ISSN 1820-2969 (PRINT)
ISSN 2956-2198 (ONLINE)
UDK 343

JCCL

JOURNAL OF CRIMINOLOGY AND CRIMINAL LAW

REVIJA ZA KRIMINOLOGIJU I KRIVIČNO PRAVO

VOLUME 63/2025
NUMBER 3

SERBIAN ASSOCIATION FOR CRIMINAL LAW
THEORY AND PRACTICE

INSTITUTE OF CRIMINOLOGICAL
AND SOCIOLOGICAL RESEARCH

JOURNAL OF CRIMINOLOGY AND CRIMINAL LAW

Belgrade, 2025

ISSN 1820-2969 (Print)
ISSN 2956-2198 (Online)
UDK 343
DOI 10.47152/rkkp

Publishers
Serbian Association for Criminal Law Theory and Practice,
Kraljice Natalije 45, Beograd
E-mail: sukp@sezampro.rs, Phone number: +381 11 26 58 019

Institute of Criminological and Sociological Research in Belgrade, Gračanička 18
E-mail: krinstitut@gmail.com, Phone number: +381 11 2625-424

Frequency of publishing:
Three times a year.
All articles and papers should be sent via online platform at https://rkkp.org.rs/

Abstract and indexing:
ERIHPLUS
Dimensions
HeinOnline Law Journal Library
Crossref
DOAJ

Financial support
Supported by the Ministry of Science, Technological Development and Innovation of Republic of Serbia

Prelom teksta
Milka Raković

Print
Birograf Comp d.o.o. Beograd

Number of prints
200

JOURNAL OF CRIMINOLOGY AND CRIMINAL LAW

VOLUME 63 / NUMBER 3 / 2025

CONTENT

Journal of Criminology and Criminal Law, 63(3), 7-30
Original Scientific Article
https://doi.org/10.47152/rkkp.63.3.1
UDK: 004.6:343.13(4-6EU)

RECEIVED: 27 October 2025
ACCEPTED: 29 November 2025

EncroChat, Sky ECC and Regulation (EU) 2023/1543: towards a new standards of digital evidence (I)*

Veljko Turanjanin[a]

This paper examines the transformation of digital evidence in European criminal procedure through the lens of Regulation (EU) 2023/1543 on European Production and Preservation Orders. Building on the lessons of the EncroChat and Sky ECC investigations, it analyses how the Regulation redefines the principles of mutual recognition and judicial cooperation in criminal matters, replacing traditional mutual legal assistance with a direct framework linking judicial authorities and private service providers. The study highlights how the new regime introduces harmonised safeguards—necessity, proportionality, and judicial oversight—intended to reconcile investigatory efficiency with fundamental rights protection. Special attention is devoted to questions of transparency, defence rights, and the prospective admissibility of digital evidence under the Regulation's standards. The paper further explores the implications for EU candidate countries, particularly Serbia, emphasizing the need to align domestic procedural law with the Union's digital-evidence framework and to prevent the misuse of the concept of "mutual trust." It concludes that the e-evidence package marks a decisive step toward a coherent, rights-based European model of digital proof and offers a normative blueprint for countries aspiring to integrate into the European Area of Freedom, Security and Justice.

KEYWORDS: EncroChat, Sky ECC, Regulation (EU) 2023/1543, digital evidence.

* This paper was written as part of the EU Criminal Law project, number 101176650 – ECL, funded by the European Union under the Erasmus+ Jean Monnet programme.

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Introduction

The digital transformation of crime and policing has profoundly reshaped the landscape of criminal justice in the European Union. The widespread use of digital technologies and online platforms for criminal purposes—often extending beyond classic forms of cybercrime—has created a pressing need for the continuous modernisation and adaptation of tools available to law enforcement and judicial authorities at both national and transnational levels (Sachoulidou, 2024, p. 257). Access to digital evidence has become an indispensable element of timely crime prevention and effective prosecution (Warken, 2017, pp. 290-291).

The exponential growth of digital communication has profoundly reshaped the landscape of criminal investigation and evidence gathering. Online platforms are no longer merely the scene of so-called "cybercrimes," but have become a pervasive infrastructure facilitating a wide spectrum of traditional offences with transnational dimensions. This development has prompted a sustained call for the modernisation and technological adaptation of law enforcement and judicial tools at both the national and European levels (Sachoulidou, 2024, p. 257). Access to electronic data has thus emerged as a central precondition for the timely prevention and effective prosecution of modern criminal activity (Warken, 2017, pp. 290-291).

At the same time, digitalisation and automation have exponentially expanded the capacity of public authorities to collect, classify, and process personal data. What was once a targeted and reactive investigative task has evolved into an ecosystem of data-driven policing (Ferguson, 2017), in which large volumes of information—often collected for non-criminal purposes—are algorithmically cross-referenced to generate predictive insights. While this transformation promises greater investigative efficiency, it also raises pressing questions about purpose limitation, data reuse, and the permissible boundaries of surveillance. The capacity to extract new meaning from aggregated datasets inevitably tests the limits of the rights to privacy and data protection, even for individuals who are not criminal suspects (Molder *et al.*, 2023, p. 513).

Recent EU initiatives on cross-border access to electronic evidence—including the Regulation on European Production and Preservation Orders—have been designed to reconcile these competing imperatives. Their dual objective is to enhance the effectiveness of transnational criminal investigations and to reinforce the protection of fundamental rights within the digital sphere (Sachoulidou, 2024, p. 259). Yet this balance remains fragile. As scholars have observed, penal law is inherently characterised by a tension between efficiency and guarantees: between the public interest in discovering truth and the individual's right to a fair and lawful trial (Kiejnich-Kruk, 2024, p. 127; Turanjanin, 2021). The challenge is particularly acute in the European Union, whose evolving legislative framework must decide whether its primary trajectory is the acceleration of judicial cooperation or the consolidation of procedural safeguards.

Behind the legislative momentum lies a shared concern with the persistent inefficiency of existing mechanisms in addressing both cybercrime and traditional offences, as electronic evidence increasingly supplants material forms of proof (Kiejnich-Kruk, 2024, p. 128). Yet, the reliance on private service providers for evidence production introduces additional risks. Orders for data disclosure may exceed their intended scope, capture inadmissible evidence, or raise conflicts of jurisdiction when the data subject's residence or location is uncertain (Monroy, 2022). These challenges illustrate how the EU's pursuit of operational efficiency in criminal justice is inseparable from deeper questions of sovereignty, accountability, and the rule of law in the digital age.

The accelerated digitalisation of society and advances in information technology have significantly expanded the capacity of police and prosecutorial bodies to collect, store, categorise, and analyse data. While information gathering has long been central to criminal investigations, the rise of automated analytical systems has enabled the emergence of so-called *data-driven policing*, in which vast datasets are processed and cross-referenced through algorithmic tools to generate new investigative leads (Ferguson, 2017). This model, however, raises fundamental questions about the permissible reuse of personal data and the boundaries of algorithmic profiling. Defining those limits and ensuring adequate safeguards for all individuals—whether suspects or not—lies at the core of the rights to privacy and data protection (Molder *et al.*, 2023, p. 513).

Within this evolving environment, the EU's legislative response to cross-border access to digital evidence pursues a dual objective: first, to enhance the efficiency and reliability of criminal investigations and prosecutions—thereby reinforcing security and public trust in the digital single market—and second, to strengthen the protection of fundamental rights for individuals affected by cross-border data-gathering measures (Sachoulidou, 2024, p. 259). Data-driven policing itself is a broad and evolving concept that spans a wide spectrum of technologies and forms part of the wider "big data revolution" transforming multiple sectors, including criminal justice (Molder *et al.*, 2023, p. 514; Davis *et al.*, 2022, p. 186).

An inherent feature of criminal law is its tension between efficiency and procedural guarantees. The enduring dilemma—whether to prioritise effective truth-finding or the protection of individual rights—persists at both national and EU levels. In the European Union context, this tension is reflected in the relationship between the newly adopted Regulation on European Production and Preservation Orders and the fundamental rights of suspects and accused persons (Kiejnich-Kruk, 2024, p. 127). The growing centrality of digital evidence in prosecutions has fuelled frustration with the inefficiency of existing mechanisms for addressing both cyber-specific and traditional offences, where electronic traces increasingly replace material evidence (Kiejnich-Kruk, 2024, p. 128).

Yet significant risks remain that such cross-border orders may extend beyond their intended scope or result in the collection of data inadmissible under national law. Moreover, uncertainties often persist regarding the residence or legal position of the affected individual, which may give rise to conflicts of jurisdiction (Monroy, 2022). The rapid digitalisation of modern life has also created a fragile landscape in which cybersecurity has emerged as

a critical concern. The growing dependence on interconnected systems exposes societies to multifaceted risks—from data leaks to tangible harms (Moghior, 2025, p. 92). In light of these developments, the absence of a unified evidentiary standard across Member States underscores the need for coherent, fair, and efficient mechanisms for the cross-border collection of digital evidence. The European Investigation Order (EIO) was initially intended to fill this role, yet subsequent institutional developments—most notably the establishment of the European Public Prosecutor's Office (EPPO) and a series of digitalisation-driven legislative reforms—have prompted the EU to seek new solutions for accessing evidence located in other Member States (Salicius and Molienė, 2024, pp. 208-209).

These conceptual and procedural tensions have been vividly illustrated in practice through high-profile European operations targeting encrypted communication networks. This became particularly evident in two emblematic cases—EncroChat and Sky ECC—which fundamentally reshaped the European debate on lawful interception, privacy, and the admissibility of evidence in the digital age. In both operations, law enforcement authorities across several EU Member States managed to infiltrate encrypted communication networks used predominantly by organised crime groups (Capus and Gilbert, 2024). The EncroChat operation, initiated by French and Dutch authorities in 2020, involved the remote installation of malware on servers and encrypted devices, allowing investigators to access millions of messages exchanged among users who believed their communications to be secure. Similarly, in the Sky ECC case, Belgian, Dutch, and French authorities dismantled another encrypted network in 2021, retrieving vast quantities of data that were subsequently shared with multiple EU jurisdictions. Dutch case-law shows that Article 6 ECHR functioned as a transparency lever: defence challenges compelled courts to disclose key aspects of the collection and processing workflow, while still admitting EncroChat data where reliability was forensically substantiated" (Oerlemans and van Toor, 2022).

While these operations yielded substantial prosecutorial successes—resulting in thousands of arrests and convictions—they simultaneously raised profound normative and procedural concerns. First, the interception and decryption techniques were conducted largely outside any harmonised EU legal framework, relying instead on ad hoc cross-border cooperation and mutual trust between national authorities. Second, the mass nature of the data acquisition blurred the line between targeted surveillance and generalised interception, raising questions under Articles 7 and 8 of the EU Charter of Fundamental Rights and Article 8 of the European Convention on Human Rights concerning privacy and data protection. Third, the absence of transparent judicial oversight and uniform procedural safeguards across Member States created uncertainty about the admissibility and evidentiary reliability of the data collected, as courts across Europe adopted divergent positions on whether the evidence was lawfully obtained.

Ultimately, the EncroChat and Sky ECC investigations underscored the urgent need for a coherent European regulatory framework governing cross-border access to digital evidence. They exposed the fragmentation of procedural safeguards, the tension between investigative efficiency and fundamental rights, and the inadequacy of existing instruments such as the European Investigation Order. Against this background, the adoption of Reg-

ulation (EU) 2023/1543 on European Production and Preservation Orders represents not only a legislative innovation but also an institutional attempt to reconcile the competing imperatives of security, efficiency, and fundamental-rights protection in the age of digital surveillance—a balance that remains at the heart of the EU's evolving criminal-justice architecture.

EncroChat and Sky ECC in European Case-Law

Factual Background of Sky ECC

Sky ECC was a subscription-based encrypted-messaging ecosystem operated by the Canadian company Sky Global. It combined modified devices—typically BlackBerry or Nokia handsets with cameras, microphones, and GPS disabled—with an end-to-end encrypted platform featuring timed deletion and "panic" wipes. The system was marketed at premium prices through a multilayer reseller network (Škulić, 2024, pp. 5-7). By early 2021, *Sky ECC* had a large user base concentrated around major European logistics hubs such as Rotterdam and Antwerp and was widely adopted by organised-crime groups for drug trafficking, money laundering, and violent offences. In March 2021 the infrastructure was disrupted and the service shut down, yet law-enforcement authorities retained access to "hundreds of millions" of historical encrypted messages, which continue to inform investigations across the EU (Europol, *Operation Sky ECC*). The transnational response was coordinated through Europol's *Operational Task Force LIMIT*, with Belgium, France, and the Netherlands as core partners and support from Eurojust, Frontex, INTERPOL, OLAF, EUIPO, and WADA.

