by the excessive complexity and dysfunction of the system. Namely, when making the division of the competences between the various authorities, the Strategy distinguishes between coordination of implementation, monitoring of implementation and supervision over the implementation of the Strategy. While the first competence was assigned to the Ministry in charge of justice, the second was granted to the Anti-Corruption Council and the third to the Anti-Corruption Agency. In addition to this complexity and variety of the stakeholders included in the process, there was no specific methodology of the monitoring and evaluation adopted, which resulted in different formats of the reports, but also in the different assessments of the situation by of the reports prepared by the Ministry, the Anti-Corruption Council and the Anti-Corruption Agency.

The new issues in this field occurred together with the opening the accession negotiations with EU brought the adoption of the Action Plan for Chapter 23, which governs comprehensive and in-depth reforms in the field of judiciary, fight against corruption and fundamental rights, in 2016 (hereinafter: AP 23) In its nature, the AP is an overarching reform document. Introductory part of AP 23, stipulated that the responsibility for supervising the implementation of activities from the Action Plan will be entrusted to the Council for Implementation of the Action Plan for Chapter 23 (hereinafter: The Council for AP 23) and the several governmental bodies in charge of the accession process. At the conceptual level, AP 23 opted for a model of impartial, expert control of the reform processes and envisaging that the members of the Council will be appointed by the Government of the Republic of Serbia on the proposal of the President of the Chapter 23 negotiating team, among civil servants and consultants already engaged in negotiations in the EU.

This never-ending story of the infinitely sharing, duplicating and overlapping competences, was made even a worse in 2014. Namely, even prior to this adoption of the Action Plan for Chapter 23, on August 7, 2014, a new governmental Coordination Body for the implementation of the Action Plan for the

implementation of the National Anti-Corruption Strategy 2013-2018 was established. In accordance with the Decision on Establishment, the Coordination Body directs activities within the scope of state bodies responsible for the implementation of the Action Plan for the implementation of the National Strategy for the Fight against Corruption in the Republic of Serbia for the period from 2013 to 2018. In addition, the Coordinating Body may propose to the Government to take decisions in order to implement the Action Plan. (items 2 and 8 of the Decision) (Kolaković-Bojović, 2019)

Although, at the level of the need to provide political support and mechanisms for the implementation of reforms at the highest level, this decision is justified, its basis on the provisions of the Strategy, but also constitutionality and legality, was challenged before the Constitutional Court. The initiator of the process before the Constitutional Court referred to the provisions of the NACS 2013-2018 according to which, as already mentioned, the coordination of the implementation of the Strategy is entrusted to the Ministry in charge of justice, and disputed the possibility of establishing and the scope of powers entrusted to this body. The Constitutional Court accepted the initiative and initiated the procedure for assessing the constitutionality and legality of the Decision.

However, the situation culminated in September 2020, when the implementation of the Law on the Prevention of the Corruption[4] has started in parallel with the adoption of the Revised Action Plan for Chapter 23.[5] Namely, Article 6 of the Law on Prevention of Corruption stipulates that the Agency supervises the implementation of strategic documents in the field of fight against corruption, submits a report to the National Assembly on their implementation with recommendations for action, gives recommendations to responsible entities and initiates amendments to strategic documents. In parallel, Article 38 of the Law on Prevention of Corruption, stipulates that the manner of reporting will be regulated in more detail by an act of the Director of the Agency, in accordance with strategic documents. Despite the promising manner of this provision, there are two controversial issues:

– Which policy documents should be considered as the strategic documents in the field of fight against corruption?
– Which monitoring mechanism has the priority when the same policy document deals with the prevention of the corruption, but also with the other rule of law issues?

4 Law on the Prevention of the Corruption, "Official Gazette RS" No. 35/2019, 88/2019, 11/2021.

5 Revised Action Plan for Chapter 23, available at: https://mpravde.gov.rs/tekst/30402/revidirani-akcioni-plan-za-poglavlje-23-i-strategija-razvoja-pravosudja-za-period-2020-2025-22072020.php, last accessed on May 3rd 2021.

From the wording of Article 2, item 7 of the Law, which defines that "strategic document" means strategies and action plans in the field of combating or preventing corruption adopted by the National Assembly or the Government, it cannot be concluded whether the Action Plan for Chapter 23 can be considered a strategic document in the field of anti-corruption, since, despite its comprehensiveness and detail, it deals with the fight against corruption in only one part. However, the Agency decided to consider the AP 23 as the anti-corruptive strategic document and consequently take over the steps needed to organise reporting and evaluation processes. [6]

Normally, this could be considered as the step forward in the clarification of the competences, but not in the situation where RS Government adopted the amended/revised version of the AP 23 in August 2020, where the responsibility for monitoring the implementation of the activities envisaged in the Action Plan was entrusted to the Coordination Body for implementation of the Action Plan for Chapter 23 (hereinafter: Coordination Body). (Revised Action Plan for Chapter 23, 2020) However, by the Revision of the AP 23, the Government decided to quit the practice of the expert membership in the body in charge of the reform monitoring, since the newly established Coordination Body is consisted of the representatives of the institutions in charge of the implementation of the Revised AP 23 (public functionaries and civil servants). This puts under the question the objectiveness of findings/reform assessment published by such a body, but also opened the huge dispute on who is the actually competent of the monitoring of the anticorruption reforms within the Chapter 23 framework. In addition to this, both, the Agency and the Coordination Body have developed their own (different) report templates and the monitoring methodology, but also both invited the institutions to report them on the implementation of the "anticorruption portion" of the AP 23.

Having all the above in mind, it seems that one of the main shortcomings of the monitoring system of strategic documents in the field of anti-corruption in the past few years was the extreme complexity of mechanisms, proliferation of the various stakeholders in charge of monitoring and evaluation, with vaguely delineated powers of competent entities and their multiple overlaps. Accompanied with the lack of the clear methodology and indicators, this continuous multiplication of the monitoring bodies put under the question an existence of the real commitment of the state to this issue. Even more, it indicates the simulation of the commitment and blurs the real picture.

6 According to the art. 38 of the Law, the Director of the Agency shell issue the Act which governs the process of reporting and monitoring

2.2. Public policies and reform monitoring in Hungary

In Hungary, the first significant government action against corruption took place in 2001. The Government has adopted Decree 1023/2001 on the Government Strategy against Corruption. (III. 14.), which classified the anti-corruption measures into four task groups. These focus mainly on the legal and criminal law legislative tasks of the administration. However, aspects of prevention and social awareness have already emerged in some measures. There is no doubt that Hungary's EU integration efforts played a significant role in adopting the document. Based on the government decision, the Parliament adopted stricter rules on conflicts of interest and declaration of assets and passed the so-called Glass Pocket Act. Until its repeal in 2012, this law required the disclosure of state and municipal contracts above a certain amount.

In the following period, some attempts were made to establish various anti-corruption advisory bodies. However, these did not result in substantive changes. The only exception was the Anti-Corruption Coordination Board, established in 2007 (since then abolished). This body approached the issue with a strategic approach and by 2008 developed an Anti-Corruption Strategy and an associated Action Plan. This document was ultimately not discussed by the Government. However, its effects can be seen on the content of the Integrity Project launched by the State Audit Office in December 2009.

Despite the favorable trend, government policy in 2010 was even more based on a criminal law approach. The penal policy has been tightened somewhat in a populist way, with the result that perpetrators have had to face an increased sentence. Within the framework of this policy, the National Defense Service was set up.

The Government of Hungary has adopted a National Anti-Corruption Program (hereinafter: The Program) for the period 2015-18 (NEMZETI KORRUPCIÓELLENES 2015-2018, 2021). The Program has supplemented the legal approach of the previous period with aspects of the value-based approach. Accordingly, the emphasis has also been placed on prevention and strengthening integrity. The program focused primarily on corruption in the public sector and the economic sector.

The government strategy in force at the time of writing this paper is summarized in the Medium-Term National Anti-Corruption Strategy for 2020-2022 (Strategy) (Medium-Term National Anti-Corruption Strategy for 2020-2022, 2021). It focuses on three objectives, which are to raise the professional standard of the fight against corruption, to increase the integrity within organizations exposed to corruption threats, and finally to reduce the risks in administrative mechanisms. The Strategy achieves its objectives in three areas of intervention: technology-based, rule-based, and value-based.

Hungarian anti-corruption documents and strategies usually distinguish between external and internal elements of anti-corruption mechanisms. Elements of external control include the legal environment and bodies that take action against corruption either through their supervisory powers or as part of the criminal justice system. Elements of internal control include an integrity management system, anti-corruption training, sensitization training, and organizational solutions that reduce corruption risks. The Public Prosecutor's Office and State Audit Office which belong to the external mechanism make an annual report to the Parliament. In addition, the representatives can give questions to the chief of these offices. The National Protective Service is under the control of the Minister of the Interior.

One of the novelties of external legal control is to eradicate corruption in health care. It has become systemic for patients to provide material goods to health care staff in hopes of better or faster care. The Hungarian government solved this problem as of January 1, 2021, by adding the fact of bribery to the Penal Code. According to this, both the transfer of an unlawful advantage to medical personnel or, in view of them, someone else in connection with the provision of health care, and its acceptance have become suitable for establishing a criminal offense of bribery.[7]

The next important step in the fight against corruption was the joint declaration signed on 18 November 2011 by the Minister of Administration and Justice, the President of the State Audit Office, the President of the Supreme Court, and the Attorney General for concerted action. Although the declaration is not legally binding, it can only be seen as a "moral commitment", but the signatories undertook to take concerted action to prevent corruption, to consult, and to establish a network of cooperation, while respecting the independence of the judiciary. The Minister of the Interior joined the National Courts Office in 2014, the Governor of the Hungarian National Bank in 2016 and the Public Procurement Authority, and finally the Hungarian Competition Authority in 2020. They were evaluated at an online event held on 26 November 2020 anti-corruption measures of the last decade (Járvány idején még inkább szükséges a korrupcióellenes összefogás, 2021) As all participants have assessed their role, no objective conclusions can be drawn from this self-assessment.

In 2011, an anti-corruption unit was established within the organizational framework of the Prosecutor General's Office, and at the same time the powers of the Prosecutor's Office were expanded: they can use disguised tools under the Prosecutor's Office Act to detect official crimes. The NCO has set up a Judicial Integrity Working Group, and a special working group on the Curia (Supreme

7 Penal Code. Section 290 (6) and Section 291 (6)

Court) analyzes all types of risks to the performance of its duties, paying particular attention to corruption risks .

As part of the anti-corruption organizational system, the National Protective Service (NPS) was established on 1 January 2010. Until that time, there was unified state police in Hungary (Christián 2012). Subsequently, however, the first three and then in 2019 four independent police organizations were established, all of which are under the control of the Minister of the Interior. One of these is the NPS, whose main task is to fight corruption. It carries out this activity in essentially the entire public administration sector. At the end of 2014, the organizational framework of government anti-corruption activities also changed. The Government referred to the coordination of its anti-corruption activities to the competence of the Minister of the Interior, including the NPS. The responsibilities of this organization include crime detection and prevention, monitoring the conduct of law enforcement personnel, auditing the integrity of government officials and law enforcement personnel, coordinating governmental tasks related to anti-corruption activities and promoting pre-appointment and non-promotion to senior positions. The due diligence referred to in the list covers the legality of the performance of the duties of the said staff, in particular their resistance to corruption. This investigation provides an opportunity for NPS' covered staff to commit minor offenses, even attempted bribery, to compel the person under investigation to take action. The subject is, of course, unaware that he is undergoing a reliability test. The purpose of the investigation is to determine how the person under investigation behaves in the provoked situation, ie how resistant he or she can be to corruption.

The Corruption Prevention Department, established within the NPS, is responsible for coordinating government anti-corruption tasks. To this end, its main tasks are: to prepare a draft anti-corruption strategy and related action plans; Continuous assessment of the integrity and corruption risks of the public administration and the corruption situation; is responsible for the development and coordination of the integrity management system of public administration bodies; It promotes awareness of the prevention potential of timely identification of corruption risks through the preparation of evaluation and analysis case studies; Proposes the development of a thematic training course on integrity counseling and training and further training in public service and law enforcement on corruption prevention, integrity and professional ethics; It prepares an audit plan to review administrative cases not covered by the appeal, in which there is no counterparty (A korrupcióellenes tevékenységgel összefüggő kormányzati feladatokban való közreműködés, 2021).

It seems that the external elements of the control mechanisms in Hungary are based on very wide-ranging cooperation. The anti-corruption work of the cooperating bodies is highly coordinated. At the same time, it cannot be ignored

that Hungary has not joined the jurisdiction of the European Public Prosecutor's Office established within the framework of the EU. The declared purpose and task of this EU body is to combat corruption and all forms of money laundering. The European Commission's Rule of Law Report for 2020 sets out criticisms relevant to our topic. Among other things, the shortcomings in the independence of public bodies relevant to the fight against corruption were highlighted. In the Commission's view, this weakens the effective control role of public bodies. Another important finding is that, despite all the positive measures, no cases with a strong suspicion of serious corruption have been detected (URL 14).

3. International Monitoring Mechanisms

In addition to the comprehensive anticorruption mechanisms developed by the Council of Europe,[8] such as legal instruments dealing with matters such as the criminalization of corruption in the public and private sectors, liability and compensation for damage caused by corruption, conduct of public officials and the financing of political parties, but also the institutional mechanisms aimed to monitoring of compliance with these legal instruments- namely the Group of States against Corruption (hereinafter: GRECO), the European Commission adopted in 2011 the Decision (20011)3673 Establishing an EU Anticorruption reporting mechanism for periodic assessment ('EU Anti-corruption Report').[9] The main idea of this action, was to introduce an efficient mechanism and methodology to monitor a situation in the member states, in terms of their fight against corruption.[10] This somehow should've reflected the principle underlined by the former European Commission President Jean-Claude Juncker, who declared that the European Union is built on compromises, but when it comes to human rights, the rule of law, the fight against corruption, there can be no compromise', (Blanche, 2019) Good in its substance, this initiative

8 This paper intentionally lefts behind the United Nations (UN) mechanisms in the fight against corruption through the United Nations Office for Drugs and Crime (UNODC), based on the (2003) United Nations Convention against Corruption (UNCAC) as the first global convention to address corruption in a comprehensive manner, trying to focus on the EU perspective.

9 (European Commission Decision establishing an EU Anti-corruption reporting mechanism for periodic assessment ('EU Anti-corruption Report'), 6 June 2011,.)

10 According to Article 2 of this Decision the Report has the following objectives: "(a) to periodically assess the situation in the Union regarding the fight against corruption; (b) to identify trends and best practices; (c) to make general recommendations for adjusting EU policy on preventing and fighting corruption; (d) to make tailor-made recommendations; (e) to help Member States, civil society or other stakeholders identify shortcomings, raise awareness and provide training on anti-corruption"

seems to be a long-awaited follow up on the Article 83 of the Treaty on the Functioning of the European Union which defines Eurocrimes as 'particularly serious crimes with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis'. EU has not made use of this power to update the pre-Lisbon legal framework, apart from directive (EU) 2017/1371 on the fight against fraud to the Union's financial interests by means of criminal law, despite the fact that the scope of corruption greatly differs across EU Member States. (Corruption Perceptions Index 2018, 2019) However, an introduction of the EU reporting mechanism appears to be disputable for at least two reasons:

– The duplication of what GRECO already does;
– An absence of the reporting periodicity in practice;
– An absence of the application of the mechanism on the candidate countries, to ensure, among others, uniformity of the approach when access the level of the compliance with the relevant standards in the member states and the candidate countries.

If we look closer to the mechanism itself, we can see that the EU Anti-Corruption Report is a 'reporting mechanism' for the periodic assessment of anti-corruption efforts in the Union in order to facilitate and support the implementation of a comprehensive anti-corruption policy in the Union. (EPRS, 2016) However, when it comes to the methodology, the EU Anti-Corruption Report is based on a wide range of sources, mostly including the existing evaluation mechanisms in other supranational *fora*, the GRECO and the Organisation for Economic Co-operation and Development (hereinafter: OECD)[11], which shows that it relies heavily on non-EU specific monitoring bodies and tools. The similar practice has been earlier established when the EU Justice Scoreboard has been developed, since it highly relies on the European Commission for the efficiency of justice (hereinafter: CEPEJ) reports.[12] While GRECO approach includes country self-assessments, followed by on-site visits, publication of evaluation reports containing country recommendations and subsequent assessment of the measures taken to implement the recommendations, the EU Anti-Corruption Report strongly relies on the member states' ownership, since the methodology in use to collect data does not include questionaries nor country visits. Basically, this additionally increases an importance of the national mechanisms in place.

11 The approach of the OECD is mainly an economic one, while GRECO has a much broader approach, including a social, political and democratic issue.

12 See more: https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/eu-justice-scoreboard_en#scoreboards, last accessed on May 16th 2021.

In terms of the periodicity, the first issue of the EU Anti-Corruption Report was published in 2014,[13] and new editions were scheduled to appear every two years. However, in 2016 the EU dropped the idea of the periodicity, while a clear explanation of such a decision was not provided. EU commission spokesperson Margaritis Schinas declared that "for the Commission, the fight against corruption is not in any way an attempt to interfere or offer value judgments within the political life in a member state".[14]

Finally, in terms of the differences in the treatment of the member states and the candidate countries, the European Commission has simply kept the annual country reports as a method for accessing the situation in candidate countries, among others, in the field of anticorruption, even when it is clear that those reports lack the clear methodology and indicators to provide a clear picture. Furthermore, this picture is frequently blurred by the current political relations. These disables, not only the objective assessment of the situation in the candidate countries, but also the comparison of the situation in the member states and the candidate countries, especially those with the similar historical and political background and the legal tradition, like Serbia and Hungary.

4. Conclusions

From the all said above, it is obvious that, despite the non-disputed importance of the anticorruption actions, an efficient monitoring & evaluation mechanism as at the level of the EU as at the national level of the EU Member States and the candidate countries is still missing. Despite the obvious discrepancies among the States that are subjected to the GRECO review, the EU (un)intentionally missed the opportunity to establish its own, sustainable monitoring mechanism based on the GRECO findings, but also to apply it uniformly both- to the Member States and the candidate countries. This resulted in the obvious lack of the clear and objective assessment of the anticorruption policies across the EU, due to proliferation of the monitoring mechanism at the national level, with the declaratory, rather than substantive purpose. This also has especially negative impact on the reform processes in the candidate countries, since they are aware of the EU incapacity and/or unwillingness to efficiently assess their anticorruption

13 (European Commission Report From the Commission to the Council and the European Parliament, EU Anti-Corruption Report, COM(2014) 38 final, 3 February 2014)

14 See more: https://euobserver.com/institutional/136775, last accessed on May 16th 2021.

policies and practices, especially in comparison with the Member States. In addition to the complex heritage of the recent transition, this makes a fruitful ground for the slow and sometimes even simulated fight against corruption.

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Hrvoje FILIPOVIĆ, PhD [*]
Assistant professor
Police College in Zagreb

Dragana ČVOROVIĆ, PhD [**]
Associate Professor
University of Criminal Investigations and Police Studies, Belgrade

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ILLEGAL ENTRY OF FOREIGN NATIONALS AS CRIMINAL OFFENCE

The paper analyzes the criminal offense of illegal entry, movement and stay in the Republic of Croatia, another Member State of the European Union or a signatory state to the Schengen Agreement under Article 326 of the Criminal Code and its connection with the misdemeanor of the prohibition of assisting a third-country national from Article 43 of the Law on Foreigners with regard to the difficulties and implications that may arise during their delimitation. In particular, the implementation of Council Directive 2002/90/EC on the definition of facilitation of unauthorized entry, transit and residence as well as its harmonization is analyzed. The differentiation between the misdemeanor in question and the criminal offense is not simple and includes a number of factors that in fact depend on each individual case, but when it comes to the classification of criminal offences, the decisive factor is greed, whereas recent case law shows that when it comes to criminal offenses under Article 326 of

[*] E-mail: hfilipovic@fkz.hr

[**] E-mail: dragana.cvorovic@kpu.edu.rs

the Criminal Code, these are well-organized groups that, upon detection, do not shy away from attacking police officers in pursuit of their goals.

Key words: illegal entry, greed, foreigners, border.

1. Introduction

The control of external borders is not just an internal matter of the state. Article 3 (2) of the Treaty on European Union offers citizens the area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to *external border control*, asylum, immigration and the *prevention and combating of crime* (Filipović, Radman, 2015: 57). The latter provision is as important as other international sources which show that the external border control and the prevention and combating of crime represent a category of international law as well as asylum and that older notions of division into categories of international and domestic law for these areas have been abandoned. This is also the case according to Regulation (EU) 2016/399[1] which in the provision of its Article 13 states that the main purpose of protecting the state border is to prevent unauthorized border crossings, to counter cross-border criminality and to take measures against persons who have crossed the border illegally, whereas the person who has crossed the border illegally and who has no right to reside in the territory of the Member State in question shall be apprehended and made subject to procedures in accordance with Directive 2008/115/EC[2]. Different adjectives are used in the literature and documents: "irregular", "illegal", "unregistered", "unauthorized", "not allowed", which are then combined with different nouns: "migrants", "immigrants", "foreigners", " foreign nationals". The report of the Global Commission for International Migration, established within the UN, accepted the term "migrants with irregular status" (Đukanović, 2013: 480-481).

The subject of this paper is the criminal offense of illegal entry, movement and stay in the Republic of Croatia, another Member State of the European Union or a signatory state to the Schengen Agreement under Article 326 of the Criminal Code[3] (hereinafter referred to as: CC).

The paper uses a descriptive method and a case study method that allow us to describe in detail, discover new and important knowledge (Vukosav, Sindik,

1 Council Regulation 2016/399 of 9 March 2016 on the Union Code on the rules governing the movement of persons across borders, OJ 77, 23.3.2016 (hereinafter: Schengen Borders Code).

2 Council Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ 348, 24.12.2008.

3 Criminal Code, Official Gazette, No. 125/11, 144/12, 56/15, 61/15, 101/17, 118/18, 126/19.

2014: 109). The verdicts were carefully selected and graded from the basic criminal offenses to the most serious ones, which were committed as part of a criminal organization.

The case study method was chosen for the reason that it is necessary to answer the main question from the research, which is the delimitation between the criminal offense from Article 326 of the CC and misdemeanors under Article 43 of the Law on Foreigners[4] (hereinafter referred to as: LF). The case study was also chosen because it is focused on specific events.

Three case study strategies were also used in the paper (Vukosav, Sindik, 2014: 109). The first refers to normative sources, the second to explanations by recent authors, and the third to case descriptions.

The design of the case study research itself contains five elements (Yin, 2007: 34). *The issue of the study* has already been mentioned, and it refers to the differentiation (delimitation) between the criminal offense from Article 326 of the CC and the misdemeanor under Article 43 of the LF. Then follow the *possible assumptions of the study*, according to which it is necessary to answer how the competent authorities act when finding persons who allow or help another person to enter, leave, move or stay in the Republic of Croatia or another EU Member State. *The unit of analysis* is the (first) component which refers to the first presumption that there is no boundary between a criminal offense or misdemeanor, and the second refers to the fact that the perpetrators of misdemeanors from Article 43 of the LF were not adequately punished. According to the *logic that connects the data with the assumptions*, it is necessary to make an analysis of criminal offences from Article 326 of the CC and the misdemeanors under Article 43 of the LF and partly answer the question of differences between particular acts. The last factor of the case study is the *criteria for interpreting the findings* (Yin, 2007: 35) and includes analyzes and proposals *de lege ferenda*.

2. Illegal entry, movement and stay in the Republic of Croatia, another EU Member State or a signatory state to the Schengen Agreement

Council Directive 2002/90/EC defining the facilitation of unauthorized entry, transit and residence[5] is especially important because the criminal actions that have been implemented in the legal order of the Republic of Croatia are listed.

4 Law on Foreigners, Official Gazette, No. 130/11, 74/13, 69/17, 46/18, 53/20.

5 Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorized entry, transit and residence, OJ 328/17, 5.12.2002.

Thus, Article 1 (1) of the Directive punishes any person who intentionally assists a person who is not a national of a Member State to enter or cross the territory of a Member State and thereby violates the laws of that State on the entry and transit of aliens. Article 1 (2) punishes any person who, for financial gain, intentionally helps a person who is not a national of a Member State to reside in the territory of that Member State and thereby violates the laws of that State on the residence of aliens.[6]

The criminal offense under Article 326 (1) of the CC incriminates enabling and assisting[7] in illegal border crossing, movement and residence in the Republic of Croatia or illegal transfer across the state border of persons from the Republic of Croatia, out of greed (Turković et al., 2013: 401). The offense referred to in paragraph 1 is a *delictum communium*, which means that it can be committed by any person. Prof. Turković and other authors state that the proposal of some county state attorney's offices to incriminate other ways of enabling illegal crossing of the state border, which do not literally represent the act of transferring across the state border, but is really about enabling and assisting illegal crossing, was thus adopted (Turković et al., 2013: 401). The act of committing is to enable or help a foreign person to enter, move or stay in the Republic of Croatia (Pavlović, 2012: 705). To enable means to create conditions for crossing the border or to move or stay in Croatia without hindrance, and help can be provided in various ways - providing a means of transport, shelter, etc. (Pavlović, 2012: 705). When a person himself or herself enters, moves or resides illegally in the specified area, he or she does not commit this criminal offense (Božić, 2015: 850).

Article 326 (2) of the CC contains qualifying circumstances in which the life or body of a person who illegally enters, moves or stays in the Republic of Croatia is endangered, in which he or she was treated in an inhuman or degrading manner or the act was committed by an official in the performance of official duties (Pavlović, 2012: 705). Paragraph 2 takes into account a number of concrete, sometimes tragic cases when people were transported across the border in a way full of danger for those people (overcrowded small ships, a large number of people crammed into a truck, etc.). Pavlović further states that the commission of an act by an official in the performance of official duties (*delictum proprium*) is a delict with a corruption character. Pavlović also states that this part of the

6 Article 1 (1 and 2) of Council Directive 2002/90/EC defining the facilitation of unauthorized entry, transit and residence

7 It is not necessary for an act of assisting to be present for every action related to the criminal offense referred to in Article 177 (1) of the CC because, according to the content of the previous agreement, his act of assisting referred to the previously promised concealment of a criminal offense (SCRC, III Kr-431/01 of 31 May 2005).

incrimination should have been separated into a separate paragraph because it has nothing to do with the acts committed under paragraph 2, while paragraph 3 incriminates the attempt (Pavlović, 2012: 705).

Persons seeking assistance for transit, transportation, accommodation can easily end up as victims of human trafficking (Kovčo-Vukadin, Jelinić, 2003: 666). For example, victims of trafficking look for ways to get to Western or Central European countries and are trafficked out of the country by false promises and deceptions, taking them into an unfamiliar environment where they are then isolated and forced into prostitution, forced labor and service to another person (Veber, Koštić, 2011: 204). Some trafficking activities include criminal groups organized by ethnicity and kinship, while in other groups they are formed on a territorial basis and are based on previous acquaintances of the perpetrators (Veber, Koštić, 2011: 205). This statement can be found in selected case studies in this paper from Article 326 of the CC and Article 43 of the LF, in which the defendants state that they helped foreigners to cross the state border illegally due to their nationality and kinship.