Open-source reconstructions based on French case materials illustrate how the *Sky ECC* "universe" functioned in practice, documenting reseller tiers, handset provisioning, and the evidentiary value of decrypted chat logs and audio notes across multiple jurisdictions, including the Balkans (OCCRP, 2024). Serbian media and academic commentary likewise report that domestic prosecutions obtained *Sky ECC* data via mutual legal assistance (MLA) from France, coordinated by Europol, while defence teams systematically challenge admissibility and reliability owing to the secrecy of decryption methods and restricted access to technical files (Insajder, 8 Nov 2022/19 Apr 2024; Škulić, 2024; Sagittae, 2023; Bajović and Ćorić, 2025; Bajović, 2022).

The question of whether and to what extent a national court should verify the lawfulness of evidence obtained abroad lies at the heart of cross-border cooperation in criminal matters. As Steinborn and Święczkowski (2023) note, the European Investigation Order (EIO) mechanism requires the issuing state to ensure that evidence gathered in another Member State meets minimum procedural guarantees before it can serve as a basis for judgment. This approach complements the principle of *mutual trust* but simultaneously highlights the need for verification safeguards when evidence—such as EncroChat or SKY ECC communications—is obtained through technologically complex or covert means.

Courts across Europe are now seized of cases in which *Sky ECC* communications constitute central inculpatory material. Recurrent defence arguments concern: (i) the lawfulness of initial access (infrastructure hacking vs. provider requests); (ii) chain of custody and forensic integrity; (iii) scope-creep and proportionality (mass acquisition → targeted use); (iv) fair-trial equality of arms given classification of technical methods; and (v) cross-border admissibility (MLA/EIO vs. direct cooperation), often linked to forum-shopping concerns.

Some jurisdictions—e.g. Italy's *Corte di Cassazione*—have required greater disclosure of collection methods, whereas others have admitted *Sky ECC* evidence when corroborated by independent proof (Insajder; Škulić, 2024; see futher Buric *et al.*, 2023). A central unresolved issue in both *EncroChat* and *Sky ECC* proceedings concerns the defence's right of access to potentially exculpatory communications and technical files. Dutch practice is often cited as emerging best practice: in *Sky ECC*-related trials, the defence was granted access through the same forensic platform used by police authorities, enhancing equality of arms and the right to a fair trial (Lasagni, Caianiello and Rezende, 2025, p. 445). Transparency in how communications were intercepted and decrypted is not only procedural hygiene but a substantive requirement for assessing legality, proportionality, and the lawful issuance of European Investigation Orders (EIOs) under Article 6 of Directive 2014/41/EU.

The judgment of the Belgrade Appellate Court (Kž1 Po1 38/24, 11 July 2025) represents the first clearly articulated position of Serbian judicial practice regarding the admissibility of evidence obtained through the SKY ECC platform. In this case, the court upheld the legality of using communication data transmitted by the French authorities in response to a mutual legal assistance (MLA) request submitted by the Serbian Office of the Prosecutor for Organised Crime. The court emphasised that MLA constitutes the only legitimate channel for the exchange of evidence between sovereign states and that a relationship of mutual trust exists between them. In doing so, the judgment implicitly aligned itself with the *mutual trust* principle in EU law, stressing that it is not necessary for evidence to be obtained in accordance with domestic procedural rules, but rather that it must comply with the law of the requested state and relevant international treaties—such as the 1959 European Convention on Mutual Assistance in Criminal Matters and the 2000 UN Convention against Transnational Organized Crime. Furthermore, the court found that the collection and use of Sky ECC data did not amount to a disproportionate interference with the right to privacy under Article 8 ECHR, given the limited, encrypted nature of the platform and the legitimate aim of combating organised crime. This reasoning effectively bridges Serbian judicial practice with emerging European standards on digital evidence and cross-border data admissibility.

The Supreme Court of Montenegro, in its decision of 10 July 2025, confirmed the finality of the appellate judgment, thereby indirectly affirming the admissibility of Sky ECC evidence used in proceedings for organised crime and drug trafficking. Although the ruling focused procedurally on the inadmissibility of a third-instance appeal, its effect was to uphold the lower courts' reasoning and evidentiary assessments, including

the reliance on Sky ECC communications transmitted via international judicial cooperation channels. Taken together with the jurisprudence of the Serbian courts, the Montenegrin case illustrates a converging regional trend: national judiciaries are increasingly recognising the evidentiary validity of encrypted communication data obtained abroad through mutual legal assistance mechanisms. This alignment mirrors the broader European movement toward harmonised standards for digital evidence collection and admissibility, as envisaged in Regulation (EU) 2023/1543.

AI-Assisted Investigations and Mutual Recognition

The fast-moving digitalisation of law-enforcement practice has transformed both the scale and nature of evidence gathering. As Sachoulidou (2024, p. 257) notes, the increasing reliance on electronic data has created a constant "modernisation imperative" for investigative authorities. Access to digital data is now integral to the timely prevention and prosecution of crime (Warken, 2017, pp. 290-291). Modern technology enables police to collect, store, and analyse massive datasets, fuelling what Ferguson (2017) termed *data-driven policing*. Yet such practices raise deep normative questions about secondary use and re-use of personal data (Molder *et al.*, 2023, p. 513). As Kiejnich-Kruk (2024, p. 127) observes, EU criminal procedure perpetually oscillates between efficiency and guarantees—a tension magnified by digital investigations.

Between April and June 2020, French authorities captured over 120 million messages from roughly 60,000 EncroChat devices within a JIT with the Netherlands and Europol, with the dataset subsequently feeding hundreds of prosecutions, including over 200 judgments in the Netherlands within two years (Oerlemans and van Toor, 2022). The EncroChat and Sky ECC operations epitomise this duality. In 2020, French and Dutch authorities—supported by Eurojust and Europol—dismantled the EncroChat encrypted network. Operating as a parallel Android system, EncroChat provided enhanced anonymity, with hardware modifications disabling cameras, microphones, and GPS, and a software "panic" function allowing remote data erasure. Its widespread adoption by organised-crime networks led to the creation of a Joint Investigation Team (JIT) between France and the Netherlands. Acting under judicial authorisation, investigators infiltrated the system, captured encrypted messages for months, and later distributed hundreds of thousands of decrypted messages via EIOs. When EncroChat collapsed, criminals migrated to Sky ECC. France, Belgium, and the Netherlands—again via a JIT—used targeted hacking, cryptanalytic tooling, and large-scale digital-forensic analysis to intercept more than one billion messages. The data were shared through EIOs, sparking extensive litigation. Defence challenges focused on the opacity of algorithmic tools and the limited disclosure of datasets. Typically, only filtered "tertiary" (derived) data reached the defence, while raw and intermediate datasets remained inaccessible. This asymmetry—especially for States receiving data via EIOs rather than as JIT members—raised equality-of-arms and algorithmic-accountability concerns (Lasagni and Contissa, 2025, pp. 19-22).

The structural flaw lies in the EIO Directive itself. Article 1(1) permits the use of EIOs for "evidence already in possession" of executing authorities—a clause designed for static documents, not for dynamic, algorithmically filtered bulk data. When evidentiary selection occurs abroad, defendants cannot influence the criteria guiding automated extraction. Consequently, the principle of mutual recognition risks replacing procedural participation with institutional trust, leaving unresolved whether such trust can substitute for effective defence rights.

As Galič, Stevens and Koops (2023) observe, the ongoing shift from targeted, *case-seeks-evidence* investigations toward data-driven, *evidence-seeks-case* policing exposes a normative gap between criminal procedure law and data-protection law. The resulting asymmetry—strong rules on data collection but weak regulation of subsequent data analysis—complicates judicial oversight of large-scale interception operations such as EncroChat and Sky ECC and underscores the need for integrated safeguards across the entire data-processing cycle.

The Grand Chamber's Judgment in M.N. (EncroChat) and ECtHR Jurisprudence

The CJEU's Grand Chamber judgment in *M.N. (EncroChat)* (C-670/22, 30 April 2024, EU:C:2024:372) delineates a crucial doctrinal boundary between collection and transmission of electronic evidence under Directive 2014/41/EU. Where an EIO seeks only the transfer of evidence already held by executing authorities, issuance may lie with a public prosecutor rather than a judge, provided domestic law would authorise the same in an analogous internal case (Arts 1(1), 2(c), 6(1)).

The proportionality test remains anchored in the issuing State's law; individualised suspicion for each affected user is not an EU-law requirement at the transmission stage. Lawfulness of collection in the executing State cannot be re-litigated—reflecting mutual trust—but the issuing authority must ensure domestic safeguards and fair-trial rights.

Two findings are pivotal. First, device infiltration used to obtain content, traffic, or location data qualifies as "interception of telecommunications" (Art. 31), triggering a duty to notify the Member State where the target is located, preserving both sovereignty and user protection. Second, under Art. 14(7), national courts must exclude evidence the accused cannot effectively contest if it may decisively influence findings—an equality-of-arms guarantee especially relevant when collection methods are classified.

This framework preserves the executing State's primacy over collection-lawfulness review while ensuring that transmission and trial use remain bound by issuing-State law and EU fair-trial guarantees. As Salicius and Moliene (2024, pp. 208-215) observe, the EIO embodies the principle *forum regit actum*, allowing evidence to be gathered under the procedural law of the requesting State, replacing the earlier *locum regit actum* model (Kusak, 2019, p. 391). Yet digitalisation challenges this balance: the "liquidity" of electronic evidence renders classical EIO procedures too slow, prompting new instruments—the European Production and Preservation Orders. Although transposition

of the EIO Directive proceeded smoothly, divergences in prosecutorial powers persist (Catanzariti, 2025, pp. 454, 473; Lasagni, Caianiello and Rezende, 2025, p. 439).

The ECtHR has simultaneously refined its approach to digital evidence implicating Articles 8 and 6 ECHR. *Big Brother Watch and Others v. United Kingdom* and *Centrum för Rättvisa v. Sweden* laid the foundations for surveillance oversight; later judgments tackled the downstream use of lawfully intercepted data. In *Akgün v. Turkey* (2021) the Court held that conviction based on ByLock-app data without independent verification violated fair-trial guarantees, underscoring transparency and defence access.

A more nuanced analysis appeared in *Ships Waste Oil Collector B.V. and Others v. the Netherlands* ([GC], nos. 2799/16 *et al.*, 1 Apr 2025). The Grand Chamber acknowledged that onward transmission of intercepted data from criminal to administrative proceedings constitutes a separate interference with Article 8 rights but found no violation, given sufficient domestic safeguards. The Court articulated four minimum standards: collection must be Convention-compliant; circumstances for transmission must be clearly set out in law; rules must govern examination, storage, use, onward transfer, and destruction; and independent judicial review must be ensured.

While prior judicial authorisation is not indispensable, robust ex post review is mandatory. The Court accepted secrecy during ongoing investigations and viewed effective competition-law enforcement as a legitimate aim under Art. 8(2). This jurisprudence shifts the focus toward the life-cycle of digital evidence—from collection through secondary use—and reaffirms that legality, proportionality, and oversight remain indispensable throughout.

In *Ships Waste Oil Collector B.V.*, the Grand Chamber explicitly referenced CJEU case-law, signalling a convergence between Strasbourg and Luxembourg. In *Lietuvos Respublikos generalinė prokuratūra* (C-162/22, 7 Sept 2023, EU:C:2023:631), the CJEU ruled that data retained for serious-crime investigations cannot be reused for lesser purposes such as disciplinary proceedings, because Article 15(1) of the ePrivacy Directive enumerates permissible aims exhaustively and hierarchically (paras. 34–44). Combined with *M.N. (EncroChat)*, this establishes the EU's purpose-limitation principle, ensuring data are not repurposed beyond their authorised scope. The ECtHR's proportionality analysis under Article 8 ECHR complements this standard, both courts insisting on independent judicial control at every stage.

Taken together—*Lietuvos Respublikos generalinė prokuratūra*, *M.N. (EncroChat)*, *Akgün v. Turkey*, and *Ships Waste Oil Collector B.V.*—a European evidentiary paradigm emerges: the CJEU emphasises competence, proportionality, and purpose limitation; the ECtHR guarantees fairness, transparency, and privacy; and their mutual reinforcement is producing a transnational evidentiary model that balances effective law enforcement with fundamental-rights protection. In this sense, *EncroChat* and *Sky ECC* transcend their operational origins—they have become catalysts for a pan-European judicial dialogue redefining the boundaries of mutual recognition, digital sovereignty, and algorithmic accountability in criminal justice.