At the time of the beginning of the identification, the police officer still does not have enough data and facts to be able to judge whether a person is a victim and whether in this particular case any of the elements of the criminal offense/violation in the formal sense are excluded (Derenčinović, 2010: 65). According to Article 5 of the Protocol against the Smuggling of Migrants by Land, Sea and Air[8] migrants shall not be subject to persecution due to the fact that they are the object of smuggling. The clause of avoiding initiating proceedings or punishing these persons (Filipović, 2018: 171) is also stated in Article 26. of the Council of Europe Convention on Action against Trafficking in Human Beings[9] and in Article 8 of the Directive 2011/36/EU on the prevention and combating of trafficking in human beings and the protection of victims[10] according to which it is determined that States parties must ensure the possibility of impunity for victims of trafficking in human beings when they were involved in illegal activities, as long as they were forced to do so (Munivrana-Vajda, Dragičević-Prtenjača, Maršavelski, 2016: 991-1009). Crepeau points out the importance of not linking migration to smuggling

8 The Protocol against the Smuggling of Migrants by Land, Sea and Air and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children supplementing the United Nations Convention against Transnational Organized Crime, General Assembly Resolution No. 55/24 of 15 November 2000

9 The Council of Europe Convention on Action against Trafficking in Human Beings was adopted on 16 May 2005 in Warsaw.

10 Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims and replacing Council Framework Decision 2002/629/JHA, Official Journal of the European Union, L 101/1 of 15.4.2011.

and human trafficking in order not to get the false impression that illegal migration is a criminal offense like smuggling and trafficking (Crépeau, 2013: 190).

The importance attached to the necessity of the greatest possible degree of detection and proof of this category of criminal offenses in the EU countries is best illustrated by the position of the German legislator expressed in Section VIII of the Criminal Procedure Code (StPO)[11] according to which the provisions on special investigative activities (seizure of items, telecommunications surveillance, computer comparison of personal data, use of technical means, use of undercover investigators and search) also apply to two criminal offenses of this character from the Law on Residence of Aliens (transfer of aliens to the Federal Republic Of Germany under paragraph 96 (2) and the transfer of aliens to the territory of the Federal Republic of Germany with fatal consequences and the business of transferring aliens pursuant to paragraph 97).[12] According to this legal text and in the case when there is a necessary degree of suspicion about the commission of these two as well as other serious crimes[13] the possibility of temporary seizure of objects or otherwise ensuring their safekeeping is allowed, provided that they are of importance for proving in the investigation. Items that include driver's licenses can also be forcibly confiscated if the person holding them refuses to hand them over. Exceptions to this are acts or other documents officially kept by a state body or official if their highest body states that publishing the contents of those acts or documents may have negative consequences for the common good of the federal state or one of the German provinces. The issuance of an order to confiscate an item is within the jurisdiction of the court, unless there is a danger of delay in which case the confiscation may be ordered by both the prosecution and the prosecutor's office investigator (Paragraph 152 of the German Courts Act). However, in such a case, the person who seized the item without a court order is obliged to request a court confirmation within three days, provided that the person from whom the seizure was made or an adult member of his family was not present during the seizure as well as in the case they explicitly opposed the seizure of the object. In case the item was seized by the prosecution or the investigator in the prosecutor's office after filing a public lawsuit, they are obliged to inform the court about the seizure within three days and hand over the seized items to the court, which is another proof of the importance attached to this evidentiary action (Roxin, 2006; Kühne, 2010; Beulke, 2008). Also, in order to

11 Bundesgesetzblatt , Part I p. 1074, 1319]; (BGBI. I S. 3799); (BGBI I S. 410). available at: https://www.gesetze-im-internet.de/englisch_stpo/

12 Par.100 a st.5. StPO

13 For offenses that fall into the category of serious offenses within the meaning of this section of the StPO, see para. 100a paragraph 2. of the StPO

clarify the crime or determine the whereabouts of the person wanted for the purpose of criminal proceedings, computer comparison of data from one criminal procedure with other data that are automatically stored for prosecution, execution of criminal sanctions or prevention of danger is allowed. Also, for this purpose, it is allowed to confiscate postal consignments and telegrams that are sent to the suspect, and are located with a person or company whose business activity is the provision or participation in the provision of postal or telecommunications services. In addition, it is allowed to confiscate postal consignments and telegrams in which the existing facts indicate that they originate from the suspect or are intended for him and that their content is important for the investigation. Confiscation of the item is within the jurisdiction of the court, unless there is a danger of delay when the prosecutor's office is also authorized.

Observed in the above context, special attention should be paid to the fact that in this group of crimes the application of one of the most debatable measures of this character is allowed from the aspect of relevant international legal acts guaranteeing freedoms and rights of citizens (Meyer-Grossner, 2006: 563-569; Roxin, Schünemann, 2012). It is the measure of surveillance and recording of telecommunications without the knowledge of the person being supervised. There are three preconditions for the possibility of applying this action of proof. In addition to the facts that justify the suspicion that someone as a perpetrator or accomplice committed any of the crimes in this category or tried to commit an act whose attempt is punishable, it is necessary that in this case the crime is serious enough to justify the application of the measure and that establishing of the facts or the suspect's whereabouts are otherwise unlikely to succeed or are significantly hampered. In case the required preconditions are met, the order for the application of the measure is issued by the court at the request of the prosecutor. The exception is the case when there is a danger of delay when the order can be issued by the prosecutor's office, but it ceases to be valid if it is not confirmed by the court within three working days. In both cases, the order can refer only to the suspect or a person who, based on certain facts, is suspected of receiving and forwarding messages on behalf of the suspect or from the suspect, or that the suspect uses his connection. In the case of issuing an order, it is the obligation of all entities whose activity is to provide or participate in the provision of telecommunications services to enable the court, prosecutor's office and their investigators in the police to implement the measure and submit the necessary information without delay.

In addition to the above, there is another specificity of this measure. It is reflected in the fact that the order can last up to a month, with the proviso that its extension is allowed beyond that period, provided that the conditions from the order are met in terms of the results obtained by the investigation. In the event

that the duration of the order is extended to a total of six months, its further extension shall be decided by the Supreme Provincial Court.

Observed in the context of this measure, two more facts deserve attention, which also speak of the criminal-political justification of its undertaking in this group of criminal acts as well. These are:

First, even without the knowledge of the person to whom the measure applies, it is allowed to take photographs outside the apartment in which the technical device for eavesdropping and recording is installed and the use of certain technical means for other special purposes of observation;

Second, in the case of a person suspected of having committed a criminal offense as a perpetrator or accomplice or who is suspected of having committed an act of aiding and abetting after the committed criminal offense, the criminal offense of preventing criminal prosecution or concealment, search of the apartment and other premises may be undertaken, as well as a personal search or search of items belonging to him both for the purpose of his arrest and in the event that the search is likely to reveal evidence.

3. Legal continuity of criminal offenses related to illegal entry, movement and residence

The forerunner of the criminal offense under Article 326 of the CC was first in the provision of Article 203 of the Basic Criminal Code[14] entitled *Illegal crossing of the state border* (Pavišić, 1993), and later in Article 177 of the Criminal Code of 1997 (hereinafter referred to as: CC/97)[15] (*illegal transfer of persons across the state border*), but the legal continuity of the crime has been preserved. However, there has been a minor modification of the same criminal offense, but the protection is focused on the same legal good, illegal transfer of persons across the state border, so that greed is not a qualifying element of the offense, but the basic offense (Garačić, 2009: 988).

The issue of legal continuity was discussed at the Sisak County Court[16] between the criminal offense under Article 177 of the CC/97 and the one under

14 Article 203 of the Basic Criminal Code of the Republic of Croatia read: (1) Whoever, without the prescribed permit, crosses or attempts to cross the border of the Republic of Croatia armed or using violence, shall be punished by imprisonment for a term not exceeding one year. (2) Whoever engages in the illicit transfer of other people across the border of the Republic of Croatia or who, out of greed, enables another to cross the border illegally, shall be punished by imprisonment for a term between six months and five years. Basic Criminal Code of the Republic of Croatia, Official Gazette, No. 31/1993; Law on the Promulgation of the Law on Amendments to the Criminal Code, Official Gazette, No. 8/1990.

15 Criminal Code, Official Gazette, No. 110/97

16 Sisak County Court, Kć-193/11 of 12 December 2013

Article 326 of the CC, so that the factual situation is subsumed under the essence of the relevant criminal offense and it is determined that Article 326 of the CC does not recognize the commission of the said criminal offense within the group, for which criminal offense the defendants were found guilty and punished. Considering that the stated criminal offense from Article 326 of the CC does not recognize the commission of a criminal offense within the group, the defendant's appeal was accepted and the case was returned for retrial (Garačić, 2009: 990). However, the contested verdict was examined by the Supreme Court[17] in the light of the applicable CC. In relation to the criminal offense under Article 177, paragraphs 1 and 2 of the CC/97, there is a criminal legal continuity in the criminal offense of illegal entry, movement and residence in the Republic of Croatia under Article 326 of the CC, with the proviso that the commission of an act in a group is now not a qualifying element that would be prescribed in the said article. However, this qualifying element is regulated in Article 329 of the applicable CC, which in this case is not more lenient for the accused, and therefore the criminal law in force at the time of the commission of the offense was applied (Garačić, 2009: 990).

4. Investigation of the criminal offense referred to in Article 326 of the CC on case studies

The research was conducted using the case study method on six selected cases from Article 326 of the CC. The first, second and third case studies relate to the basic commission of the criminal offense under Article 326 (1) of the CC, fourth on Article 326 (1), in which the criminal report was rejected due to lack of evidence, but it was selected on the grounds that a misdemeanor report (indictment proposal) from Article 43 of the Law on Foreigners should have been filed, the fifth refers to Article 326 (2) of the CC in which the qualifying element of committing a criminal offense is apparent, and the sixth on Article 326 of the CC in which a criminal association is organized (Article 329 of the CC).

4.1. Illegal entry, movement and stay and damage to another's property

The case study in question was chosen because it is a criminal offense under Article 326 of the CC and the criminal offense under Article 235 of the CC.

17 Supreme Court of the Republic of Croatia, Kž-us-17/13 of 20 March 2013

From the brief description of the event it is evident that the defendant[18] M. J., BiH citizen, was guilty for coming to the territory of the Republic of Croatia and taking over a previously parked VW Golf III car in Županja on March 27, 2019, in order to gain undue material benefit, by prior agreement, for a monetary reward in the amount of EUR 400.00. He arrived in the immediate vicinity of the Babina Greda toll stations by car at around 8.30 pm, where four Chinese nationals were waiting for him whom he placed in the above mentioned car with the goal of enabling further illegal movement of foreign nationals, even though he was aware that the above Chinese nationals were foreigners who have come to the territory of the Republic of Croatia illegally and who do not meet the conditions for entry and stay. He then entered the A3 motorway at around 9 pm and was driving in the direction of Zagreb, but near the town of Popovača, he was spotted by police officers who *tried to stop him using light and sound signals* that he deafened *and continued at high speed driving between other vehicles moving in the direction of Zagreb* and without stopping, agreeing to cause damage, he ran into the front ramp of an automatic ramp owned by Croatian Motorways. Therefore, out of *greed*, the defendant allowed other persons to *move illegally* in the Republic of Croatia and damaged someone else's property thus committing the criminal offence from Article 326 (1) and Article 235 (1) of the CC.[19]

In the second case study, the defendants[20] S. V. and H. Š., citizens of BiH, are guilty that on March 29, 2019, on the route Dvor na Uni - Velika Gorica, in order to *gain illegal material benefits*, they agreed with unknown persons to

18 "In his testimony, the defendant M. J. stated that he fully admitted to having committed the crimes in the manner described in the factual description of the indictment. He explained that he committed the acts due to poverty or the difficult financial situation in which his wife and he currently live. They are the parents of a minor child with health problems, the defendant's mother lives with them, and his wife and he lost their jobs in October last year, so he agreed to transfer Chinese citizens for 400 euros to provide the family with a livelihood. Everything in the factual description of the indictment is true, he committed the acts exactly as described there. Namely, it is true that at one point he noticed that a vehicle was following him, and then he noticed that it was the police officers when they turned on the rotating lights. He did not stop because the Chinese citizens he was transporting started attacking him in the vehicle, shouting in unintelligible English that they did not have passports and not to stop the vehicle, so he continued to move ... " Zagreb Municipal Criminal Court, number: 4 K -659 / 19-8 dated May 9, 2019.

19 Pursuant to Article 326 (1) of the CC, the accused M. J. is sentenced to imprisonment for a term of one year, on the basis of Article 235 (1) of the CC M. J. is sentenced to imprisonment for a term of 5 months. Pursuant to Article 51 of the CC, the defendant is sentenced to a single term of imprisonment of 1 year and 2 months. Pursuant to Article 57 of the CC, the defendant MJ is sentenced to a partial suspended sentence in such a way that 6 months of imprisonment is served from the sentence to which the defendant M.J. was sentenced, and part of the 8-month prison sentence will not be executed if the defendant does not commit a new offense in the period of four years.