Challenges of the Current Framework

The transfer and admissibility of evidence in criminal proceedings constitute one of the central issues of modern criminal procedure law. This is particularly evident in transnational cases, where evidence collection necessarily entails some restriction of the rights of the accused, raising the question of how to balance procedural efficiency with the protection of human rights. One of the most significant legal instruments in this field is the European Investigation Order (EIO), introduced by Directive 2014/41/EU of 3 April 2014, adopted on the basis of Article 82(1)(a) of the Treaty on the Functioning of the European Union (Ruggeri, 2014, p. 4; Vervaele, 2005; Vogler, 2014, p. 45; Allegrezza, 2014, p. 52; Dediu, 2018, p. 300). The initiative for the Directive originated in 2010 from eight Member States, aiming to replace the fragmented legal instruments previously governing the cross-border transfer of evidence within the EU—most notably, Framework Decision 2003/577/JHA and Framework Decision 2008/978/JHA. The Directive thus established a unified and coherent mechanism for evidence gathering—its first and most evident advantage.

The EIO is defined as a judicial decision issued or validated by a judicial authority of one Member State (the issuing State) with a view to carrying out one or more investigative measures in another Member State (the executing State) for the purpose of obtaining evidence. In addition to prospective investigative acts, the EIO may also be issued for the transfer of evidence already in possession of the executing authorities. Member States are obliged to recognise and execute an EIO on the basis of the principle of mutual recognition (Zimmerman, Glaser and Motz, 2011, p. 56; Heard and Mansell, 2011, p. 354; Belfiore, 2014, p. 93; Szilvia, 2011, p. 39; Ivanović and Ivanović, 2015, p. 210).

The concept of an issuing authority is defined broadly: it may include a court, a judge, an investigating judge, a public prosecutor, or any other competent authority acting as an investigative body in a given case. Before transmitting an order, the issuing authority—typically a judge or prosecutor—must verify its compliance with the conditions laid down in the Directive. The executing authority is responsible for recognising and enforcing the order, and in some national systems, judicial authorisation is additionally required. Although investigative measures are in practice often implemented by the police, the Directive expressly insists on the preservation of the judicial role in the chain of decision-making.

The EIO covers all investigative measures, except for the establishment of Joint Investigation Teams (JITs), which are governed by separate instruments. It may be issued in a variety of procedural contexts: in criminal proceedings conducted before judicial authorities; in administrative proceedings that may result in a judicial decision in criminal matters; and in proceedings concerning the liability of legal persons. The Directive also introduces a standardised form, containing information on the issuing and validating authorities, the person concerned, a description of the criminal offence and applicable legal provisions, as well as details regarding the requested measures and evidence.

The key conditions for issuing an EIO are set out in Article 6 of the Directive. The issuing authority may make an order only if two cumulative requirements are met: the measure is necessary and proportionate to the purpose of the proceedings, taking into account the rights of the suspect or accused; and the same measure could have been taken in a similar domestic case under national law. If the executing authority believes that these conditions are not satisfied, it may request clarification or even question the execution of the order. In such cases, the issuing authority may decide to withdraw the EIO. The EIO must be transmitted to the executing authority by any means capable of producing a written record and verifying its authenticity, including through the European Judicial Network's secure communication systems. If the authority receiving the order lacks competence, it must forward it to the competent authority and notify the issuing authority accordingly.

The EIO was thus designed to reduce the duration of cross-border investigations and increase their efficiency. Yet many scholars emphasise that procedural acceleration must not come at the expense of the rule of law and the protection of fundamental rights (Farries, 2010, p. 432; Mirisan, 2018, p. 225; Ruggeri, 2014, p. 225; Armada, 2015, pp. 8-9). Issues such as conflicts of jurisdiction, forum shopping, and the respect for defence rights remain central challenges in the practical application of the EIO.

The executing authority is obliged to recognise an EIO without further formalities and to execute it under the same conditions as if the investigative measure had been ordered by a domestic authority. Exceptions exist only where grounds for non-recognition, non-execution, or postponement explicitly provided in the Directive apply. During execution, the executing authority must respect the formalities and procedures indicated by the issuing authority, unless these would be contrary to the fundamental principles of the executing State's legal system. Finally, the issuing authority may request that its representatives be present in the executing State to assist in the execution of the order, provided this occurs in accordance with the domestic law of the executing State and without any powers of criminal prosecution. Such officials are subject to the laws of the host State for the duration of their presence.

The rapid digitalization of modern society has profoundly transformed the operational environment of criminal justice. As technological dependence deepens, cybersecurity vulnerabilities and data-driven criminality have become systemic risks, exposing gaps in traditional procedural frameworks (Moghior, 2025, p. 92). While the European Investigation Order (EIO) was conceived as a comprehensive response to such challenges, the accelerating pace of digitization continues to test its adaptability.

One of the principal obstacles lies in the absence of a unified evidentiary standard across Member States. National systems differ considerably in defining, gathering, and admitting evidence—disparities that become particularly visible in cross-border digital investigations. The EIO was intended to offer a single, harmonised mechanism for obtaining evidence across jurisdictions (Salicius and Moliene, 2024, pp. 208-210), yet the emergence of new institutions such as the European Public Prosecutor's Office (EPPO)

and the adoption of digital-evidence-specific legislation have progressively diversified the investigative landscape. These developments compel the EU legislator to explore alternative pathways for accessing evidence located in another Member State, thereby diluting the EIO's original unifying purpose (Salicius and Moliene, 2024, pp. 209-211).

A key procedural innovation of the EIO is its endorsement of the forum regit actum principle—meaning that the requested investigative measure should be executed in accordance with the formalities and procedures specified by the issuing State. This approach replaced the earlier locus regit actum principle under the pre-existing conventions, which tied evidentiary procedures to the State where the evidence was physically located (Salicius and Moliene, 2024, p. 211; Kusak, 2019, p. 391). The shift reflected a conceptual move toward recognising the functional sovereignty of the requesting authority and aimed to strengthen mutual trust as the cornerstone of EU judicial cooperation.

Nonetheless, digital evidence has revealed the practical limits of this model. The liquid and transient nature of electronic data—constantly shifting across servers and jurisdictions—renders the conventional EIO procedure often too slow for effective use (Salicius and Moliene, 2024, p. 215). For this reason, the recent "electronic evidence package," comprising the European Production and Preservation Orders, does not replace the EIO but rather supplements it with a faster, direct-access mechanism specifically tailored for the volatile context of digital data.

The distinctive evidentiary character of electronic content further complicates procedural harmonisation. Such data constitute a rich but unstable source of probative information whose collection raises acute questions about privacy, admissibility, and reliability. Member States apply divergent approaches to their acquisition and use, producing a fragmented regulatory environment that undermines mutual recognition (Kusak, 2024). To address these divergences, recent scholarship argues for the development of EU-level minimum standards governing electronic content data, coupled with a presumption of admissibility for evidence gathered in conformity with those standards. Instead of harmonising specific investigative techniques, this model would operate on the level of data categories, ensuring that any measure targeting electronic content meets uniform EU safeguards (Kusak, 2024).

From an institutional perspective, the field of judicial cooperation remains broad and multi-layered, encompassing both police and judicial actors and covering areas of increasingly overlapping competences (Catanzariti, 2025, p. 454). Against this backdrop, the EIO Directive represents a landmark codification—a single framework intended to simplify and accelerate cross-border investigations by replacing traditional mutual legal-assistance mechanisms (Catanzariti, 2025, p. 473).

Empirical assessments indicate that the transposition and implementation of Directive 2014/41/EU have, overall, been smooth. By 2018, all Member States had amended their domestic legislation to comply with the Directive's requirements, and major systemic difficulties have not been reported (Lasagni, Caianiello and Rezende, 2025, p. 439). Nonetheless, isolated critiques—such as those directed at Germany's transposition

for insufficient emphasis on mutual trust and judicial reciprocity—demonstrate that the practical success of the EIO depends less on formal compliance and more on the depth of normative alignment among national legal cultures.

While the Directive sets out a unified procedural framework, its practical effectiveness depends on the range and regulation of investigative measures available under domestic law. Although in practice it often happens that a specific investigative measure requested through an EIO does not exist in the domestic legislation of the executing State, the Directive nonetheless prescribes a minimum set of measures that the executing authority must be able to provide. These include: obtaining already existing information and evidence in the possession of public authorities; access to police and judicial databases; questioning of witnesses, victims, experts, or suspects; so-called *non-coercive measures*; and identification of users of a telephone number or IP address. An alternative measure may be applied if it achieves the same result with less intrusiveness, but only after informing the issuing authority. Where a requested measure does not exist under domestic law and no adequate alternative can be provided, the executing authority must notify the issuing authority that execution is not possible. In practice, such cases raise defence-right concerns, particularly regarding the examination of witnesses in light of the ECtHR's jurisprudence on fair-trial guarantees.

Articles 22–31 of Directive 2014/41/EU establish a special regime for certain investigative measures which, due to their nature and degree of interference with individual rights and freedoms, require more detailed regulation. These include measures involving the physical presence of persons (e.g. temporary transfer of detained individuals), the use of modern technological means (e.g. videoconferencing), access to sensitive financial information (e.g. bank account data), and those that most profoundly interfere with privacy (e.g. interception of communications). The detailed regulation of these measures aims to ensure both the efficiency of criminal proceedings and the proportionality and protection of fundamental rights of the individuals concerned. Among these, communication surveillance occupies a particularly sensitive position. This evidentiary measure directly engages the right to privacy under Article 8 of the European Convention on Human Rights (Turanjanin, 2021, pp. 34-60). It is also one of the most costly investigative measures, and during the drafting of the Directive, proposals were made to introduce a specific ground for refusal of an EIO based on the excessive costs of its execution (Arasi, 2014, p. 133).

An EIO may be issued for the interception of telecommunications in a Member State from which technical assistance is required. Where several Member States are able to provide full technical support for the same interception, the order shall be addressed to only one of them—preferably the State where the interception subject is located or will be located. The order must include information necessary to identify the subject of interception, the duration of the interception, and sufficient technical details for its implementation. The issuing authority must also justify why this measure is essential for the criminal proceedings. Execution may be refused not only on general grounds but also if the investigative measure would not be authorised in a comparable domestic case. The executing State may further condition its consent on the fulfilment of any domestic legal requirements.

The EIO for interception may be executed in two ways: through direct transmission of the intercepted communication to the issuing State, or by recording and subsequently transmitting the results to the issuing State. The issuing and executing authorities are expected to consult each other regarding the practical arrangements for carrying out the interception. Additionally, during issuance or execution, the issuing authority may—where justified—request a transcript, decoding, or decryption of the data, which remains subject to the executing authority's consent (Article 30, Directive 2014/41/EU).

When a competent authority of one Member State ("the intercepting State") authorises the interception of telecommunications, and the communication address of the interception subject is being used on the territory of another Member State ("the notified State") whose technical assistance is not required, the intercepting State must notify the competent authority of the notified State. Notification must occur: before interception, if the intercepting State knows at the time of issuing the order that the subject is or will be located in the notified State; or during or after interception, as soon as it becomes known that the subject is or was located in the territory of the notified State. A standardised form is prescribed for such notification. However, the notified State may, if the interception would not have been authorised in a comparable domestic case, inform the intercepting State within 96 hours of receiving the notification that the interception must not be carried out or must be discontinued. The notified State may also stipulate that any material intercepted while the subject was within its territory may not be used, or may only be used under specified conditions (Article 31, Directive 2014/41/EU).

In essence, the special investigative measures regulated by Directive 2014/41/EU illustrate the delicate balance between the efficiency of criminal prosecution and the protection of fundamental rights. Whether involving the temporary transfer of detained persons, technologically assisted hearings, access to financial data, or the interception of communications, all such measures raise questions of proportionality, procedural guarantees, and mutual trust among Member States. Their practical implementation largely depends on the judicial culture and institutional capacity of each State, often leading to uneven application in practice. Consequently, these measures represent the most sensitive dimension of the European Investigation Order—one that most clearly exposes both its efficiency advantages and its human-rights vulnerabilities.

Beyond traditional evidentiary tools, the rise of digital technologies has introduced a new category of cross-border evidence that tests the limits of the EIO's procedural design. The European Investigation Order (EIO) is one of the central instruments of judicial cooperation in criminal matters within the European Union. It was designed to facilitate rapid, efficient, and standardised gathering of evidence from other Member States without the delays associated with traditional mutual legal assistance procedures. The EIO is particularly significant in the context of digital evidence, as modern criminal investigations increasingly rely on electronic data such as emails, metadata, cloud-stored content, or app-based communications. However, despite its normative value, practice has revealed numerous challenges in its implementation.