20 The defendants waived their right to appeal. Municipal Court in Velika Gorica, number: 24 K-65/2019 of 18 April 2019.

transport four citizens of the Republic of Turkey for a sum of at least 100.00 euros to each defendant. Namely, in the morning in the village near Dvor na Uni, the first defendant placed the citizens of the Republic of Turkey H.M., I.A., A.C. and I.H.S. in an Audi A3 vehicle, knowing that the named were illegally in the territory of the Republic of Croatia and drove towards Velika Gorica. While he was driving, a Mercedes type C220, driven by H. Š., was moving in front of his vehicle as the so-called "vehicle precursor" with the aim of spotting police patrols on the section of their movement and warning the first defendant, but they were stopped by police officers - the first defendant at 8.50 am in Buševec, and the second defendant at 9.55 am in Ogulinec. Therefore, out of *greed*, they enabled other persons to *move and stay illegally* in the Republic of Croatia, thus committing the criminal offense under Article 326 (1) of the CC.[21]

In the third case study, the defendants[22] V. G. and Z. B., the citizens of the Republic of Croatia, and S. B., a citizen of North Macedonia, are guilty that from an unspecified day during the month of July 2018 to July 25, 2018 in Jablanovac, they placed four Iranian citizens – L.R.S., N.K., H.M. and V.M. who did not have formal and legal conditions for residence in the territory of the Republic of Croatia in order to gain illegal *material benefits* for the amount of 400 euros. The defendants, knowing that the citizens of Iran are *staying illegally* in the territory of the Republic of Croatia and that they do not have the required visa, provided accommodation for the mentioned persons until July 25, 2018, when they were found at the address by police officers. Therefore, the first defendant, the second defendant and the third defendant out of *greed* enabled and helped other persons to move and stay in the Republic of Croatia, thus committing the criminal offense under

21 The court sentenced the first defendant S. V. and the second defendant H. Š. pursuant to Article 139 (2) of the CC to imprisonment for a term of 1 year each, and on the basis of Article 56 of the CC, the court imposed a suspended sentence, so the imprisonment sentence imposed on the first defendant S.V. and the second defendant H. Š will not be executed if the defendants do not commit a new criminal offense within 3 years of the verdict becoming final, otherwise a suspended sentence will be revoked. Municipal Court in Velika Gorica, number: 24 K-65/2019 of 18 April 2019.

22 The defenses of all the defendants are in conflict with each other and oppose each other. The first defendant, V. G., stated in his statement that he did not consider himself guilty; he first states that he went to visit the building often and that he also went upstairs, only to later change his statement and state that he did not go that often nor did he go to the first floor. He further states that he often reported burglaries in that facility and suggested that the police request proof of this, but a document was submitted by the police that he had done so only twice, not during this or the previous year. The second defendant Z. B. states that he did not feel guilty and did not present his defense until the hearing, in which he partially harmonized his defense with the other defendants, and in a way that was partly similar to what others had stated at the hearing. The third defendant S.B. stated that he did not feel guilty, he also testified differently in his defenses given during the proceedings, thus denying that he went to the 1st floor where the migrants were caught, but did not explain how his old ID card was found there if he did not go to the 1st floor nor came to the Republic of Croatia since 2016. Municipal Court in Novi Zagreb, number: 57 K-470 / 18-25 from 21 January 2018.

Article 326 (1) of the CC. Therefore, the first defendant V. G. was sentenced to 1-year imprisonment, the second defendant Z. B. to 2 years' imprisonment and the third defendant S. B. to 2 years' imprisonment. Therefore, the first defendant V. G. was sentenced to 1-year imprisonment, the second defendant Z. B. to 2 years imprisonment and the third defendant S. B. to 2 years imprisonment.[23] In all the mentioned case studies, greed is present, i.e. the acquisition of material gain.

The first and second case studies show the recklessness of the perpetrators because they disobey the orders (Filipović, 2011: 67) of police officers, do not want *to stop at mandatory stop signs even when the police use light and sound signals and continue driving at high speed between other vehicles* (Filipović, 2011: 238), and they also use the "vehicle precursor" with the aim of spotting police patrols on the section of movement and avoiding them, which is certainly an indication that these are possible organized groups, but which has not been proven in these cases.

4.2 Illegal entry, movement and stay - dismissal of criminal charges

The case study in question was chosen because it concerns the rejection of a criminal charge in relation to the criminal offense under Article 326 of the CC. The criminal charge states that on May 24, 2019, at around 12:35 pm, a police patrol stopped a personal car driven by the suspect S. A. A., and there were three people in the front and back passenger seats. The report states that the interviews conducted established that the passengers in the vehicle did not hire S. A. A. for illegal transfer from the territory of the Republic of Croatia to the territory of the Republic of Slovenia, and were returned to the territory of Bosnia and Herzegovina on the same day from where, according to their own testimony, they came illegally to the territory of the Republic of Croatia. The defendant S.A.A. in his defense, which he presented during the interrogation before the on-duty Deputy State Attorney, denied that he had committed the criminal offense for which he is charged, stating that he visited Zagreb County because he moved to Croatia with his family seven months ago. At one point, while driving through a wooded area, three people unknown to him "jumped" onto the road and stood in front of the car so that he was forced to stop. It was about two men and one woman, who asked him where he was from because they obviously concluded from his physiognomy that he could be their compatriot or a person who understood Arabic. Then a

23 Municipal Court in Novi Zagreb, number: 57 K-470 / 18-25 dated 21 January 2018

woman in tears begged him to take them to the car and drive them part of the way, showing her legs which were very swollen, so he finally agreed, only to be stopped by the police after 15 minutes of driving.

The criminal charge was rejected due to the fact that no objects or money were found in the suspect's possession that would indicate him as the perpetrator of the criminal offense for which he is charged and that in this case there is no personal and material evidence to challenge the suspect's defense since it is not possible to question the foreigners since they were returned to the territory of BiH.[24] It was certainly a wrong qualification of the act, that is, it was necessary to go with the qualification of the misdemeanor from Article 43 of the LF, and not with the criminal offense under Article 326 of the CC as was the case, and greed has not been proven.

4.3 Illegal entry, movement and stay – Article 326 (2) of the CC

The following case study was chosen because it is a criminal offense under Article 326 (2) of the CC committed jointly by the first defendant D. S. I. and the second defendant B. P. A.[25] (citizens of the Republic of Bulgaria) on October 15, 2019, in order to *gain material benefit* in an unspecified amount of money, by taking over a Ford Transit van with Italian registration plates from the Slunj area. The first defendant was driving the vehicle, while the second defendant was in the front passenger seat, and a total of 26 illegal migrants were transported by being placed in the trunk of a van registered as a truck without ventilation and windows, measuring 353x179x202 cm. They were moving in the direction of the Republic of Slovenia, in order to cross the state border, as a result of which they were found by police officers in Soboli at the Kikovica toll station. Therefore, out of *greed*, they enabled other persons to move and reside in the Republic of Croatia illegally, and when committing a criminal offense, they were treated in an inhuman and degrading manner, thus committing the criminal offense under Article 326 (1 and 2)of the CC and were sentenced to 2 years in prison each.[26]

24 ODO No: K-DO-469/19 of 26 July, 2019

25 Defendants pleaded guilty, the first defendant alleges that he confessed to the crime in full as described in the indictment and that he is sorry that he committed it and that he did not know it was illegal. In Serbia, he agreed by phone with one person to transport migrants, which they then took to Slunj in order to transfer them across the Slovenian border. After picking up 26 migrants in Slunj, who were placed in the back of a Ford Transit van, they headed for Rijeka, where they were caught by police officers at toll booths. For transportation costs that they received 150 euros. The second defendant stated that he confessed to the criminal offense he was charged with, and that everything that was stated in the indictment was true. Municipal Court in Rijeka, number: K-171 / 2019-17 dated 11 April 2019.

26 Municipal Court in Rijeka, number: K-171 / 2019-17 dated 11 April 2019.

The case study shows that the perpetrators are willing to seriously endanger human lives in order to obtain undue property gain. For the said criminal offense, at least the prescribed minimum set of three years' imprisonment should certainly have been imposed.

4.4. Illegal entry, movement and stay within a criminal association

The case study in question was chosen because it is a criminal offense under Article 326 of the CC, which was committed as part of a criminal organization under Article 329 of the CC. From a brief description of the events, it can be seen that the defendants S.P. and B.S. from July 29 to November 20, 2018, in order to gain material benefits, transported foreign citizens from BiH and Serbia to Croatia, and further to Slovenia and then to Italy for amounts of 200, 400 and 1000 euros per person. [27]

With the help of an unknown driver, they picked up foreign nationals at an agreed place and transported them to Zagreb or drove them as *a vehicle precursor in order to spot and avoid police patrols*, where V. Ž. (along with several other people) organized temporary *accommodation* for foreign nationals, from where they were picked up again by drivers and transported to the immediate vicinity of the border. In the described manner, from July 29 to November 20, 2018, 153 foreign nationals were "transferred" across the state border of BiH and Serbia to the Republic of Croatia and from the Republic of Croatia to Slovenia and further to Italy on 17 occasions. So, the first defendant[28] and the second defendant[29], being aware of the goal of the criminal organization, and as part of such an organization,

27 Zagreb County Court, 5 Kov-Us-41/19 dated 17 July 2019.

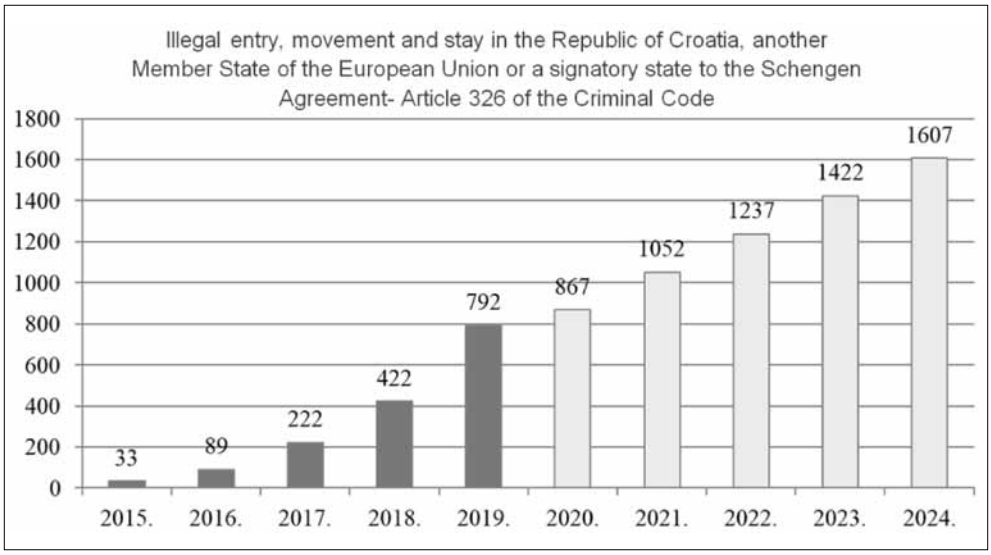
28 The first defendant S. P. was sentenced to imprisonment for a term of 2 (two) years and 11 (eleven) months, and pursuant to Article 57 (1), a partial suspended sentence shall be imposed on him, provided that he is sentenced to 1 (one) year and 3 (three) months of imprisonment, and he will not serve the part of the imprisonment for a term of 1 (one) year and 6 (six) months if he does not commit a new criminal offense within a period of 3 (three) years, provided that the probation period begins to run from the imprisonment sentence served. Zagreb County Court, 5 Kov-Us-41/19 dated 17 July 2019.

29 The second defendant B. S. was sentenced to imprisonment for a term of 2 (two) years and 8 (eight) months, and on the basis of Article 57 (1), a partial suspended sentence shall be imposed on him, provided that he is sentenced to 1 (one) year and 5 (five) of imprisonment for which he was sentenced, and he will not serve the part of the prison sentence for a term of 1 (one) year and 5 (five) months if he does not commit a new criminal offense within a period of 3 (three) years, provided that the probation period begins to run from the imprisonment sentence served. Zagreb County Court, 5 Kov-Us-41/19 dated 17 July 2019.

enabled and helped another person to illegally enter, leave, move and stay in the Republic of Croatia, another EU member state or a signatory state to the Schengen Agreement out of greed.[30]

5. Statistical analysis of the number of committed criminal offenses under Article 326 of the CC

Graph 1 shows the data from Article 326 of the CC for a period of five years in the Republic of Croatia. Comparing the above data, it can be seen that in the first observed year there were 33 criminal offenses, whereas at the end of the observed period in 2019, there were 608 criminal offenses, which is an increase of 1742.42% compared to the first period and indicates that the problem is very serious, which is emphasized by almost every international source on migration of the Council of Europe and the European Union. The trend of the criminal offense from Article 326 of the CC, when calculated using a linear trend, is certainly not completely reliable, but according to the calculation, it indicates a trend according to which in 2024, 1313 criminal offenses under Article 326 of the CC shall be recorded if there is no serious change in that regard.



Graph 1.
y = 185,1x - 58,6
R^2 = 0,906

30 Zagreb County Court, 5 Kov-Us-41/19 dated 17 July 2019.

6. The principle of *ne bis in idem* as regards the criminal offense under Article 326 of the CC and Article 43 of the LF

The descriptive analysis, as well as the analysis of the case study, shows that there are points of contact between the offenses under Article 43 of the LF and Article 326 of the CC. Prof. Martinović states that in some criminal offences and violations, even the most skillful formulation of legal descriptions cannot avoid "overlap", i.e. the apparent confluence between violations and criminal offenses (Martinović, 2019: 618).

Prof. Elizabeta Ivičević states that a few years after the verdict of the European Court of Human Rights in the case of *Maresti vs. Croatia*, it is possible to see to some extent its influence on the Croatian criminal or misdemeanor legal order. First of all, it should be concluded that certainly the most difficult task set by the above verdict before the Croatian legislator has not yet been fulfilled: a clear delineation of misdemeanors and criminal offenses at the legislative level. There are still many criminal offenses and misdemeanors overlapping, which overlap in their description, impeded punishment and protected legal good (Ivičević-Karas, Kos, 2012: 582).

The analysis of numerous cases shows that no charges are filed for both misdemeanors and criminal offenses, because otherwise the principle of *ne bis in idem* would be violated. According to this principle, the same person cannot be tried twice in the same case that has already been *adjudicated*, it has its roots in Roman law, although older written legal sources also contained indications of the rules on this prohibition (Ivičević-Karas, 2014: 271). Influenced by the jurisprudence of the European Court of Human Rights, the application of the *ne bis in idem* principle in the context of the (im)possibility of consecutive misdemeanor and criminal proceedings has been in the center of attention of the domestic professional public in recent years, especially after the *Maresti vs. Croatia verdict*[31] (Ivičević-Karas, 2014: 271). Professor Ivičević Karas further mentions a new institute that is not sufficiently known to the professional public, and it is a transnational principle of *ne bis in idem* proclaimed by the Convention implementing the Schengen Agreement – CISA.[32] A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party, (Article 54 of the CISA). The provisions of the Convention Implementing

31 ECHR, *Maresti vs. Croatia*, 55759/07, dated June 25, 2009

32 Convention implementing the Schengen Agreement, Official Journal L 239 of 22 September 2000

the Schengen Agreement have largely shaped the provisions on *ne bis in idem* in a number of instruments of European Union law, however, it should be noted that *ne bis in idem* from the Convention Implementing the Schengen Agreement, unlike the one from the Charter, applies in relations between Member States, but not within national jurisdictions (Ivičević-Karas, 2014: 283). In addition, Article 55 of the Convention Implementing the Schengen Agreement explicitly provides for the possibility of derogating from the *ne bis in idem* principle, regarding the application of the principle of territoriality and the safeguard principle that Contracting States may apply subject to prior explicit declaration (Ivičević-Karas, 2014: 283).

However, given that the idea of a complete demarcation of misdemeanors and criminal offenses is unfeasible, the solution *de lege ferenda* should be sought elsewhere (Martinović, 2019: 618). First of all, it would be desirable to legitimize in an appropriate way the fundamental ingredient of "close connection in nature and time", which is to include the sentence imposed in misdemeanor proceedings in the sentence imposed in criminal proceedings (Martinović, 2019: 618).

7. Conclusion

The specificity of these criminal offences and misdemeanors is that the victims are very interested in crossing the state border and arriving at the destination they planned and have no interest in revealing the perpetrator or the entire network through which they came from distant states. The criminal offense and the misdemeanor are similar and for the same offense a criminal charge cannot be filed with the competent State Attorney's Office and an indictment with the competent misdemeanor court, because otherwise the principle of *ne bis in idem* would be violated.

It is evident from the paper as a whole that the acts from Article 326 of the CC and Article 43 of the LF overlap in their description, except for the most important factor of greed, which is a crucial difference between a misdemeanor and a criminal offense of illegal entry, movement and residence in the Republic of Croatia, another EU Member State or a signatory state to the Schengen Agreement.

Case studies have pointed out a problem in proving greed for the crime under Article 326 of the CC, but it is evident that the penalties for the misdemeanor of the prohibition of helping a third-country national under Article 43 of the LF are quite high and certainly have an effect on both special and general prevention, and it is evident that the courts are quite consistent in imposing fines of HRK 23,000.00 for each assisted third-country national. The proposal is that in Article 225 (3) of the LF first states a fine, and only then imprisonment in accordance with the principle of proportionality; and not that there is any doubt about the type of sanction.

Case studies have shown that the perpetrators of criminal offenses under Article 326 of the CC are well organized in groups and use sophisticated mobile devices, then "vehicle precursors" to avoid the police, and in case of detection do not shy away from attacking police officers in achieving their goals.

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Emilija PETROVA*
PhD Student
Faculty of Security
Skopje, Republic of North Macedonia

Metodija DOJCINOVSKI, PhD**
Professor
Military Academy Gen.Mihailo Apostolski
Skopje, Republic of North Macedonia

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BORDER MANAGEMENT AND PROCEDURE IN CASE OF HIGH LEVEL OF RADIATION AT THE BORDER CROSSINGS IN THE REPUBLIC OF NORTH MACEDONIA

The aim of this paper is to strengthen the ability of border crossing staff to check the presence of persons and vehicles for possible presence of radioactive materials outside regulatory control, in an effort to prevent smuggling and illicit trafficking in such means and materials. Regarding the use of radiation detection equipment, which is used at the border crossings in the Republic of North Macedonia, for the needs of control and verification of the entire import and export for possible presence of radioactive shipments. It documents the overall detailed process that the officers involved (customs officers and border police) will use to detect all radioactive material passing through the site, the process that will be used to determine the legitimacy of the radioactive substances that would be detected and the most appropriate way, which should be reacted and acted upon if illegal shipments of this

* E-mail: emilijapetrova83@yahoo.com

** E-mail: metodija.dojcinovski@mod.gov.mk

type are detected. Information that will help existing and new officials to perform their duties in a timely manner, in an appropriate and consistent manner.

Keywords: border crossings, radioactive materials, radiation, border police, customs officers

1. Introduction

In order to successfully counter radioactive threats, law enforcement agencies, and especially those responsible for border management, must always be one step ahead. It is necessary to develop mutual communication, coordination of activities, planning and readiness to respond to threats quickly and efficiently. This could not be done without well-trained and inventive professionals. Well-designed, effective and consistent exchange of information and intelligence procedures, in correlation with operational planning are vital. Provide more training in the field of ionizing radiation and radiation protection, especially for officials working at border crossings. It is important for them to know all the radioactive sources and the dangers they can cause, of course how to protect themselves from unwanted action, in exposure to radiation, because a little carelessness can cause great harm to staff and the environment. The staff the Border Police Service and the Customs officers should know well how to handle all the instruments they have for radiation detection and in case of any incident at the border crossing, to immediately inform the regulatory body in the State to act in accordance with the law.

Radiation threat assessment is the basis for establishing an appropriate radiological emergency preparedness and radiological emergency response systems. Thus, this radiation threat assessment actually identifies the facilities, activities or locations where there is a possibility of emergency radiation on the territory of the Republic of North Macedonia, as well as sources of ionizing radiation that may lead to a radiation emergency that requires appropriate action and measures to protect the population, persons participating in the intervention and the environment Through the realization of their competencies, the institutions directly involved in the border control are obliged to ensure the safety and health of the people, the environment and the cultural heritage. Establishment of a National Coordination Mechanism for Border Management, which will be managed by the Border Police Service in cooperation with all other national border management services, in order to achieve cooperation, coordination, mutual support and exchange of information between them.

2. Radiation detection equipment at the border crossings

The Personal Radiation Detector (PRD)[1] is a small, stand-alone device used to detect gamma radiation. This device is basically used to determine the safety zone or perimeter during field work, to protect officials.

The Radioisotope Identification Device (RID) is a compact device for manual use and is used to locate the radiation source and determine the specific isotope present. The device has the ability for remote, computerized data transmission, for sending isotope data to technical experts who are not present on the spot.

Portal Radiation Monitors (PRMs) are larger fixed systems, located in places intended for basic control and verification, and are used to detect gamma and neutron radiation. Usually, the operation and use of PRM is controlled by a computer.

The Geiger counter is a device for manual use, which helps operators to locate the radioactive source (s) in a timely manner.[2]

3. Organizational responsibility

3.1. Customs Administration / Border Police

The Border Police and the Customs Administration[3] of the Republic of North Macedonia are competent institutions for initial control of the border crossings for entry and exit from our country and responsible for the initial reaction and action in case of activation of a certain alarm and its assessment. The RSD (Radiation Safety Directorate) is responsible for ensuring that all necessary secondary checks and controls have been carried out and that all other agencies have been duly informed of what to do in case of suspicious alarms or threats. [4]

Customs Service:

The main tasks of the Customs Service are: conducting customs supervision, conducting customs control, customs clearance of goods, conducting customs control, investigative and intelligence measures aimed at preventing, detecting and investigating customs offenses and criminal acts, initiating proceedings customs and other offenses, as well as criminal offenses established by law and collection

1 Standard operating procedures for detecting increased levels of ionizing radiation (2016)

2 Plan for protection of the population in case of a radiation emergency event in the Republic of Macedonia (Official Gazette of RM no. 84/11)

3 National Strategy for Integrated Border Management (2021-2025)

4 Plan for protection of the population in case of a radiation emergency event in the Republic of Macedonia (Official Gazette f RM no. 84/11)

of mandatory fines, calculation and collection or refund of export and import duties, taxes and other public duties and fees on import, export or transit of goods, as well as implementation of forced collection in accordance with the law,[5] conducting customs-administrative procedure in the first instance, controlling the import and export of effective domestic and foreign money, checks and monetary gold, controlling the export, import and transit of goods for which prescribed special measures of interest for safety and public morality, preservation of health and life of people, animals and plants, protection of the environment, prescribed by the Law on Customs Administration, other laws and regulations.

MOI (Border Police):

The main bearer of activities in the field of border management is the Ministry of Interior (MOI) through the border police which operates within the Public Security Bureau (PSB). According to the Law on Police, the border control in the Republic of Northern Macedonia is under the competence of the Ministry of Interior, and the security of the state border and border control (border surveillance and border checks) are performed by the border police, as part of the Ministry of Interior.[6]

Border control is performed in accordance with the Law on Border Control and covers matters related to border checks and border surveillance, as well as analysis of national security threats and analysis of threats that may affect border security, and is performed in order to for:

– Prevention and detection of crimes and misdemeanours and detection and apprehension of their perpetrators,
– Prevention and detection of illegal migration and trafficking in human beings,
– Protection of life, human health, personal safety, property, environment and nature and - prevention and detection of other dangers to public order, legal order, national security and international relations.

The Border Police is an integral part of the PSB and for efficient performance of its tasks is structured on three levels: central, regional and local.

3.2. Border Check and Control

The main purpose of border checks is to enable fast and unimpeded legal flow of legal passengers and goods and to prevent illegal activities at border crossings through effective systematic checks of persons and vehicles crossing the state border. In order

5 Law on the Customs Administration (Official Gazette of RM no. 46/04, 81/05, 107/07, 103/08, 64/09, 105/09, 48/10, 53/11 and 113/12)

6 Law on Border Control (Official Gazette of RM no. 171/10)

to fulfil that goal, based on the profile and frequency of passengers and vehicles, a categorization of the border crossings[7] (border crossings of the first, second and third category) was performed and accordingly the human and material resources are planned and engaged. In order to speed up the processing of passengers and also to prevent illegal entry and exit of persons using forged or foreign documents, the border crossings were continuously equipped with modern equipment in accordance with EU standards and the Passenger and Vehicle Control System was upgraded.

In that direction, and taking into account the continuous increase of passengers, especially in air traffic, as well as the increased security threats, in the next period the priority will be the further modernization of the border crossings, equipment and IT systems used on them, as well as opening of new border crossings for road traffic. Further improving inter-agency cooperation with institutions present at border crossings will continue to be a priority.

Border checks[8] shall be carried out in the area of border crossings, outside the area of the border crossing by train, aircraft, vessel or other place, as well as on the territory of a neighbouring country in accordance with an international agreement. There are currently a total of 23 border crossings, of which 18 for road, 3 for rail and 2 for air. Four border crossings for road traffic function as joint border crossings with neighbouring countries: BCP Tabanovce - Presevo with R. Serbia has grown into a Joint Border Crossing for international road traffic, and new border crossings were opened ZGP Belanovce - Stancic with R. Kosovo, ZGP G. Crcorija - Golesh with R. Serbia and ZGP Dzepishte - Trebishte with R. Albania, the last two of which are for local traffic.

The border control in the Republic of North Macedonia is performed by the police of the (Ministry of Interior) of the Ministry of Interior in accordance with the national legislation which is to a large extent harmonized with the EU standards in the field of border operations.

The main purpose of border control is to ensure fast, efficient and safe legal flow of passengers and goods, and on the other hand to detect and prevent illegal (illegal) crossing of the state border and all forms of cross-border crime (including smuggling of migrants, trade with people, drug trafficking, smuggling of excise goods, vehicles, etc.), and thus contribute to the detection and prevention of threats to public order, the rule of law, national security and the international reputation of the state. Border control consists of border checks, border surveillance and risk analysis.[9]

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7 Law on State Border Surveillance (Official Gazette of RM no. 71/06/66/07)

8 National Strategy for Integrated Border Management (2021-2025)

9 Standard operating procedures for detecting increased levels of ionizing radiation (2016)

The Customs Service also plays a key role in border control by conducting customs supervision, customs clearance of goods,[10] customs control, excise supervision on the entire territory of the Republic of North Macedonia, investigative and intelligence measures to prevent, detect and investigate customs offenses and criminal works, protection of the safety and security of people, animals and plants, protection of objects of historical, artistic and archaeological value, copyright and other rights, as well as other trade policy measures prescribed by law, implementation of customs controls after customs clearance.

Conducting internal controls and audits in all spheres of customs operations and the overall functioning of the Customs Administration, in order to detect cases of non-compliance with laws and internal acts and abuses in the performance of official duties by employees, conducting misdemeanour proceedings, pronouncing misdemeanour sanction for committed customs, excise and foreign exchange misdemeanour, as well as initiating a procedure (IAES, 2019) for criminal acts determined by law.

4. Operational procedures

In case of a radiation emergency[11] at the border crossing point, basic inspection and control, secondary inspection and control and tertiary inspection and control are applied.