First, although the EIO operates within the EU, digital evidence is frequently stored outside the Union's territory. Many major service providers (e.g. Google, Meta, Microsoft) host data on servers located in third countries, most commonly in the United States or Ireland. In such situations, investigative authorities must combine the EIO with mutual legal assistance (MLA) instruments, which significantly slows down the process. This difficulty becomes especially acute when dealing with real-time data or volatile content that can be quickly altered or deleted—contexts in which speed of execution is crucial. Second, divergences in national legislation among Member States add another layer of complexity. In some jurisdictions, public prosecutors are authorised to issue orders for the collection of electronic evidence, whereas in others, such powers are reserved exclusively for the judiciary. These differences create legal uncertainty and lead to practical delays, as executing States often require judicial confirmation even where, under the law of the issuing State, a prosecutor could have issued the order. Comparative analyses show that this "lowest common denominator" approach may in practice reduce the efficiency of the EIO mechanism.

Third, the collection of digital evidence inevitably entails restrictions on fundamental rights, particularly the right to privacy guaranteed by Article 8 of the European Convention on Human Rights (ECHR) and the rights to privacy and data protection under Articles 7 and 8 of the Charter of Fundamental Rights of the European Union. Consequently, every measure taken under an EIO must pass a strict necessity and proportionality test. The experience of Member States demonstrates that courts frequently have to balance investigative needs with the protection of individual rights, introducing further legal and ethical dilemmas into the process. Fourth, although Directive 2014/41/EU formally covers electronic data, its provisions have proven insufficient for the swift and effective acquisition of digital evidence in practice. This shortcoming prompted the adoption of Regulation (EU) 2023/1543 of the European Parliament and of the Council of 12 July 2023, establishing the European Production Order and the European Preservation Order. This Regulation aims to create a direct and uniform mechanism for obtaining digital data from service providers across the EU, thereby overcoming the limitations of the EIO in this domain. As a directly applicable legal instrument, it enhances legal certainty and harmonisation of practice, ensuring that uniform rules apply throughout all Member States without the need for national transposition.

Regulation (EU) 2023/1543 on E-Evidence

Digital Evidence in the European Criminal Justice Context

Beginning in 2013, EU agencies and other institutions started issuing a series of guidelines concerning the handling and use of electronic evidence (Buono, 2019). Despite this growing institutional attention, there is still no universally accepted definition of digital evidence, and various understandings of the concept can be found across the literature. Since there is no universally accepted definition of *digital evidence*, various understandings of this concept can be found throughout the literature. Primarily, *digital evidence* is a term often used synonymously with *electronic computer evidence*. It is generally consid-

ered a form of evidence that differs from other material evidence by the format in which information is embedded — the *digital form* — which involves some kind of electronic or magnetic device and manifests as a sequence of ones and zeros that can be translated into a human-readable form through an electronic device (Lukić, 2012, p. 182).

Alternatively, digital evidence may be defined as any *electronic data capable of establishing a significant link between the perpetrator of a criminal offence and the victim* (Pladna, 2025, p. 3), or as *information of evidential value that is stored, transmitted, or retrieved in binary form* (Leacock, 2008, p. 221). It may also be understood as *any data stored or transmitted by computer systems that support or contradict a theory of how an offence occurred, or that address critical elements of the crime such as intent or alibi* (Hamidović, 2011, p. 362). Another approach defines digital evidence as *any information, regardless of human intervention, that can be extracted from a computer and must be in a format readable or interpretable by experts* (Ghosh, 2004, p. 9). In a broader sense, the term can be understood as *any information of probative value stored or transmitted in digital form*, implying that digital evidence encompasses data stored on, processed through, or retrieved from computers or other electronic devices such as audio, video, communication, or photographic equipment (Chaikin, 2006, pp. 240-241). Ultimately, the concept of digital evidence may be used to denote *the establishment of proof of misuse within systems employing digital technology in the broadest sense of the term* — that is, *any information in digital form that has evidential value and is either stored or transmitted in that format*.

Internationally recognised standards play a particularly significant role in the handling of digital evidence, as they ensure its authenticity, integrity, and admissibility in criminal proceedings. ISO/IEC standards 27037, 27041, 27042, and 27043 provide comprehensive guidelines for the identification, collection, acquisition, preservation, analysis, and interpretation of digital evidence, as well as for the overall process of digital investigation. In addition, the International Organization on Computer Evidence (IOCE) has adopted fundamental principles of digital forensics, insisting on the preservation of original data, the documentation of all procedural steps, and the regular updating of procedures. The Scientific Working Group on Digital Evidence (SWGDE) develops practical guidelines for handling different types of digital evidence, such as mobile phones, cloud systems, and CCTV recordings. The implementation of these standards in practice not only guarantees the reliability of digital evidence but also safeguards the procedural rights of the parties, in accordance with Article 6 of the European Convention on Human Rights (Britz, 2004, p. 157).

On this basis, *digital evidence* may be defined as any information in electronic or digital form that possesses evidentiary value in criminal proceedings, which is stored, processed, or transmitted through a computer or other electronic device and may be used as proof in accordance with law and international standards. This category encompasses a wide range of content: emails and attachments, data from messaging applications (such as Viber, WhatsApp, Signal, and Telegram), cloud files, metadata accompanying communications (IP addresses, MAC addresses, logs), geolocation data, content and interactions from social media platforms (Facebook, Instagram, TikTok), as well as digital photographs and video recordings. In both theory and practice, a distinction is commonly drawn between

content data (e.g., the text of a message), *metadata* (e.g., time of sending, sender's IP address), and *transactional data* (e.g., information about cryptocurrency payments).

The importance of digital evidence in contemporary criminal proceedings continues to grow. In cases involving cross-border criminality—such as cybercrime, organised crime, and terrorism—digital evidence often constitutes the only material enabling the identification and prosecution of perpetrators. Its distinctive feature lies in the fact that it leaves traces invisible in the physical world, yet capable of reconstructing the entire sequence of criminal events. The concept of the *digital footprint* encapsulates the idea that nearly every human activity—from making a phone call to browsing the internet—leaves an electronic record that may hold evidential value. However, digital evidence also poses a number of challenges. First, its immaterial and easily alterable nature raises questions of authenticity and integrity. Forensic methods such as the calculation of hash values thus become crucial for demonstrating that data have not been tampered with. Second, digital evidence is frequently stored on servers located outside the territory of the state conducting the proceedings, creating complex issues of jurisdiction and the need for cross-border cooperation. Third, obtaining such data necessarily interferes with the right to privacy and data protection, as guaranteed by Article 8 of the European Convention on Human Rights and Articles 7 and 8 of the Charter of Fundamental Rights of the European Union. Therefore, the collection of digital evidence must always be subjected to a strict test of necessity and proportionality.

Scholars have long recognised that digital evidence has *"changed the paradigm"* of criminal proceedings. It not only expands the range of evidentiary means but also transforms the very concept of proof, as it often has the potential to reconstruct a criminal act objectively and conclusively. Yet, this potential can only be realised if procedural guarantees are respected—particularly the rights of the defence and the principle of equality of arms.

At the European level, the growing importance of digital evidence initially became apparent through the practices of national investigative authorities and within the implementation of the European Investigation Order (EIO). However, the increasing reliance of criminal investigations on data held by private service providers soon exposed the limitations of existing mutual legal assistance mechanisms. This development ultimately prompted the adoption of Regulation (EU) 2023/1543 on European Production and Preservation Orders for electronic evidence, intended to facilitate direct access to such data across borders while preserving essential procedural safeguards and fundamental rights (Signorato, 2023, p. 10). In contemporary criminal proceedings, digital—or electronic—evidence encompasses any probative information stored or transmitted in digital form. The omnipresence of information and communication technologies (ICT) means that cross-border collection of such data frequently arises during investigations. For instance, photographs, messages, or documents relevant to a case may be stored on servers or devices physically located abroad. According to the European Commission, digital evidence is required in approximately 85 per cent of criminal investigations, and nearly two-thirds of such data are held by service providers established outside the investigating Member State (European Commission, 2024).

Background and Rationale

As Juszczak and Sason (2023) explain, the adoption of the e-evidence package marks a pivotal stage in the development of the European Area of Freedom, Security and Justice. Embedded in the EU's broader security architecture, the initiative seeks to reconcile two imperatives: protecting individuals from the misuse of digital technologies and enabling judicial and law enforcement authorities to access electronic evidence across borders "in a swift and legally sound manner" (Juszczak and Sason, 2023, p. 182). The package—comprising Regulation (EU) 2023/1543 and Directive (EU) 2023/1544—modernises the investigative framework in response to lessons drawn from the 2016 terrorist attacks and subsequent Council conclusions on improving criminal justice in cyberspace. Prevention, detection, and enforcement were identified as interdependent pillars of EU internal security, with electronic evidence positioned at the core of this triad. As Forlani (2023) further observes, the e-evidence package was the outcome of a lengthy and politically delicate negotiation process that pushed the principles of mutual trust and mutual recognition to their limits. The negotiations, initiated with the Commission's 2018 proposals, centred on striking a balance between investigative efficiency and the protection of privacy and defence rights. The most contentious issue concerned the degree of involvement of judicial authorities in the Member State where a service provider is located in verifying and executing cross-border orders. This "e-evidence scenario," as Forlani terms it, departed from traditional models of judicial cooperation based on territoriality and letters rogatory, replacing them with a direct procedural link between investigating authorities and private service providers. The final compromise reached in 2023 thus embodies a cautious equilibrium—enhanced procedural efficiency combined with a strengthened framework of fundamental rights safeguards.

The beginning of the twenty-first century was marked by the intensive normative activity of the European Union in the field of criminal law, through the adoption of directives and framework decisions, complemented by the rapid development of the case law of the Court of Justice of the European Union (Mitsilegas, 2007). At the same time, the Western Balkan states, as candidates or potential candidates for EU membership, developed their own regimes of mutual legal assistance in criminal matters (Klip, 2016; Plešničar and Šugman Stubbs, 2009).

The traditional mechanism of mutual legal assistance proved to be slow and ineffective, thereby opening the way for a more radical concept in the EU—the mutual recognition of foreign judicial decisions. Since the early 2000s, this principle has become the "cornerstone" of judicial cooperation, with the European Arrest Warrant as its most prominent instrument (Christou, Kouzoupi and Xanthaki, 2009; Klimek, 2015, 2017). The principle of mutual recognition, developed as early as the Cassis de Dijon case (1979), served as the basis for overcoming the difficulties of harmonizing diverse national legislations (Diez, 2015). Its four key functions—legislative, interpretative, optimizing, and balancing—enabled it to become a flexible instrument of European legal integration (Suominen, 2014).

From this same logic emerged the further development of instruments in the field of digital evidence. If the European Arrest Warrant represented the paradigm of mutual recognition in the area of deprivation of liberty, the new Regulation (EU) 2023/1543 aspires to become its counterpart in the field of obtaining and preserving electronic evidence. Its essential role is to replace the traditional mechanisms of mutual legal assistance (marked by slowness, complexity, and the risk of forum shopping) with a more efficient regime that directly binds service providers and introduces explicit safeguards for the protection of fundamental rights.

A central part of the Regulation is found in recitals 10–20, which repeatedly stress the necessity of aligning investigatory efficiency with fundamental rights protection. These provisions underline that the collection of electronic evidence, due to its intrusive nature, must respect the guarantees of the Charter of Fundamental Rights of the European Union, particularly Articles 7 (respect for private and family life), 8 (protection of personal data), and 47 (right to an effective remedy and fair trial). The Regulation thus frames digital investigative powers not merely as technical tools but as measures conditioned by strict constitutional requirements. The recitals make clear that necessity and proportionality operate as guiding principles in assessing production or preservation orders. Investigative authorities must demonstrate that such measures are indispensable for the criminal proceedings at hand and that no less intrusive alternative is available. This proportionality test resonates with the case law of the Court of Justice of the EU in areas such as data retention (*Digital Rights Ireland*, C-293/12, and *Tele2 Sverige*, C-203/15), where broad and indiscriminate collection of data was held incompatible with fundamental rights. By embedding these references, the Regulation acknowledges the tension between expansive law enforcement needs and the individual's right to privacy.