4.1. Basic check and control

The basic check and control starts when a certain person or vehicle enters or leaves the terminal or border crossing. At the entrance or exit of the country, the vehicles pass through the PMR systems placed along the lanes. For the purposes of proper PMR control, traffic must be regulated to ensure adequate vehicle speed and flow. The basic inspection and control of persons and vehicles entering or exiting terminals or border crossings can be performed with the help of other hand-held or compact devices and devices for measuring radiation, such as PRD, Geiger counters, RID and backpacks with equipment to detect radiation.

10 Instructions for work in detecting increased levels of ionizing radiation (CA of the Republic of Macedonia) - Skopje, 2011

11 Rulebook for categorization of Radiation and nuclear threats (Official Gazette of RM no. 162/09)

4.2. Secondary check and control

If any of the radiation alarms are activated, the managing official directs the person or vehicle to the place provided for secondary check and control. After determining the safety zone with the help of PRD, the official will separate the passengers from the vehicle and will start checking and controlling both the vehicle and the persons who pose a potential threat. Once the official has located[12] all potential sources of radiation, with the help of UIRI should try and identify them.

After the identification of the sources and the initial on-site investigation (through analysis of the relevant documentation and examination of the suspects), the official should determine whether it is a safe alarm or the presence of possible radioactive material outside regulatory control.

4.3. Tertiary check and control

Tertiary check and control is usually performed by RSD (Radiation Safety Directorate)[13] with appropriate knowledge in the specific area, from regulatory bodies and bodies in charge of radiation detection, through the use of more sensitive and sophisticated equipment for measurement and detection, in order to assess and identifies the threat. RSD can check for possible contamination and supervise and control the process of raising and securing the source. After analyzing all the data provided through tertiary verification and control, the RSD may decide to detain or omit the person or vehicle that triggered the alarm. If the RSD determine that this is radioactive material outside regulatory control, officials should detain suspects and assets and secure the radioactive source.

5. Procedure in case of active alarm

5.1. Steps to be taken

At least two officers should perform all secondary checks and controls. Each of them must own PRD. During the whole procedure, the passengers and / or the vehicle that triggered the alarm must be properly secured. Officials are required to make all devices used for basic screening and detection of gamma

12 National Strategy for Development of Integrated Border Management Skopje-2014-2019

13 Law on protection from ionizing radiation and radiation safety (Official Gazette of RM no. 48/02, 135/07, 53/11, 43/14)

radiation, such as PMR, PRD, RID or Geiger counters, available to colleagues performing secondary screening and control. If the primary alarm refers to gamma-neutron or neutron radiation, if possible, perform an additional check and measurement with another primary detector or PMR. If only gamma radiation, gamma-neutron or neutron-only radiation is detected during the additional initial check-and-check, then refer persons or vehicles to the secondary check-and-check location. If no additional alarm is activated during the additional initial check and control, then it can be assumed that the cause of the initial alarm was natural background radiation. In that case, the officials should document the event, thus ending the procedure.

For all persons and vehicles that will be referred for secondary inspection and control, the official should provide all available data regarding the activated alarm from CAS, the relevant documentation for the shipment (if any), the form for the Report for secondary inspection and control and hand-held radiation detection and detection devices, which will be required for secondary inspection and control. At the moment of access to the persons or vehicles that have turned on the alarm, the officials must be equipped with personal radiation detectors (PDR) or so-called pagers, and they must have at their disposal a radioisotope identification device (RID).

If at any time, before or during the secondary inspection and control, the official notices a reading of "9" on the screen of his PDR, he or she must immediately move away from the radiation source until the display number changed to "8" or lower, after which he should immediately inform his superior about it. Remove passengers from the vehicle. Constantly secure both persons and vehicles. After setting up the safety perimeter with the help of PDR, using the manual radiation measuring devices, try to locate the potential source of radiation among the passengers or in the vehicle. If you can, mark potential locations where the source might be located. If you suspect that it may be residual radiation as a result of medical treatment, isolate the person and ask them about any medical treatments they have been exposed to in the past. Officials MUST NOT be in close contact with persons considered to have been exposed to medical isotope treatment. All body fluids in these patients may be contaminated with medical isotopes, including their sweat and saliva. Officials should detain all persons and vehicles that will turn on the neutron and high gamma radiation alarms and report the incident to their superiors immediately. Officials should call the RSD whenever it is necessary to coordinate tertiary verification and control and verify the identification of the source. Isolate and secure the source or sources until RSD representatives arrive at a secure location at the border crossing. At the very border of the security perimeter around the source, in the safe zone, the reading of PDR must not be higher than "8".

6. Previous experiences and results

In the period from 2008-2010, there were 20 incidents of illicit trafficking in radioactive material on the territory of the Republic of Northern Macedonia, of which 15 incidents were recorded at the following border crossings: Bogorodica, Blace and Tabanovce. In 14 of the incidents, the presence of a radioactive source was detected in trucks loaded with scrap metal, while in one of the incidents, a truck loaded with consumer goods was returned due to the presence of thorium lamps. The other five incidents that occurred on the territory of the Republic of Northern Macedonia confirmed the presence of an ionizing scrap metal fire reporter (Am-241) in two incidents and the presence of a radioactive source from a radioactive lightning rod (EU-152, Co-60) in scrap metal in three incidents.

Namely, in the period from 2007 to 2012, there were 27 incidents of illegal trade on the territory of the Republic of Macedonia, with the largest number of incidents occurring in 2008, at the border crossing Blace. In the period from 2017 and 2018, there were a total of 8 incidents with illegal trade at the border crossings in the Republic of Macedonia, with which the majority of incidents are recorded at the border crossings Tabanovce and Blace. We can conclude that most of the extraordinary events in the period 2007 - 2012 occurred at the border crossing Blace during import. The reason for this is the fact that in Kosovo at that time the area of protection from ionizing radiation, including radioactive sources, was not properly regulated. The lack of a regulatory body is the reason for the increased number of emergency events, especially in 2008. Following the establishment of an appropriate regulatory body in Kosovo, which was established on 21.06.2011, there has been a significant decline in the number of emergency events at the Blace border crossing. On 06.06. 2018, the Radiation Safety Directorate of the Republic of North Macedonia and the Agency for Radiation Protection and Nuclear Safety of the Republic of Kosovo signed a memorandum of cooperation. Co-60, Th-232, Eu-152/154, Am-241, Ra-226 and others appear as sources in most of the extraordinary events in this period. These are radioactive sources built into lightning rods that were installed in the past on the entire territory of SFRY by the Institute of Nuclear Sciences "VINCA", ionization fire alarms and radioactive sources that are part of measuring instruments.

The detected radioactive sources are usually of 5 categories or are excluded from the control, but they have enough activity to be detected. In case of detection of a radioactive source at the border crossing, actions are taken to respond and deal with the situation. The following are performed: basic, secondary and tertiary inspection and control. The Border Police and the Customs Administration of the Republic of North Macedonia are competent institutions for initial (basic)

control of the border crossings for entry and exit from the Republic of Macedonia and responsible for the initial reaction and action in case of activation of a certain alarm and its assessment. Of course, they are also responsible for performing a secondary check that will highlight the initial signs of a threat.

Agencies, which should act in case of identification of suspicious alarms or threats. The Radiation Safety Directorate for each incident that will occur at the border crossings receives the notification from the responsible person of the Customs Administration through the Duty Operations Center DOC or through the NCCBM (National Coordination Center for Border Management).

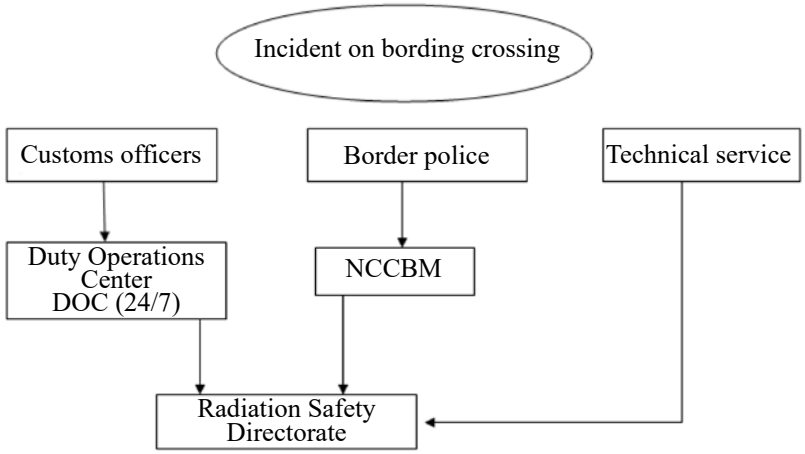

Figure 1. Schematic representation of the response in case of an emergency with radioactive sources at the border crossing

Table 1. Equipment for radiation detection at the border crossings of the Republic of North Macedonia

State border	Radiation pagers	Geiger-Miller counter	Panel Detectors
North	23	4	3
East	12	1	3
South	24	2	3
West	11	2	2
Total	70	9	11

Table 1 shows the total number of detection equipment used by customs officers and border police officers. From this we can conclude that the equipment used by officials is as follows: radiation pagers, Geiger-miller counters and panel

detectors. On the territory of the Republic of Northern Macedonia, the customs and police officers have a total of 70 pagers for radiation, 9 Geiger-Miller counters and 11 panel detectors.

7. Conclusion

In that direction, and taking into account the continuous increase of passengers, especially in air traffic, as well as the increased security threats, in the next period the priority will be the further modernization of the border crossings, equipment and IT systems used on them, as well as opening of new border crossings for road traffic. Further improving inter-agency cooperation with institutions present at border crossings will continue to be a priority. The Radiation Safety Directorate as a regulatory body in the country whose competence is protection from ionizing radiation, radiation safety and security will provide training and exercises for customs officers and border police in cooperation with the IAEA (International Atomic Energy Agency), will strengthen the control of all sources of ionizing radiation in the country, including devices for identification of radiation at the border crossings and will participate in the development of Standard Operating procedures for action when detecting increased levels of radiation at the border crossings. One of the main priorities of the Customs Administration in the coming period will be the full establishment of digital customs, which will also contribute to trade facilitation and strengthen border security.

The Customs Administration will continue with the further harmonization of the national customs legislation and procedures with the legislation of the European Union by amending the customs laws, bylaws and instructions for their application, in accordance with the legislation of the European Union. In order to facilitate and accelerate the flow of goods and passengers will work on improving selective control by applying risk analysis and assessment, improving the quality of services and working conditions of economic operators and customs officers by building a new and improving the existing infrastructure border crossings, acceleration of the flow of vehicles at the border crossings and customs terminals by improving the cooperation and harmonization of controls with other state institutions responsible for the implementation of the customs procedure and introduction of joint controls of goods, passengers and means of transport in one place with the border services of neighbouring countries. In that direction, it will continue with activities in order to provide simple and predictable procedures and formalities. The modernization of the border police will be a priority in the coming period, especially in the area of video surveillance and mobility, because the

existing funds are continuously used and some of them are already depreciated. Priorities will be the maintenance and further development of cooperation with neighbouring countries and improving the efficiency of existing forms of cross-border police cooperation, initiating new forms of cooperation at the southern border, as well as creating conditions (technical, legal) for using data from EU real-time systems (satellite imagery, real-time information and data, etc.).

The assessment of the degree of endangerment of the state border sectors will be performed regularly, and the planning and allocation of resources will be performed in accordance with the established situation and the identified risks. Cooperation with the Ministry of Defence will also continue in the area of support by the Army in securing the parts of the state border that have been identified as the most critical. In 2020, an additional challenge was the emergence of COVID-19 which significantly affected all segments of society, including border management. The pandemic affected the border operations in several aspects, primarily the need to further conduct border police work in much more complex conditions than before (in a pandemic) and the additional tasks and role of the border police and other relevant institutions in the IGS system in dealing with COVID -19 nationally. Given that this situation will continue in the future, the pandemic is a risk factor for all planned measures and activities in the coming period and all involved institutions will take the necessary measures to adjust to new trends and meet the goals in complex condition

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Abbreviations used:
- Personal Radiation Detector-PRD
- Radioisotope Identification Device -RID
- Administrative Technical Affairs-ATA
- Central Alarm Station-CAS
- Radiation Safety Directorate – RSD
- Ministry of Interior – MOI
- Customs Administrations-CA

Veaceslav URSU, PhD
univ. prof., chief commissioner
Dean of Faculty of Law,
Public Order and Civil security
Academy "Stefan cel Mare", Moldova

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THE LEGAL NATURE OF EXTRADITION AND EXPULSION, CONSTITUTIONAL AND CRIMINAL JUSTICE REGULATION

The study examines the extradition and expulsion, analyses the constitutional and criminal justice regulations of the legal institutions under consideration, identifies their particularities and the reveals their legal nature. Based on the identified features, the author tried to highlight the essential similarities and differences of the institutions concerned, in order to finally discover and describe the legal nature of expulsion and extradition.

Keywords: expulsion, extradition, international treaties, conditions of reciprocity, the legal regime of foreigners and stateless persons, international legal assistance in criminal matters, security measure.

1. Introduction

Extradition and expulsion are often confused when these two institutions have to be applied to in connection with certain persons. They are similar, but in the same time, they differ according to their procedure and the subjects to which extradition and expulsion apply. Because of this confusion, we frequently see how

journalists and everything related to media[1], police officers, prosecutors and judges misunderstand the real meaning and the applicability of these two institutions in practice. Even if the legislative framework covers these differences and explains the application procedure, sadly, it often happens that the victims of these errors are not offered the legal and available guarantees and end up suffering due to lack of knowledge.