Another key element highlighted in these recitals is the protection of privileged communications and sensitive professions. Orders should not undermine professional secrecy, such as lawyer–client communications, journalistic sources, or medical confidentiality. This safeguard reflects the Court's jurisprudence, as well as the European Court of Human Rights' repeated emphasis on the chilling effect of surveillance on freedom of expression and defense rights (see *Michaud v. France*, *Big Brother Watch v. UK*). Such provisions are particularly significant when evaluating operations like EncroChat and Sky ECC, where entire networks of communications were intercepted indiscriminately, raising questions about whether the rights of non-suspects, professionals, and third parties received adequate protection. Finally, recitals 10–20 address the principle of judicial oversight. The Regulation specifies that the most intrusive categories of data—such as content data—must be subject to prior authorization by a judicial authority. This procedural safeguard seeks to ensure impartial scrutiny before data is accessed or disclosed, thereby reinforcing the legitimacy of cross-border requests. At the same time, the recitals leave unresolved questions regarding bulk interception and "hacking measures": practices that were central to the EncroChat investigations, but which are not easily reconcilable with the Regulation's model of targeted, case-specific orders. The gap between

the Regulation's safeguards and the investigative reality of encrypted network infiltration highlights a potential challenge for its practical application in future high-profile cases.

Recitals 21–34 focus on the substantive scope of the Regulation by defining the categories of electronic data that can be subject to production or preservation orders. The Regulation distinguishes between four main categories: subscriber data, access data, transactional data, and content data. Each of these is associated with different thresholds of protection and procedural safeguards, reflecting the varying degree of interference with privacy and other fundamental rights. Subscriber and access data are presented as the least intrusive categories. They cover information identifying the user of a service (e.g., name, address, IP address) and data necessary for logging into a service. Recitals argue that because these data types typically do not reveal the substance of communications, they can be obtained under a less strict legal standard. Nevertheless, the aggregation of such data has been shown in practice to generate detailed user profiles, raising the question whether their classification as "low intrusive" remains adequate in light of technological realities (Koops and Leenes, 2014).

Transactional data—such as metadata indicating when, how, and between whom communications took place—are recognized as more sensitive. The Regulation explicitly notes that transactional data may allow the reconstruction of entire social networks and movement patterns. Therefore, production orders for such data must pass a higher threshold, requiring demonstration of necessity and proportionality and, in many cases, judicial authorization. The emphasis on metadata reflects lessons from the CJEU's jurisprudence (*Digital Rights Ireland*; *Tele2 Sverige*), where the Court found that metadata could be just as revealing as content.

The most sensitive category, content data, receives the highest level of protection. The recitals state that access to the substance of communications requires prior judicial approval, and such measures must be restricted to serious criminal offences. Since Regulation (EU) 2023/1543 has not yet entered into force, its safeguards could not have been applied to past investigations such as EncroChat and Sky ECC. Nevertheless, these operations provide a crucial stress test for the Regulation's future framework. The contrast between the Regulation's model of targeted, judicially authorised production orders and the reality of bulk interception techniques illustrates the potential limitations of the forthcoming regime. The central question is thus prospective: whether the Regulation will effectively regulate such investigative practices in the future, or whether they will continue to exist in a legal grey zone outside the scope of harmonised EU law.

Finally, the recitals stress the importance of legal certainty and harmonisation across Member States. By clarifying categories of data and corresponding safeguards, the Regulation seeks to prevent divergent national practices and "forum shopping" by investigators. However, critics note that the complexity of distinguishing between data types may create interpretative uncertainty, particularly in cases involving advanced encryption technologies or mixed data sets (Bignami, 2020). This interpretive ambiguity will likely become a contested issue in future judicial review before the CJEU and national courts.

References

Allegrezza, S. (2014) 'Collecting criminal evidence across the European Union: The European Investigation Order between flexibility and proportionality', in: Ruggeri, S. (ed.) *Transnational Evidence and Multicultural Inquiries in Europe*. Cham: Springer, 59-82.

Apelacioni sud u Beogradu (2025) *Presuda Kž1 Po1 38/24, 11 July*. Beograd: Posebno odeljenje za organizovani kriminal.

Armada, I. (2015) 'The European Investigation Order and the lack of European standards for gathering evidence', *New Journal of European Criminal Law*, *6*(1), 8-33.

Bajović, V. (2022). 'Evidence from encrochat and sky ecc encrypted phones', *CRIMEN: časopis za krivične nauke*, *13*(2), 154-179.

Bajović, V. and Ćorić, V. (2025) 'EncroChat and Sky ECC data as evidence in criminal proceedings in light of the CJEU decision', *European Journal of Crime*, *Criminal Law and Criminal Justice*, 33, 235-262.

Belfiore, R. (2014) 'Critical remarks on the proposal for a European Investigation Order and some considerations on the issue of mutual admissibility of evidence', in: Ruggeri, S. (ed.) *Transnational Evidence and Multicultural Inquiries in Europe*. Cham: Springer, 125-145.

Britz, M. (2004) *Computer Forensics and Cyber Crime: An Introduction*. New Jersey: Prentice Hall.

Buono, L. (2019) 'The Genesis of the European Union's New Proposed Legal Instrument(s) on e-Evidence', *ERA Forum*, *19*(3), 307-312. doi:10.1007/s12027-018-0525-4.

Buric, Z., Engelhart, M., Novokmet, A. and Roksandic, S. (2023) 'The admissibility of the results of mass surveillance of communication as evidence on Croatian criminal procedure: the Sky ECC case', *Croatian Annual of Criminal Sciences and Practice*, *30*(2), 243-274.

Capus, N. and Gilbert, D. (2024) 'Intercept evidence from foreign language communications: Reliability and minimum standards in the interests of justice', *The International Journal of Evidence & Proof*, *28*(4), 280-297. doi: 10.1177/13657127241283662.

Catanzariti, M. (2025) 'Piercing the Veil of Ignorance of Fundamental Rights Protection: What Is Transnational in EU Judicial Cooperation?', in: *Facilitating Judicial Cooperation in the EU*. Leiden: Brill, Nijhoff. doi:10.1163/9789004705791_016.

Chaikin, D. (2006) 'Network investigations of cyber attacks: The limits of digital evidence', *Crime, Law & Social Change*, *46*(2), 141-158.

Davis, J., Purves, D., Gilbert, J. and Sturm, S. (2022) 'Five ethical challenges facing data-driven policing', *AI and Ethics*, *2*(2), 185-193.

Dediu, D. (2018) 'Protection of fundamental rights in the light of the Directive regarding the European Investigation Order', *Conferința Internațională de Drept, Studii Europene și Relații Internaționale*, 2018, 1-10.

Farries, A. (2010) 'The European Investigation Order: Stepping forward with care', *New Journal of European Criminal Law*, *1*(4), 445-457.

Ferguson, A.G. (2017) *The Rise of Big Data Policing: Surveillance, Race, and the Future of Law Enforcement*. New York: New York University Press.

Forlani, G. (2023) 'The e-evidence package: The happy ending of a long negotiation saga', eucrim – The European Criminal Law Associations', *Forum*, *18*(2), 174-181. doi:10.30709/eucrim-2023-013.

Galič, M., Stevens, L. and Koops, B.-J. (2023) 'Editorial: A trialogue on regulating data-driven criminal procedure', *New Journal of European Criminal Law*, *14*(4), 423-433. doi:10.1177/20322844231213484.

Ghosh, A. (2004) 'Guidelines for the Management of IT Evidence', *APEC Telecommunications and Information Working Group*, 29th Meeting, Hong Kong.

Hamidović, H. (2011) 'Osnovne karakteristike digitalnih dokaza', *Kriminalističko-forenzička istraživanja*, *4*(1), 55-69.

Heard, C. and Mansell, D. (2011) 'The European Investigation Order: Changing the face of evidence-gathering in EU cross-border cases', *New Journal of European Criminal Law*, *2*(4), 351-370.

Ivanović, A. and Ivanović, A. (2015) 'Evropski dokazni nalog i Evropski nalog za istragu u krivičnim stvarima', *Pravne teme*, *3*(5), 112-130.

Juszczak, A. and Sason, E. (2023) 'The use of electronic evidence in the European Area of Freedom, Security and Justice: An introduction to the new EU package on e-evidence', eucrim – The European Criminal Law Associations', *Forum*, *18*(2), 182-200. doi:10.30709/eucrim-2023-014.

Kiejnich-Kruk, K. (2024) 'Quo vadis Europa—balancing between efficiency and guarantees in criminal proceedings using the example of EU production and preservation orders', *New Journal of European Criminal Law*, *15*(2), 126-145. doi:10.1177/20322844241247482.

Kusak, M. (2019) 'Mutual admissibility of evidence and the European investigation order: aspirations lost in reality', *ERA Forum*, *19*(1), 1-15.

Kusak, M. (2024) 'EU Cross-Border Gathering and Admissibility of Electronic Content Data', *European Journal of Crime, Criminal Law and Criminal Justice*, *32*(2), 126-155. doi:10.1163/15718174-bja10054.

Lasagni, G. and Contissa, G. (2025) 'Effective Rights and Remedies in the Computable Era: Facing Informative Asymmetry When AI Adds to Transnational Cooperation', in: *Facilitating Judicial Cooperation in the EU*. Leiden: Brill, Nijhoff. doi:10.1163/9789004705791_003.

Lasagni, G., Caianiello, M. and Rezende, I.N. (2025) 'Comparative Remarks on Mutual Recognition Instruments of Judicial Cooperation in Criminal Matters', in: *Facilitating Judicial Cooperation in the EU*. Leiden: Brill, Nijhoff. doi:10.1163/9789004705791_015.

Leacock, C. (2008) 'Search and seizure of digital evidence in criminal proceedings', *Digital Evidence and Electronic Signature Law Review*, 5, 83-92.

Lukić, T. (2012) 'Digitalni dokazi', *Zbornik radova Pravnog fakulteta u Novom Sadu*, 2, 105-120.

Mirisan, L. (2018) 'The European Investigation Order', *Annales Universitatis Apulensis Series Jurisprudentia*, 21, 89-103.

Moghior, C. (2025) 'Cyber-securitization in light of the Snowden revelations: effects on institutional reform in the US and EU', *Europolity: Continuity and Change in European Governance*, *19*(1), 91-120.

Molder, R., Fedorova, M., Dubelaar, M. and Lestrade, S. (2023) 'The principle of purpose limitation in data-driven policing: A guiding light or an empty shell?', *New Journal of European Criminal Law*, *14*(4), 512-533. doi:10.1177/20322844231212749.

Monroy, M. (2022) *What's the problem with the EU regulation on the release of electronic evidence*? Available at: https://digit.site36.net/2022/03/04/whats-the-problem-with-the-eu-regulation-on-the-release-of-electronic-evidence/ (Accessed: 15 August 2025).

Oerlemans, J.J. and van Toor, D.A.G. (2022) 'Legal aspects of the EncroChat operation: A human-rights perspective', *European Journal of Crime, Criminal Law and Criminal Justice*, 30, 309-328.

Sachoulidou, A. (2024) 'Cross-border access to electronic evidence in criminal matters: The new EU legislation and the consolidation of a paradigm shift in the area of "judicial" cooperation', *New Journal of European Criminal Law*, *15*(3), 256-274. doi:10.1177/20322844241258649.

Sagittae, G. (2023) 'On the lawfulness of the EncroChat and Sky ECC operations', *New Journal of European Criminal Law*, *14*(3), 273-293. doi:10.1177/20322844231159576.

Salicius, M. and Moliene, R. (2024) 'The problem of obtaining evidence from EU countries while achieving the "crime does not pay" goal', *Baltic Journal of Law and Politics*, *17*(2), 207-227.

Signorato, S. (2023) 'Cross-border gathering of e-evidence: different legal frameworks in European Union and Council of Europe', *Journal of Eastern-European Criminal Law*, *2023(*1), 9-18.

Turanjanin, V. (2021) 'The principle of immediacy versus the efficiency of criminal proceedings: Do changes in the composition of the trial panel violate the right to a fair trial?', *Nordic Journal of Human Rights*, *39*(1), 73-87. doi:10.1080/18918131.2021.1923242.

Vervaele, J. (2005) *European Evidence Warrant: Transnational Judicial Inquiries in the EU*. Antwerp: Intersentia.

Vogler, R. (2014) 'The European Investigation Order: Fundamental rights at risk?', in: Ruggeri, S. (ed.) *Transnational Evidence and Multicultural Inquiries in Europe*. Cham: Springer, 147-165.

Warken, C. (2017) 'Elektronische Beweismittel im Strafprozessrecht – eine Momentaufnahme über den deutschen Tellerrand hinaus, Teil 1. Beweissicherung im Zeitalter der digitalen Cloud', *Neue Zeitschrift für Wirtschafts-, Steuer- und Unternehmensstrafrecht* (NZWiSt), *2017*(5), 289-295.

Zimmerman, F., Glaser, S. and Motz, A. (2011) 'Mutual recognition and its implications for the gathering of evidence in criminal proceedings: A critical analysis of the initiative for a European Investigation Order', *European Criminal Law Review*, *1*(1), 55–84.

Journal of Criminology and Criminal Law, 63(3), 31-46
Review paper
https://doi.org/10.47152/rkkp.63.3.2
UDK: 343.143
341.231.14

RECEIVED: 28 October 2025
ACCEPTED: 17 November 2025

Anonymous witnesses in International Criminal Law*

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Witness anonymity as a protective measure leads to a conflict between two rights – the defendant's right to confront and cross-examine witnesses, on the one hand, and the witness's right to protection. How witnesses before international criminal courts faced threats and intimidation, and their role in international criminal trials is important and indispensable, the question arises as to whether they should be granted anonymity in certain cases and under certain conditions. So far, in the practice of international criminal courts, anonymity has been granted to witnesses only in the *Tadić case* before the ICTY. Although other chambers of the ICTY considered the application of this protective measure, and the chambers of the ICC as well, anonymity was not granted to any witness. The main reason is that it is considered that the application of this protective measure is not in accordance with the rights of the defendant. Today, when examples of the use of anonymous witnesses can be found in the practice of certain national courts, which has been confirmed in the practice of the European Court of Human Rights, their use in the practice of international criminal courts can be reconsidered. If the use of anonymous witnesses is allowed before international criminal courts, it must be a last resort and an exceptional measure. Strict conditions for its application must be met first of all, and a balance must be established with the rights of the accused, which are limited due to the use of anonymous witnesses. If the use of anonymous witnesses is not allowed, the consequence may be an acquittal due to lack of evidence, because witnesses refuse to testify out of fear, which has already happened in the practice of international criminal courts. The paper provides a brief historical overview of the use of anonymous witnesses, as well as a brief presentation of national solutions and decisions of national courts regarding their use. The protective measures provided by the acts of international criminal courts, which can serve as a basis for the use of anonymous witnesses, are analyzed. Various positions presented in the *Tadić case* before the ICTY when deciding on

* The paper is the result of the author's scientific research work within the Research Program of the Faculty of Law, University of Kragujevac for 2025, which is funded by the Ministry of Science, Technological Development and Innovation of the Republic of Serbia.

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the use of anonymous witnesses, as well as some positions presented before the ICC, are also analyzed. Finally, some guidelines are provided that may be useful for granting anonymity status if this protective measure is to be applied in international criminal justice.

KEYWORDS: victims, witnesses, protective measures, anonymous witnesses, right to confront, right to cross-examine witnesses, international criminal courts.

Introduction

Prosecution and punishment of perpetrators of international crimes is considered the basic task of international criminal courts, which, by doing their task, contribute to the achievement of the goals of international criminal justice, which are more broadly set and consist of „fighting impunity, administration of justice, strengthening the rule of law, endeavors to conflict ending and preventing its re-occurrence, establishing truth for reconciliation, providing victims with closure and compensation, as well as contributing to the restoration of international security and peacekeeping" (Ranđelović *et al*., 2023, p. 78). In order to realize the stated tasks and goals, international criminal justice relies on the testimonies of victims and witnesses of international crimes, whose importance is invaluable and their role is irreplaceable. International criminal justice faces numerous challenges in finding witnesses, contacting them, and getting them to agree to come before the international criminal court and testify. Since the international criminal courts are mostly dislocated from the country where the conflict took place and where the international crimes were committed, it is sometimes very difficult for the investigators to locate witnesses and get in touch with them. This is especially the case when an armed conflict is still ongoing in a country. For the witnesses themselves, testifying before international criminal courts can seem intimidating, primarily for two reasons. First, because they may be afraid of retaliation by the defendant or his associates, which is especially pronounced in the case when the armed conflict is still ongoing, and after testifying, the witnesses need to return to their country of residence where the situation is generally unsafe, and they fear for their lives and the lives of their families. Second, in addition to the fear of reprisals, the fact that they have to go to an unknown country, sometimes even in another continent, and testify before an international criminal court, where they do not know anyone, nor do they know what the procedure itself looks like, can be frightening for witnesses.

Aware of these dangers, the creators of the statutes of international criminal courts paid great attention to prescribing measures for the protection of witnesses and victims, with the establishment of special units for victims and witnesses that will provide them with assistance before, during and after the testimony. Measures to protect victims and witnesses, among other things, include concealing their identities from the public and trial in closed sessions. Their goal is threefold: to minimize the threat to their safety, to avoid an attack to their privacy and dignity, and to avoid or minimize the traumatic experience of testifying before an international criminal court (De Brouwer, 2015, p. 704). One of the protective measures that has emerged as particularly controversial in the practice of international

criminal courts, but also in theory, is the anonymity of witnesses. In the broadest sense, witness anonymity implies that „witnesses provide testimony in criminal proceedings without being seen, heard or identified by the accused (and his/her legal representative(s)) or anybody else in the public arena of the court room" (Le Roux-Kemp, 2010, p. 353).

The use of anonymous witnesses is always considered in conjunction with the defendant's right to confront and cross-examine witnesses, and throughout history there has been a constant debate about whether it is in conflict with this right of the defendant, whether anonymous witnesses should be allowed at all, and if so, under what conditions. The right of the defendant to cross-examine witnesses, or to have someone do so on his behalf, dates back to Roman criminal procedure during the Republic and early Empire, which was adversarial. The Roman governor of Judea, Festus, once said that „It is not the custom of the Romans to hand over any man to death before the accused has met his accusers face to face and before he has had an opportunity to defend himself against the charge" (Lusty, 2002, p. 363). The use of anonymous witnesse is related to generally "dark" historical periods, such as a new way of questioning witnesses by the judge himself and in secret, developed in secular and ecclesiastical courts throughout Europe in 12th century (Herrmann and Speer, 1999, pp. 515-516; Lusty, 2002, pp. 364-365), and so called "Inquisition" appeared in the 13th century, which meant that witnesses against the accused remained completely anonymous (Lusty, 2002, pp. 365-367). Today, the right of the accused to examine witnesses is established in all modern national legislation and in important international treaties, such as the International Covenant on Civil and Political Rights, the European Convention on Human Rights and the American Convention on Human Rights. This right of the accused is guaranteed in the statutes of international criminal courts, as well. However, in numerous cases, both in national and international trials, it has been considered whether the restriction of the right of the defense to cross-examine a witness, which inevitably occurs when granting the witness the status of anonymity, constitutes a violation of the right to a fair trial. Not only are the theoretical positions on this issue very different and contradictory, but also in the practice of different courts, decisions range from allowing to not allowing the anonymity of witnesses, and in the case of allowing – the conditions set and the legal argumentation differ.

The aim of the paper is to summarize some basic historical circumstances in which anonymous witnesses were used, as well as situations in which the practice of the courts of individual national states raised the question of granting witnesses the status of anonymity, which can be useful in order to create a complete picture when considering whether or not anonymous witnesses should be allowed in international criminal trials. The next goal of the work is the analysis of the provisions of the statutes of international criminal courts on the protection of witnesses and victims, which are the basis for granting the status of anonymity. The last goal of the work is the presentation and analysis of the judicial practice of international criminal courts on anonymous witnesses, in order to finally indicate the arguments for and against the use of anonymous witnesses in international criminal trials, the conditions under which it would possibly be justified, but also alternative ways of providing protection to witnesses of the commission of international crimes.

Witness protection in international criminal law

According to the conducted research, the disclosure of information about the identity of witnesses and victims before international criminal courts resulted in intimidation, death threats, attacks, murders, stigmatization and isolation by relatives, the community and others (especially in cases of sexual violence), economic and social hardship (such as job loss), offering bribes. Such consequences did not occur only in relation to the victims and witnesses, but also in relation to their relatives and other close persons (De Brouwer, 2015, pp. 709-710). Bearing this in mind, prescribing protective measures in the acts of international criminal courts is considered necessary, both for the purpose of guaranteeing the safety of victims and witnesses, and for the undisturbed conduct of proceedings before these courts.

The historical development of international criminal justice shows that at the beginning of this development, victims and witnesses of international crimes were completely marginalized and that little attention was paid to their position and role before international criminal courts. The Statute of the International Military Tribunal in Nuremberg does not mention victims of international crimes at all, and it is interesting that in the trials before this Tribunal, not a single victim was called to testify, because all the evidence was based on documentation from the Nazis themselves (Garkawe, 2003, pp. 346-347).

However, the situation is changing before the *ad hoc* tribunals, so their statutes and rules of procedure and evidence contain a number of provisions relating to the position of and assistance to victims and witnesses, which are essentially reflected in the establishment of victim and witness units authorized to propose protective measures and to provide victims and witnesses with expert advice and support, and in the definition of special procedural rules and measures for the protection of victims and witnesses (See more: Banović, 2009; Banović and Milekić, 2014). This is logical, since the trials before the two tribunals were largely based on the testimonies of victims and witnesses, while written documents were a secondary source of evidence. Therefore, the need for the protection of victims and witnesses was essential.

The statutes of these tribunals stipulate that the Court itself, in its rules of procedure and evidence, ensures the protection of victims and witnesses, and protective measures include, among other things, conducting proceedings in camera and protecting the identity of victims (art. 22 of the ICTY Statute and art. 21 of the ICTR Statute). The protection of victims and witnesses is further specified in the Rules of Procedure and Evidence, prescribing that in exceptional circumstances, any party to the proceedings may request a judge or a trial chamber to order that the identity of a victim or witness who may be in danger or at risk be withheld until such person has been placed under the protection of the International Tribunal. The identity of the victim or witness must be disclosed within a period specified by the trial chamber to allow sufficient time for the preparation of the Prosecution or the defence (Rule 69 of the ICTY and ICTR Rules of Procedure and Evidence). Under Rule 75, some of protective measures are: 1. measures to prevent the public or the media from revealing the identity or whereabouts of the

victim or witness or persons who are related to the victim or witness, in the following manner: a) by erasing from the public files of the International Court names and data that can be used to determine identity; b) by not disclosing to the public any document that indicates the identity of the victim or witness; c) using a device to alert the image or voice or internal television during testimony; and d) assigning a pseudonym; 2. holding closed sessions in accordance with rule 79; 3. appropriate measures enabling sensitive victims and witnesses to testify, such as one-way closed circuit television.

Such measures for the protection of victims and witnesses were, among other things, „imposed" by the factual situation that the Tribunal for the former Yugoslavia began its work while the armed conflict in the territory of the former Yugoslavia was still ongoing, so it was therefore necessary to ensure the protection of victims and witnesses who, after testifying, were supposed to return to their homes in the war-torn area. Logically, there was a fear that they might be in danger because of their testimony (Momeni, 1997, pp. 162-163). However, some believed that the protective measures conceived in this way could damage the reputation of the Court in two ways: first, because they could violate the defendant's right to confront and cross-examine the witness, and second, because they are not in accordance with the presumption of innocence (Falvey, 1995, p. 517).

In the context of the growing commitment to understanding and respecting the importance and significance of victims and witnesses in international human rights law and international humanitarian law, the Statute of the ICC has included numerous provisions regulating their position at various stages of the proceedings,[1] and imposing on the authorities of the proceedings an obligation to take care about their position (Schabas, 2001, pp. 146-147). Those who worked on the drafting of the ICC Statute and the Rules of Procedure and Evidence have highlighted the modest provision on victims and witnesses in the ICTY and ICTR statutes as a major shortcoming of these statutes (Jorda and De Hemptinne, 2002, p. 1399).

The protection of victims and witnesses before the ICC can be general and special protection. While general protection is enjoyed by all victims and witnesses, special protection can be granted only to certain categories of victims and witnesses.

The general protection of victims and witnesses is prescribed in the ICC Statute and according to it the Court shall take appropriate measures to protect the physical and psychological integrity, dignity and privacy of victims and witnesses. In taking these measures, the Court shall take into account all relevant circumstances of the case, including the age of the victims and witnesses, their sex, their state of health and the nature of the criminal offence committed, in particular, but not limited to, in cases where the acts committed involve sexual or gender-based violence or violence against children. The Prosecutor shall take these measures in particular at the stage of investigation and

[1] The provisions on the position of victims in proceedings before the ICC are largely taken from the UN Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power of 1985: UN General Assembly, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Resolution 40/34, UN Doc A/RES/40/34, 29 November 1985, cited in: Van den Wyngaert Hon, C., Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge, Case Western Reserve Journal of International Law, vol. 44, issue 1, 2011, p. 478.

prosecution of such criminal offences. The taking of these measures shall not prejudge the outcome of the proceedings, nor be contrary to the rights of the accused and to a fair and impartial trial (Art. 68 para. 1 of the Statute).