According to the legal framework that is governing these two institutions, in particular the Criminal Code of the Republic of Moldova, we distinguish the following statements:

1) Extradition does not apply to the citizens of the Republic of Moldova and persons granted political asylum in the Republic of Moldova [1, art.13].
2) Foreign nationals and stateless persons who have committed crimes outside the territory of the Republic of Moldova, but who are located on the territory of the Republic of Moldova, may be extradited only on the basis of an international Treaty to which the Republic of Moldova is a party or under conditions of reciprocity under the court decision, only if there are serious grounds for believing that they are at risk of death, torture or other inhuman or degrading treatment.
3) Expulsion is applied to foreign citizens and stateless persons who have been convicted of crimes and can be barred from remaining on the territory of the Republic of Moldova [2, art.105].

2. Constitutional principles on extradition and expulsion

The Constitution of the Republic of Moldova states in article 15 that the citizens of the Republic of Moldova take advantage of the rights and freedoms confirmed in the Constitution and other laws and have the obligations lay down therein. In this context, we would like to express our view on the protection of RM citizens abroad and their right not to be extradited or expelled from the country.

Thus, para. (2) of article 18 of the Constitution of the Republic of Moldova stipulates that citizens of the Republic of Moldova benefit from state protection both at home and abroad. As it is confirmed in the Constitution, this principle is

1 One of the most resounding case related to extradition/expulsion and a wrong application of the procedure is the **CASE OF OZDIL AND OTHERS v. THE REPUBLIC OF MOLDOVA**, where the Court stated that there had been a violation of Article 5 § 1 (right to liberty and security) and Article 8 (right to respect for private and family life), holding that the applicants had been deported/expelled by illegal transfer which had failed to comply with all national and international legal guarantees.
https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-193614%22]}

the natural and logical consequence of the political relationship between citizens and the state. This is a constant connection; it spreads and works wherever the person is, in his or her home state or in another state.

This principle also applies to cases where RM citizens can, or even commit offenses in another state's territory, and of course in cases when they are committed against them or against their rights and freedoms. According to the citizen's membership of the Moldovan state, citizens of the Republic of Moldova enjoy state protection abroad, as they have the constitutional right to ask the Moldovan authorities for appropriate protection. That is, the authorities of the Republic of Moldova abroad have the constitutional obligation to offer them the necessary protection. This does not mean, however, that by exercising this obligation, the respective Moldovan authorities must or may in some way undermine the sovereignty of the State on whose territory the citizens of the Republic of Moldova are located, the latter are obliged to respect the law order of that state. When enjoying state protection, Moldovan citizens must fulfil their obligations under the laws of the state in which they are located, including the laws of Moldova.

Therefore, this principle must be understood in an international context, since the cooperation of states in this field is carried out on the basis of bilateral or even international conventions and agreements., the Constitution of the Republic of Moldova stipulates in Article 19 on the protection granted to foreigners and stateless persons in R. Moldova, that foreigners and stateless persons have the same rights and duties as citizens of the Republic of Moldova, with the exceptions set by law. In other words, R. Moldova grants foreigners and stateless persons, the so-called national regime, according to which foreigners and stateless persons, as mentioned, have the same rights and obligations as their own citizens, with exceptions determined by law, for example, to fill up exclusive political rights (for example, to hold a public office), as well as some constitutional requirements for citizens of the RM (e.g., country defense obligation).

A constitutional right belonging exclusively to foreigners or stateless persons is that of political asylum.

Paragraph (2) of article 19 of the Constitution of the RM stipulates that the right of asylum shall be granted and withdrawn in accordance with the law, in compliance with the international treaties to which the Republic of Moldova is a party. This regulation is intended to demonstrate the alignment of Moldova with intentional standards in the protection of human rights and fundamental freedoms.

People who contribute, through their work on ensuring peace, progress and humanity in general, and who are persecuted for these activities in the states they are located, or whose citizens they are, are also logical to find shelter and defense in another state.

The general rule accepted by international humanitarian law is that asylum is granted to foreign nationals or stateless persons wanted or persecuted for political activities. This means that not all foreigners or stateless persons who come to Moldova will receive political asylum. The name itself of this institution indicates the type of activity carried out by the person, i.e. political activity, so if it is found that the reasons for requesting asylum are not legal, asylum will not be granted (for example, the citizen is followed for ordinary law). Similarly, persons wanted for crimes against peace and humanity or war crimes will not be able to enjoy this right.

Foreigners or stateless persons may be extradited only on the basis of an international Convention or on the basis of reciprocity pursuant to the judgment of the court (paragraph (4) of article 17 of the Constitution of the RM).

At the same time, paragraph (3) of article 17 of the Constitution of the RM stipulates that citizens of the Republic of Moldova may not be extradited or expelled from the country.

The constitutional provisions stated were taken over by the legislator and incorporated in the text of the criminal law in the art. 13 CC of the RM.

Extradition and expulsion are two serious measures which substantially affect and restrict the right to individual freedom and free movement.

Article 25 para. (1) of the Fundamental Law declares that the individual freedom and security of the person are inviolable, and art. 27 of the Constitution states and guarantees the right to free movement, i.e., the right of every citizen to establish his residence in any place of the country, to leave, to emigrate and to return to the country. Whereas, extradition and expulsion essentially limit these rights.

We will analyze more in details the extradition as a measure of forcing someone to leave the country when wanted for serious crimes and requested by another state for its investigation or prosecution. The institution of the extradition by a state of persons who have committed criminal offenses to another foreign state has long been known to international law. Regarding the place of extradition as a legal institution in the system of international law, interpretations of researchers are equivocal.[2] Sometimes extradition is considered to be a secondary institution that has outlived its existence. But crime is developing, becoming cross-border, organized crime is establishing new contacts; criminals who have committed crimes in one country are hiding in another, are permanently changing their place of life and are gaining support and assistance from their "fellowship". All of this makes extradition a very actual issue.

2 Special attention is paid to this institute by scientists, members of the international criminal law association. This issue was discussed especially at the colloquium in Helsinki (September 1992), which was in preparation for the International Congress of this association which took place in Rio de Janeiro in 1994.

At the same time, the tendency of some countries not to extradite their citizens, who have committed crimes abroad, even if they do not have diplomatic immunity, is highlighted. Other countries, on the contrary, extradite their criminals (their own citizens) in a way to make easier for them to re-socialize.

The legal nature of extradition is irregularly understood. Some scholars consider extradition to be a matter of administrative law, because often the ruling on the application of extradition is not the court, but the government or another state body. At the same time, extradition can also be considered as an element of criminal procedure law, as we are dealing with the order of transmission of the person who committed a criminal offense to another country under certain procedural guarantees. Extradition can also be considered as part (institution) of criminal law, i.e., serving the sentence.

The laws of different countries address the issue of extradition differently. For example: In Italy and Romania the rules on the extradition of criminal offenders included in the Criminal Code. The criminal code of the Russian Federation and of the Republic of Moldova, there is also an article on extradition.

The extradition of criminals is mentioned in the Constitution of Russia, France, Germany, Ireland, Italy, Portugal, Spain, including in the Constitution of the Republic of Moldova.

In practice, the issues of extradition to European countries, as a rule, are decided by the courts. At the same time, many countries are putting in place extraordinary trials, or are being tried on an ad hoc basis.

This is mentioned in the laws and legal literature of Austria, Denmark, France, Portugal, Switzerland and Spain.

The issue of extradition arose for the first time in connection with the expulsion of diplomats who committed crimes or other legal violations beyond the borders of their countries. The notion of "diplomatic immunity" emerged as a new legal institution, then the circle of subjects was widened, and this immunity is spread over. Subsequently, the "right of non-extradition" was granted to persons who applied for political asylum in other countries and who have previously committed crime in countries they left.

Many scholars criticize this institution, citing the following arguments: Conventions on extradition between states often go against the Human Rights Pact. A typical example of this inexpediency is the case when there are discussions between countries on extradition, which last for long periods of time, even years, and the citizen, whose guilt is not yet proven, is deprived of liberty all these years.

This is why the globally recognized principles and standards contained in the human rights agreements must be included in the extradition conventions, with due regard for the national laws of the states. However, it is clear that in the fight

against international crime, without the application of the institution of extradition, it will be very difficult to operate.

Generally, the states resolve the issue of extraditing offenders by ratifying bilateral or regional treaties. There are many bilateral conventions on extradition between different states. For example, the Republic of Moldova has concluded such conventions with Romania, the Russian Federation, Ukraine, Belorussia, the Baltic States, and other European states, including Turkey, Israel, etc.; Romania has bilateral treaties and conventions with about 29 states in the world, including Moldova in 1997, Germany - Yugoslavia (1970), Germany - Australia (1987).

One of the regional treaties is the Convention on the extradition of offenders, 1966, concluded by members of the British Community of nations.

The former USSR had a number of agreements on legal assistance with several countries, including Korea, Hungary, Poland, Romania, Mongolia and so on.

However, it should be noted that in some conventions, the chapters on extradition have a general formulation without any necessary concretization, which makes it difficult to extradite offenders. Legal assistance conventions, in principle, have a broader content than extradition conventions. They also discuss issues relating to administrative, civil and other legal fields, through which economic, interstate and other relations are regulated. These conventions often contain the reference that one or other issue, including the issue of extradition, must be resolved and further regulated separately.

There are several general conventions on the issue of extradition in the world.

3. Substantive conditions of extradition and expulsion provided by national and international legal acts

In 1957, the European Convention on extradition was adopted in Paris. In 1975, the additional protocol to this Convention was adopted in Strasbourg, which centralized some issues. In Strasbourg, the second additional protocol to the same Convention was adopted in 1978. The Council of Europe is aiming at a common understanding of the issue of extradition between the countries of Europe, followed by the third additional Protocol, ratified in Strasbourg on 10 November 2010 and signed by the Republic of Moldova on 12 April 2013. Apart from the Paris Convention, there are also other treaties and arrangements which solve the problems of extradition. For example, the 1983 Strasbourg Convention on the Exchange of persons who have committed crimes; then, those in Brussels in 1987, 1991.

Extradition is therefore the act whereby a state, in whose territory a criminal has been taken refuge, hands over that offender, at the request of another state to be tried or serve the sentence to which he was convicted by the courts of that state.

Extradition therefore appears as a bilateral act between two states: one in whose territory the offender is located and to which the extradition request is addressed (the requested state) and another, which is interested in punishing the offender and which addresses the extradition request (requesting state) for this purpose.

Extradition is, by its finality, an act of international judicial assistance in extranal matters, whereby a criminal is transferred from one state to another for being tried for the offense committed or for serving the sentence to which he or she was convicted.

From this definition, the following features of the institution of extradition shall be separated:

1. An act of sovereignty interfered in relations between two states;
2. A judicial act sought and awarded only to bring about repression, the extradited person being a defendant or a person convicted of a criminal offense;
3. International legal assistance;

It follows that extradition has a complex (mixed) legal nature, not only as an act of legal assistance but also an act of sovereignty, including a court act. Following a definition adopted at the 10th Congress of the International Criminal Law Association held in Rome in 1969 "extradition is an act of inter-state judicial assistance in criminal matters, aimed at transferring a prosecuted or convicted individual, from the area of the judicial sovereignty of one state to the area of the other state'.

Extradition is, therefore, a sovereign element of the state, which can admit or refuse to hand over a foreign criminal who is on its territory. When there is a treaty between two parties, the question of extradition is resolved quite clearly: if the person does not have diplomatic immunity, then he or she must either be trialed or be handed over to the requesting state (party). But there are more difficult situations: when the authorities of a state, extraditing the offender, are not sure that the person sent to the home state, will be punished. There is no extradition treaty between these countries. In this case, a process of discussions is initiated, during which the person/criminal will be held for a long time in prison until his trial.

As an impediment to extradition may be the essential difference between punishment measures for the same offenses in different countries; the confidence of the state representatives (who transmit or receive the offender) that the person will be or is subjected to torture , and so on. Many treaties or conventions on legal assistance state not only for extradition (transmission of the offender) but also for refusal to extradite, for example, article 8 of the Convention provides that a

requested party may refuse to extradite a person wanted, if that person is also under his or her prosecution for the same criminal actions.

Article 546 CPC of the RM confirms that the RM is under an obligation to comply its national law with the provisions of the Convention and States and states in paragraph (2) that extradition will also be refused if:

1) The offense is committed in the territory of the Republic of Moldova;
2) in respect of that person, a national court or a court of a third state has already issued a sentence, a decision of acquitting or terminating the criminal proceedings for the offense for which the extradition is requested, or an order of the criminal prosecution body to cease or to carry out criminal investigation of this deed by the national bodies;
3) the limitation period for the imposition of criminal liability for the offense in question under national law has been completed or amnesty has been granted;
4) according to the law, prosecution can only be started on the prior complaint of the victim, but such a complaint is missing;
5) the offense in respect of which extradition is sought is considered by national law to be a political offense or a related offense;
6) The General Prosecutor, the Minister of Justice or the court dealing with extradition has serious grounds for believing that: a) the extradition request has been made for the purpose of following or punishing a person on grounds of race, religion, sex, nationality, ethnic origin or political opinion; (b) the situation of this person is likely to be aggravated on one of the grounds referred to in (a); c) if the person is to be extradited, he or she will be subjected to torture, inhuman or degrading treatment or will not have a fair trial in the requesting country;
7) the wanted person has been granted refugee or political asylum status;
8) the requesting state does not ensure reciprocity in the sphere of extradition.

If the act for which extradition is requested is punishable by the law of the requesting country with the death penalty, the extradition of the person may be refused unless the requesting party gives sufficient assurances that the death penalty will not be imposed on the prosecuted or convicted person [3, art. 546].

The offender himself often insists on his more urgent extradition, first of all, as the prison regime in the country where he wishes to be extradited is more "free" than in the country where he or she can send him or herThe question of extradition is resolved by combining the principle of territoriality (place of crime and place of offender) and the citizenship of that person. From our point of view, the basic principle for extradition must be regarded as the principle of citizenship,

that is to say, the principle of personality of criminal liability does not apply to the territorial principle.

The principle of citizenship has been presented in the new Criminal Code of the Republic of Moldova (article 13) where it is mentioned that citizens of the Republic of Moldova who have committed crimes abroad cannot be extradited from the country and are liable for criminal liability under this Code. The law follows from the fact that the behaviour of the citizen R.M. who has committed crimes is considered a criminal not only by the criminal law of the foreign state but also by the criminal law of the R.M. The outright ban on extraditing R.M. citizens to foreign states, on whose territory the crime was committed, is based on the principle of citizenship of applying criminal law in space, provided in article 11 CC of the R.M.

As regards foreigners and stateless persons who have committed crimes outside the territory of the Republic of Moldova and are on the territory of the Republic of Moldova, may be extradited only on the basis of an international Convention to which the R.M. is a party of or on the basis of reciprocity.

The persons mentioned may be extradited to the foreign state, either for criminal purposes or for serving the sentence applied to them in the requesting state. According to the general rule, this action is carried out by the competent organs of the R.M. in accordance with the bilateral conventions of the R.M. on legal assistance, in which the issue of extradition is specifically regulated.

In such a case, the requested state on whose territory the offender is located shall, at the request of another (applicant) state, limit its jurisdiction over that person and transmit it to the requesting state. The request for extradition may be based on the fact that the offender is a citizen of the requesting state or has committed the offense within its territory, or even outside its territory but against its interests.

The first statement is often based on article 17 of the Constitution of the R.M. which mentions that the citizens of the Republic of Moldova cannot be extradited or expelled from the country.

According to the article 6 para. (2) of the European Convention on extradition (Paris 13.12.1957; additional Protocols (Strasbourg 15.10.1975, 17.03.1978)), if the requested party does not extradite its own national (citizens of the Republic of Moldova), it shall, at the demand of the requesting party, submit the case to the competent authorities so that judicial proceedings may be conducted if necessary. To this end, the files, information and objects concerning the offense shall be transmitted free of charge by the route stated in article 12 para. (1). The requesting party shall be informed of the results of its request [4, European Convention on extradition].

Paragraph (4) Article 546 CPC stipulates that if the Republic of Moldova refuses extradition, upon the request of the requesting state, the possibility shall be examined to take over the criminal investigation in regard of the person who is a citizen of the Republic of Moldova or a stateless person.

Finally, we will name some fundamental principles on extradition accepted by the international community:

1. consistent respect for human rights in the conventions and treaties on extradition, their conformity with the human rights conventions;
2. the incorporation into national law of basic human rights, as provided for in international conventions on extradition;
3. the cautious attitude toward extradition in cases of possible usage of capital punishment to the offender (in some countries' laws it is expressly indicated in the law that extradition will not be permitted if, after the offender's transmission, the death penalty will be applied to him).
4. Strict compliance in the conventions on extradition and in its application practice with the minimum rules of conduct with prisoners recommended by the UN
5. the extradition exclusion to countries where torture is applied on convicted or cruel treatment is admitted;
6. exclusion of extradition to countries where there is discrimination on grounds of race, religion, social and so on;
7. stimulate extradition to countries guided by the principle of humanism, including to persons who have committed crimes.

Extradition is a useful tool in the fight against crime.

Without it, the enforcement of criminal law under the principle of territoriality could not be carried out in cases where, after committing the crime, the perpetrator managed to leave the territory of the country.

It would also not be possible to enforce criminal law on the basis of the principle of personality of criminal liability. According to the provision of article 13 C.C. of the R.M. extradition is granted or may be requested by our state to another state either on the basis of an international convention to which the R.M. is a party of or on the basis of reciprocity. Regulating the plurality of legal sources, the provision in the article 13 C.C. establishes the order in which these sources must function, first, the conventions, then reciprocity. In Romania in their absence there is domestic law.

Criminal law does not therefore contain provisions relating to the conditions for extradition, giving priority to international conventions and practices in the field of extradition.

In the absence of a special convention and law, the conditions of extradition shall be those presented by international law on the basis of international law.

The terms of extradition shall be divided into basic and formal terms. The basic conditions of extradition involve: a criminal offense is committed; a person is identified, the accused is proved to be guilty of, or that he has been involved in the offense; it may be possible to impose a criminal penalty on this person or to have a criminal conviction of the person concerned.

The typical basic conditions of extradition may be supplemented, by supplementary provisions of the conventions or by law, by certain specifications or limitations which constitute the complimentary framework of the normal conditions.

Extradition, involving the consent of the states between which they intervene, is essentially an institution of international law and must therefore find its place in international conventions or in the practice of relations between states. When the regulation of extradition is ruled by the International Convention, that regulation shall enforce the rules of international law.

The procedure Code of the Republic of Moldova and its provisions confirm the above. Thus, according to article 531 CPC [5, art.531] the provisions of the international treaties to which the Republic of Moldova is a party of and other international obligations of the Republic of Moldova will have priority in relation to the provisions of this chapter.

If the Republic of Moldova is a party to several international acts on legal assistance also signed by the state from which the legal assistance is requested or by the state requesting it, and if there are discrepancies or incompatibilities between the norms of these acts, the provisions of the treaty ensuing the more beneficial protection of human rights and freedoms shall apply (Article 531 para. (2) CPC).

The Paris Convention on extradition (13.12.1957), which has been in force for the RM since 31.12.1997, provides for the order of preference in the granting of extradition. It may be interested in obtaining the extradition of an offender and thus be a requesting state:

– the state of which the offender is a national;
– the state in whose territory the crime was committed;
– the state against the interests of which the offense has been committed;

The requested state — is the state where the pursued offender is located. The order of preference shall be as follows:

– The offender is first transmitted to the state on whose territory the offense was committed;
– Secondly, preference shall be given to the state whose interests where harmed by the committed offense;
– The state of which the offender is a national.

The provisions presented are fully in conjunction with the provisions of article 9-11 of the Paris Convention:

➢ Article 9 *Non bis in idem*.

Extradition shall not be granted when the requested person has been definitively tried by the competent authorities of the requested Party, for the act or facts for which extradition is requested. Extradition may be refused if the competent authorities of the requested party have decided not to pursue or to terminate the prosecution they intended on the same or similar conduct.

➢ Article 10 *Prescription.*

Extradition shall not be granted if the prescription of the action or penalty is completed in accordance with the law of either the requesting Party or the requested Party.

➢ Article 11 *Capital punishment.*

If the offence on which extradition is requested is punishable by death according to the law of the requesting party and if, in such a case, that penalty is not found in the requested Party's law or is not normally enforced there, extradition may be granted only on the requesting party's assurances, considered as appropriate by the requested party, that the death penalty will not be enforced.

In turn, expulsion is the safety measure provided for by the criminal law, which consists of removal from the territory of R. Moldova.

The Article 105 CC of the RM stipulates that foreigners and stateless persons who have been convicted of crimes may be banned from staying in the territory of the country. As a security measure, expulsion aims at removing a danger and preventing the commission of crimes stipulated in the criminal law.

In case of expulsion, the situation of danger may have the source either in the nature or in the seriousness of the offense (espionage or other criminal offense against the state) or in the personality of the perpetrator, who is a foreign national or a stateless person. When applying expulsion measures, the judge must not simply find that the perpetrator is a foreign or stateless person, but must reach the conclusion that the state of danger emanating from this person can only be removed by forcing the foreigners or stateless person to leave the territory of the Republic of Moldova.

Sometimes there may be cases where the danger of further offenses appears from the foreign victim's quality rather than the offender's author, in the sense that not the fear that this alien may commit a new offense materializes the danger, but the fear that other people, outraged by the presence of the foreign offender in the country, after serving the sentence, could react violently against him, commit crimes and disturb public order.

The expulsion safeguard measure can only be applied in several conditions:

- the offender should be a foreign citizen or a stateless person (person without citizenship). This quality must exist at the time of the trial, because if

the foreign citizen or the stateless person at the time of the trial acquired citizenship of the Republic of Moldova, he can no longer be expelled because, on the basis of article 17 of the Constitution of the Republic of Moldova, "the citizens of the Republic of Moldova cannot be extradited or expelled from the country", a postulate, that has already become a principle of law.

- the foreign citizen or stateless person has been convicted of an offense. It does not matter whether the offense is committed within or outside the territory of the RM. The important thing is that our courts are competent to judge the case in accordance with the principles of the application of criminal law in space (territoriality, reality, universality).
- the presence of the foreign citizen or stateless person on the territory of the RM should be the source of a dangerous situation, the removal of which is possible only by expelling him from this territory.
- the person is not subjected to inhuman or degrading treatment or punishment in the state he is to be expelled. This condition, which has been the subject of multiple examinations by the European Court of Human Rights, and which also applies to extradition [See the case of Soering v. The United Kingdom, 5, pag. 31], requires the judge to be certain when deciding on expulsion that it will not infringe article 3 of the ECHR, that is, the person will not be exposed in the state where he or she is exposed to a real risk of inhumane treatment.

This condition is impossible to comply with in cases of expulsion in states where the person risks the death penalty. In this context, the Court of Strasbourg decided that the exposure of the person to the "death blind syndrome" [See the case of Cruz Varas and others v. Sweden, [5, pag.31-32]], constitutes a treatment or punishment incompatible with article 3 of the Convention.

The article 105 para. (2) CC of the RM stipulates rules on applying the "expulsion" measure imposed on a person sentenced to imprisonment: "In the event that expulsion accompanies a punishment of imprisonment, the expulsion shall be enforced only after the punishment is executed".

The article 105 para. (3) requires the judge a further condition for applying expulsion - when adopting such decision the person's right to privacy shall be considered. Thus, the respect for the right to privacy may invalidate the legality of the expulsion measure if the foreign citizen or the stateless person is married to a citizen of the RM, has children or has adopted children who are citizens of the RM and who are resident in the RM, and this measure trigs them from leading a normal family life. The action must also be considered and motivated in relation to the attempt to preserve other values – public order, safety or others, when it is

the case of a foreigner who has been on the territory of the RM for a long time, where his parents, other relatives, also reside, especially if he didn't leave contact with them. In such a situation, expulsion set them apart and, although he tries to remain in contact with them by correspondence, there is an infringement of the right to respect family life, guaranteed by paragraph (1) of the article 8 of the ECHR [See the Moustaquim v. Belgium case, [5, pag.333]].

4. Conclusion

In conclusion, the analyzed institutions have certain similarities but differences can also be identified, which distinguish them from each other.

First of all, both institutions have their origin in the Basic Law, in the sense that they are regulated by the Constitution of the Republic of Moldova, being taken over by the criminal legislation and defined in the Criminal Code of the Republic of Moldova.

As a consequence of their application, the person guilty of a criminal offense shall be expelled from the territory of the state he has domicile.

Secondly, expulsion and extradition are also ordered by a court ruling. Both institutions operate on a post-factum basis, i.e., after the person has committed an act prescribed by the criminal law. Both extradition and expulsion are nominal, that is to say, targeted at a specific person, identified by law enforcement bodies. Foreign nationals or stateless persons may be extradited or expelled; the law prohibits the extradition and expulsion of their own nationals or foreigners and stateless persons who have been granted political asylum in accordance with the legislation in force. They will be refused if the bodies of the recipient state have sufficient reason to believe that the person, in the state where he is extradited, will be subjected to torture, inhuman or degrading treatment or punishment.

At the same time, by its legal nature, extradition is a form of international legal assistance in criminal matters, expulsion is a security measure. For this reason, their aims differ: expulsion is intended to remove a danger and prevent the person from committing new offenses, extradition is intended to secure the act of bringing justice – either to hold the person to criminal liability and to impose a criminal penalty on him or to serve the sentence imposed, with the offender having a conviction in the requesting state.

Extradition demands a request from the requesting state, expulsion is the initiative of the state on whose territory the crime was committed and which considers that the person's remaining on its territory will result in danger that must be removed.

Expulsion is applied in relation to persons convicted of offenses, and In the event that expulsion accompanies a punishment of imprisonment, the expulsion shall be enforced only after the punishment is executed, but extradition is carried out in relation to the accused or convicted persons, whether they have been held criminally liable or have served their sentence in the requesting State.

In the event of expulsion, the person may, in some cases, choose the country of destination to which he is to be expelled, but in case of extradition, the offender will be transferred to the requesting country without alternatives.

When deciding on the expulsion of persons present in paragraph (1) of the article 105 CC of the RM their right to privacy shall be considered, the rule on extradition does not contain any express provision on this.

The request for extradition is made under the international treaty the Republic of Moldova and the requested state are party of, and vice versa, or under written obligations on a reciprocal basis; expulsion being ruled by national law.

Finally, the wider application of both extradition and expulsion will make a substantial contribution to the administration of justice, the enhancement of international relations and cooperation between states, the fighting against and preventing crime at national but also at international, cross-border and transnational levels.

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International and national legislation consulted:

- European Convention on extradition, Paris 13.12.1957, in force for the Republic of Moldova from 31.12.1997;
- Constitution of the Republic of Moldova no.1 from 29.07.1994, in force from 29.03.2016;
- Criminal Code of the Republic of Moldova no. 985 from 18.04.2002, in force from 2003;
- Criminal Procedure Code of the Republic of Moldova no.122 from 14.03.2003;

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