The following measures are available to the chamber: 1. that the names of these persons or any information that could lead to their identification be deleted from the public records of the Court; 2. that the Prosecutor, the defense or any other participant in the proceedings be prohibited from disclosing such information to a third party; 3. that the testimony be conducted by electronic or other special means, including the use of technical means that allow for the alteration of the image or voice, the use of audio-visual technology, in particular video conferencing and closed-circuit television, and the exclusive use of sound media; 4. that a pseudonym be used for victims, witnesses or other persons at risk due to the testimony of the witnesses; 5. that the Chamber conduct some phases of the proceedings in camera (Rule 87 par. 3 of the Rules of Procedure and Evidence) (See more on these protective measures: Gajić, 2010, pp. 94-175).

In addition to general protective measures, the possibility of applying special protective measures is also provided, in a way that as an exception to the principle of public proceedings, regulated by Article 67 of the Statute, the chambers of the Court may, in order to protect victims and witnesses or the accused, conduct any phase of the proceedings in camera or allow presentation of evidence by electronic or other special means. These measures shall be applied in particular in the case of victims of sexual violence or a child who is a victim or witness, unless otherwise ordered by the Court, taking into account all the circumstances, in particular the views of the victims and witnesses (Art. 68 para. 2 of the ICC Statute). Special measures include, in particular, measures aimed at facilitating the testimony of a traumatized victim or witness, such as a child, an elderly person or a victim of sexual violence (Rule 88 para. 1 of the Rules of Procedure and Evidence). In accordance with the provisions on special measures, all motions and requests, as well as responses to them, may be filed „under seal" and remain so until the chamber decides otherwise (Rule 88 paras. 3 and 4 of the Rules of Procedure and Evidence).

Within the framework of Art. 68 of the ICC Statute, one provision applies exclusively to witnesses before the ICC. According to that provision, in a case where the disclosure of evidence or information in accordance with the Statute could lead to a serious threat to the safety of the witness or his family, the Prosecutor may, for the purpose of any stage of the proceedings taking place before the commencement of the trial, withhold such evidence or information and file a motion in its place, and submit their summary. Such measures shall be applied in a manner that does not prejudge the outcome of the proceedings and is not inconsistent with the rights of the accused and a fair and impartial trial (Art. 68, par. 5 of the ICC Statute).

There are exceptions to the obligation of the Prosecutor, or the defense, to provide the opposing party with the names of witnesses they intend to call to testify, as well as copies of any statements previously made by those witnesses, which apply, inter alia, in accordance with the provisions of Art. 68 of the ICC Statute. Where, in order to protect the safety of a

witness and his family members, certain information is qualified as confidential, such information shall not be disclosed. This may include not disclosing the identity of the witness and his family members before the start of the trial (Rule 81, paras. 3 and 4 of the Rules of Procedure and Evidence).

Anonymity of victims and witnesses as a protective measure

The most controversial protective measure in both theory and practice is the measure aimed at completely concealing the identity of the victim or witness, the application of which was first questioned in the practice of the ICTY and resulted in different positions of judges, but also in a debate among theorists of international criminal law.

In the *Tadić case* before the ICTY, the Trial Chamber emphasized that the right of a witness to protection must be balanced with the right of the accused to a fair trial, that the Prosecutor must demonstrate the existence of five circumstances in order to reach a decision on the complete anonymity of a witness, in relation to the anonymity of the witness and in relation to the accused and his defense. The first circumstance is the existence of a genuine fear for the safety of the witness or his family. This circumstance must be assessed objectively, starting from the British case Regina v. Taylor, where the Court took the position that there must be a real reason for fear of consequences if the evidence is given and the identity of the witness is revealed (Momeni, 1997, p. 165). The second circumstance requires that the testimony of a particular witness must be important to the Prosecution's case. In this sense, the evidence must be such that it would be unfair to the Prosecution to proceed without it, where the Chamber specifically emphasized that the International Tribunal depends to a large extent on the testimony of eyewitnesses and their willingness to appear before the Court and give evidence (ICTY, Decision on the Prosecutor`s Motion Requesting Protective Measures for Victims and Witnesses, 1995, para. 63). The third circumstance implies that the Trial Chamber must be satisfied that there is no *prima facie* evidence that the witness is not trustworthy. Essentially, this protects the proceeding itself from witnesses who have a criminal record, or are biased or otherwise unreliable, and shifts the burden of checking the witness in this regard to the Prosecution. The Prosecution must submit a report on the reliability of the witness to both the Court and the defence (ICTY, Decision on the Prosecutor`s Motion Requesting Protective Measures for Victims and Witnesses, 1995, para. 64). The fourth circumstance that must be examined in order to reach a decision on the complete anonymity of the witness is the ineffectiveness or non-existence of effective witness protection programmes. In explaining this requirement, the Chamber explained that a number of witnesses live in the territory of the former Yugoslavia or have family members still living there and fear that they or their family members may be harmed, either because of retaliation for their testimony or to deter others. The Tribunal itself does not have a police force that can provide protection to these witnesses when they leave the Tribunal, nor does it have long-term witness protection programmes (ICTY, Decision on the Prosecutor`s Motion Requesting Protective Measures for Victims and Witnesses, 1995, para. 65). Finally, the fifth circumstance implies that any measure

adopted must be strictly necessary, and if less restrictive measures can provide the protection required, they will be applied (ICTY, Decision on the Prosecutor`s Motion Requesting Protective Measures for Victims and Witnesses, 1995, para. 66). Examples of less restrictive measures include allowing the defense attorney, but not the defendant, to see the witness for the purpose of cross-examination, or revealing the witness's identity only to the defense (Momeni, 1997, p. 175).

Even if all five conditions for granting anonymous status to a witness are met, the Chamber emphasized that restricting the defendant's right to examine, or to have others examine a witness testifying against him can only be permitted in exceptional circumstances. It is precisely the situation of armed conflict that existed and continues in the area where the alleged crimes were committed that is cited as the exceptional circumstance *par excellence*. The Chamber refers to most of the main international human rights instruments which allow for certain derogations from recognised procedural guarantees in these situations (Art. 15 of the European Convention on Human Rights, Art. 4 of the International Covenant on Civil and Political Rights and Art. 27 of the American Convention on Human Rights) (ICTY, Decision on the Prosecutor`s Motion Requesting Protective Measures for Victims and Witnesses, 1995, paras. 60-61).

In order to reach this decision and to base it on legal reasoning, the Chamber further investigated the laws of individual states and the case law of various national courts,2 as well as international treaties, and was aware of the controversial nature of its decision. However, the Chamber took the view that the right of the accused to examine a witness need not necessarily be violated if the witness is allowed to remain anonymous. The Chamber proposed four guidelines that should be followed in order to ensure the fairness of the trial in situations where anonymous witnesses are used. First, judges must be able to observe the demeanor of the witness in order to assess the reliability of the testimony. Second, judges must be aware of the identity of the witness in order to test the reliability of the witness. This raises the question of the extent to which judges in international courts are able to examine the reliability of the witness at all. Third, the defence

[2] Of particular relevance to the topic of this paper is how the South African judiciary has dealt with the issue of the use of anonymous witnesses after apartheid, which the country faced throughout the 20th century. It is believed that no other country in the world has faced witness intimidation on such a scale and with such a level of brutality as post-apartheid South Africa. When the apartheid trials began in the High Court in Johannesburg, the political party, the African People's Congress, publicly called for the killing of its former members who were now appearing as witnesses for the Prosecution, considering it „just revenge" (Melaku, 2018, p. 314). In one case, the court considered whether, in addition to denying the public access to the identity of a witness, not to disclose his identity to the defense as well, and took the view that such a measure would represent a departure from the principle of open justice. The court considered that the consequences of not revealing the identity of the witness to the defense are, among other things, that the defense cannot examine and get to know the background of the witness, which would make it difficult to determine whether the witness was really present in the situation he stated, and the witness himself may be „encouraged" to exaggerate or testify falsely. In a similar case before the same Court, a few months later, the Trial Chamber granted a witness complete anonymity (Lusty, 2002, p. 402).

must be given sufficient opportunity to question the witness on matters unrelated to his or her identity or current residence, such as how the witness could have obtained the incriminating information, but excluding information that would enable the witness's real name to be found. The Chamber clarified that the publication of nicknames used in the camps clearly falls into this latter category and the majority of the Trial Chamber will therefore not allow the publication of this information in relation to witnesses who have been granted anonymity without the express consent of those witnesses. *Fourth*, the identity of a witness must be published when there is no longer reason to fear for his or her safety (ICTY, Decision on the Prosecutor`s Motion Requesting Protective Measures for Victims and Witnesses, 1995, para. 71). Following these guidelines, the Chamber in the *Tadić case* granted complete anonymity to witnesses who were forced to participate in the sexual mutilation of other prisoners, to those who observed the beating of soldiers and the killing of people in their neighborhood, and who expressly stated that they would not testify without the granted anonymity (Momeni, 1997, pp. 167-168).

In the *Tadić case*, one judge dissented from the decision on anonymous witnesses, holding that the Statute and the Rules of Procedure and Evidence of the ICTY do not provide a basis for granting anonymity to witnesses to the detriment of the fairness of the proceedings and the rights of the accused, and holding that the use of anonymous witnesses in the present case was not in accordance with the principle of a fair trial (ICTY, Separate opinion of judge Stephen on the Prosecutor`s Motion requesting protective measures for victims and witnesses, 1995).

Although the decision to grant complete anonymity to witnesses in the *Tadić case* is cited as the first such decision made in international criminal justice, it cannot be said that it has become a precedent, because in other cases, trial chambers have not supported such a decision, considering that the anonymity of witnesses is not in accordance with the rights of the accused (Lusty, 2002, p. 419). Although measures related to concealing the identity of witnesses before the ICTY have been most commonly used in cases of sexual violence, there have been very opposing opinions among international criminal law theorists regarding this decision. On the one hand, some are of the opinion that concealing the identity of a victim or witness conflicts with many of the rights of the accused in the proceedings, primarily with their right to a fair trial, since the accused's ability to cross-examine is limited if he does not know the identity of the witness (See more: Leigh, 1996; Leigh, 1997), while, on the other hand, there are opinions that concealing the identity of victims and witnesses is inevitable before international criminal courts, given the nature and consequences of the international crimes committed and the fact that many victims and witnesses generally refuse to appear before the court unless they are provided with protection measures, or will appear before the court at great risk to themselves and/or their families (Chinkin, 1997, pp. 75-79). Trial chambers of international criminal tribunals are obliged to ensure the fairness of the proceedings on the one hand, and the protection of victims and witnesses on the other. With this in mind, the decision of the Trial Chamber in the *Tadić case* is justified by three facts. First, there was no witness protection program before the ICTY. Second, the situation in the former Yugoslavia, despite the presence of peacekeepers, was still unsafe at

the time of the ICTY proceedings. Third, the fact is that the Prosecutor's Office could not prosecute without the testimony of eyewitnesses, many of whom refused to testify without the protection provided by the Tribunal (Momeni, 1997, p. 170).

Contrary to the position of the Chamber in the *Tadić case* before the ICTY, the Rwanda Tribunal granted witnesses protection measures in the form of non-disclosure of their identities until they were brought under the protection of the Tribunal, but it also ordered the Prosecution to disclose to the defense the identities of protected witnesses and their unredacted statements within 30 days before trial in order to give the defense sufficient time to prepare (Amnesty International, 1999, p. 26).

The issue of the application of the protective measure of concealing identity was raised before the ICC already in the first case before the ICC, the *Lubanga case*, but in relation to minor victims who were allowed to participate in the proceedings (therefore exclusively as victims, not as witnesses). The legal representatives of the victims stated in their submission to the Court that in the majority of cases the victims are persons under the age of 18 and that they constitute a particularly vulnerable group; that until recently these victims were under the authority of the accused; that the families of the victims belong to the same community as the accused, in which he still has a certain influence, and therefore the participation of the victims in the proceedings puts them at risk; that a large number of victims are still in the Republic of Congo, where the situation is still insecure, and the possibilities of providing protection are limited. Therefore, the greatest concern of the victims is their protection and the protection of their families (ICC, Joint submissions of the Legal Representatives of Victims a/0001/06 to a/0003/06 and a/0105/06 on the modalities of victims` participation in the proceedings leading up to and during the trial, 2007, pp. 2-3). Protective measures had already been applied by the Pre-Trial Chamber and the Victims and Witnesses Unit, whereby the Pre-Trial Chamber allowed victims to participate in the proceedings anonymously, concealing their identities from the public and the defense. Victims' representatives requested that these measures remain in force during the proceedings before the Trial Chamber (ICC, Joint submissions of the Legal Representatives of Victims a/0001/06 to a/0003/06 and a/0105/06 on the modalities of victims` participation in the proceedings leading up to and during the trial, 2007, pp. 13-14). The Defense opposed maintaining the anonymity of victims during the trial phase because the defendant has the right to know the identity of all victims and those who have submitted a request to participate in the proceedings, and anonymity at the trial phase is not the only available protective measure, and therefore the disclosure of the victims' identities is a prerequisite for their participation in the proceedings (ICC, Decision on victims` participation, 2008, pp. 17-20). The Prosecutor's position was that the parties to the proceedings should be aware of the identity of victims participating in the trial and in the pre-trial stages of the proceedings, but acknowledged that it may be necessary for victims to remain anonymous to the public (ICC, Decision on victims` participation, 2008, pp. 20-23).

Having considered all the above submissions, the Lubanga Trial Chamber took the view that protective and special measures constitute a legal instrument through which the Court can ensure the participation of victims in the proceedings, as they constitute a necessary

step to protect their safety, psychological and physical well-being, dignity and private life. Furthermore, in the Chamber's view, protective measures constitute a right of victims under the provisions of the ICC Statute. While both the Prosecution and the Defence have objected to the anonymity of victims during the trial and in the pre-trial stages of the proceedings, the Chamber is aware, although it is preferable for the identity of victims to be known to the parties to the proceedings, of the particularly vulnerable position of many victims who continue to live in conflict zones where it is difficult to ensure their safety. However, special consideration must be given to the rights of the accused before allowing the participation of anonymous victims, because while the safety and security of victims is a central responsibility of the Court, their participation in the proceedings cannot be permitted to the extent that it undermines the fundamental guarantees of a fair trial. The greater the scale and importance of the participation of victims in the proceedings, the more likely it is that the Chamber will require their identification (ICC, Decision on victims` participation, 2008, pp. 43-44).

With regard to dual status, the Chamber considers that victims appearing before the ICC should not automatically be considered as witnesses, as whether victims appearing before the Court will also have witness status depends on whether they are called to testify during the proceedings. Victims of crimes are often able to provide direct evidence of the crimes allegedly committed, and a general prohibition on their participation in the proceedings as victims if they are called to testify would be contrary to Art. 68 para. 3 of the ICC Statute and the Chamber's obligation to establish the truth. However, in the case of a person with dual status, the Chamber will determine whether the participation of a victim who is also a witness in the proceedings may adversely affect the rights of the defence at a particular stage of the proceedings. In this regard, the Chamber will consider the manner in which the victim with dual status may participate, the need for her participation and the right of the accused to a fair and expeditious trial (ICC, Decision on victims` participation, 2008, p. 45).

In accordance with the position taken by the Chamber, most of the minor victims who participated in the proceedings remained anonymous in relation to the accused Lubanga, precisely for reasons of their safety, as they continued to live in the conflict zone. However, the Chamber emphasized that the more a victim participates in the proceedings, the more likely it is that the Chamber will decide to disclose his/her identity to the parties to the proceedings, which is in line with the principle of a fair trial. This practically means that when a victim who is allowed to participate in the proceedings also appears as a witness, the Chamber will reconsider the status of her anonymity.

Conclusion

Witness anonymity as a protective measure leads to a conflict between two rights – the defendant's right to confront and cross-examine witnesses, on the one hand, and the witness's right to protection. Today, when the role of witnesses in international criminal trials is important and indispensable, the question arises as to whether they should be granted anonymity in certain cases and under certain conditions.

Faced with the dilemma of whether or not to allow anonymous witnesses, some judges, even in cases of serious crime (organized crime, mafia and gang crimes, drug trafficking, etc.), have taken the position that anonymous witnesses should not be allowed, emphasizing that „the greater danger is if we go too far and accept a restriction of freedom that is foreign to our history and tradition. Because if we do that, we will harm ourselves more than any gang or group of gangs could ever do" (Lusty, 2002, pp. 383-384). Other judges emphasized that states have other ways of providing protection to witnesses, such as protective supervision and accommodation, relocation, issuing documents with a new identity, imposing strict criminal sanctions in the event of injury or intimidation of witnesses, etc (Lusty, 2002, p. 384). On the contrary, there are also views that the anonymity of witnesses is both a way to encourage witnesses to report crimes and testify, but also a way to ensure their complete safety in criminal proceedings (Le Roux-Kemp, 2010, p. 352).

In making a decision whether to allow the use of anonymous witnesses in international criminal trials or not, all of the above views should, first of all, be taken into account, because both the views for and against anonymous witnesses have their own reasons and arguments. The view that anonymous witnesses should not be allowed because it violates the right of the accused and the defense to cross-examine the witness is justified from the aspect of the accused's right to a fair trial. However, the right to a fair trial is not only the right of the accused, but also the right of the victims (who may appear as witnesses in the proceedings), so the question may be raised whether their right to a fair trial is violated if they are allowed to remain anonymous, when all the conditions for that are fulfilled. It seems that listing the arguments for and against anonymous witnesses, although useful, does not offer an answer to the question and a practical solution.

Therefore, we should start from the provision of Art. 64 para 2 of the ICC Statute, according to which the trial chamber is obliged to provide a fair and expeditious trial which is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses. This provision is interpreted as meaning that the chamber is obliged to apply a balancing test between the fair trial rights of the accused and the protection of witnesses (Kurth, 2009, p. 615), and it can serve as a basis for deciding on granting witnesses the status of anonymity.

What is very important to note is the fact that some national legislations allow the use of anonymous witnesses, which has been confirmed in the case law of the European Court of Human Rights. If we look at the crimes in which the issue of using anonymous witnesses has been considered, it can be concluded that these are serious forms of crime, such as organized crime (especially related to drug trafficking), crimes committed by the mafia and gangs, sexual crime, etc. If we start from the gravity of the crime as a kind of prerequisite for the use of anonymous witnesses, it can definitely be said that international crimes meet this prerequisite, because they are considered the most serious crimes and are recognized as such by the entire international community. However, another circumstance should be key here, and that is the real danger to the life of the witness and/or his family. This is especially true when an armed conflict in the witness's country of residence is still ongoing at the time of the proceedings before the international criminal court, when the situation

there is generally unsafe, and for the witness it may become even more unsafe if he or she testifies against the accused. Consequently, many witnesses may refuse to testify, thereby reducing the chances that the accused's guilt will be proven, he or she will be punished and the task of the international criminal court will be accomplished.

If a witness, despite the unsafe situation in the country of residence and the risk of reprisals, agrees to testify, the need for, and also the right to, protection must be taken into account. Before the international criminal court even considers the possibility of granting the witness complete anonymity, it is obliged to check whether his or her protection can be achieved by applying some other protective measure. In other words, anonymity should be a measure of last resort. In addition, anonymity should be an exceptional measure, to be applied if certain, strictly defined conditions are met. Anonymity of witnesses as a last resort and an exceptional measure is in line with the positions of the European Court of Human Rights, according to which the need for anonymity must be determined in relation to each specific witness, and anonymity must be a last resort - if protection can be provided by less restrictive measures, they must be applied (ECHR, Judgment in Case of Van Mechelen and Others v. The Netherlands, 1996, paras. 58-62).

In deciding whether or not to grant complete anonymity to a witness, the two-step test defined in the practice of the European Court of Human Rights can be useful. This test actually helps the court to decide whether or not to grant anonymity status to a witness, taking into account the balance with the fairness of the proceedings. In the first step, it should be examined whether the difficulties of the defense caused by the anonymity of the witnesses are balanced with some other actions of the court that would allow the defense to challenge the statements of anonymous witnesses and cast doubt on their reliability. The second step involves the court's assessment that the verdict is not based exclusively or to a decisive extent on the statements of anonymous witnesses (ECHR, Judgment in the Case of Doorson v. The Netherlands, 1996, paras. 75-76). The practice of the European Court of Human Rights is developing on the issue of anonymous witnesses, appreciating different circumstances from case to case - the level of fear of the witness, the absence other protection measures, the seriousness of the criminal offense being tried, the nature of the witness (whether he was an official or not), etc. (See more: Turanjanin, 2021), but the principle position is that anonymous witnesses should be allowed in certain cases and under certain conditions.

What should also be kept in mind is that international crimes are characterized by mass victimization, so a large number of victims and witnesses appear in trials before international criminal courts. Most of them do not need any protective measures, and among those who do, only a small percentage can insist on complete anonymity.[3] There-

[3] For example, according to official ICTY statistics, as of mid-2015, more than 4,650 witnesses have testified since the Tribunal's first trial in 1996. In the period from 1996-2013, 72.2% of witnesses testified without any protective measures. Over a quarter of the total number of witnesses testified with some type of protective measure. The majority of these witnesses had their testimony conducted in open court with certain steps introduced such as the name being withheld from the public or the audio and visual broadcast of proceedings being distorted to

fore, the use of anonymous witnesses would not be a rule, but an exception that would be allowed only under strict conditions.

Finally, the use of anonymous witnesses before international criminal courts should not be excluded *a priori* as a possibility, because in some situations, due to retaliation against witnesses whose identity is known, judges may be put in a situation where they have to acquit the accused due to lack of evidence. This was the case in the *Haradinaj et al.* and *Limaj et al.* cases before the ICTY, where witnesses refused to testify due to fear, so the Court issued acquittals due to lack of evidence (De Brouwer, 2015, p. 711). In the case of *Haradinaj et al.*, the Trial Chamber stated in its verdict that it faced great difficulties in obtaining evidence from a large number of witnesses, that many witnesses stated that they were afraid to appear and testify, so the Chamber got the impression that the trial took place in an unsafe atmosphere for the witnesses. This situation was influenced by numerous factors, such as the fact that the area where the witnesses come from - Kosovo, is a small area where family and social ties are strong, so it is difficult to guarantee anonymity, and the situation in Kosovo itself is generally insecure, and therefore unsafe for witnesses (ICTY, Judgement in the Case of Prosecutor v. Haradinaj et al., 2008, para. 6). This can be considered one of the cases where one should have considered granting the witnesses complete anonymity. Of course, the judgment cannot be based only on the testimony of anonymous witnesses, but together with other evidence, the testimony of these witnesses can influence the determination of the defendant's responsibility and the passing of a guilty verdict.

safeguard the identity of the witness. Some witnesses gave testimony in closed session, meaning that only the parties were able to view the proceedings. Less than a fraction of one percent of witnesses have been granted long-term protection such as relocation to third countries. ICTY, Witness statistics, available at:
https://www.icty.org/en/about/registry/witnesses/statistics, accessed: September 2025.

References

Amnesty International (1999) *The International Criminal Court: Ensuring an Effective Role for Victims*. Available at: https://www.amnesty.org/en/documents/ior40/006/1999/en/ (Accessed: 25 October 2025).

Banović, B. (2009) 'Zaštita žrtava i svedoka pred međunarodnim krivičnim sudovima', *Pravni život,* 13, 1085-1101.

Banović, B., Milekić, V. (2014) 'Postupak pred međunarodnim krivičnim sudom - korak napred u odnosu na praksu ad hoc tribunala' *Pravni život,* 9, 631-641.

Chinkin, C. (1997) 'Due Process and Witnesses Anonymity', *American Journal of International Law,* 1, 75-79. https://doi.org/10.2307/2954142

De Brouwer, A. M. (2015) 'The Problem of Witness Interference before International Criminal Tribunals', *International Criminal Law Review,* 15, 700-732. https://doi.org/10.1163/15718123-01504005

European Court of Human Rights (1996) *Judgment in Case of Van Mechelen and Others v. The Netherlands.*

European Court of Human Rights (1996) *Judgment in the Case of Doorson v. The Netherlands.*

Falvey, J. (1995) 'United Nations Justice or Military Justice: Which is the Oxymoron? Analysis of the Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia', *Fordham International Law Journal,* 19, 474-528.

Gajić, G. (2010) *Zaštita svjedoka pred međunarodnim krivičnim sudovima*. Banja Luka: Internacionalna asocijacija kriminalista.

Garkawe, S. (2003) 'Victims and the International Criminal Court: Three major issues', *International Criminal Law Review*, 3, 345-367. https://doi.org/10.1163/157181203322584350

Herrmann, F., Speer, B. (1999) 'Facing the Accuser: Ancient and Medievel Precursors of the Confrontation Clause', *Virginia Journal of International Law,* 34, 481-554.

International Criminal Tribunal for the former Yugoslavia (1995) *Decision on the Prosecutor`s Motion Requesting Protective Measures for Victims and Witness*, Prosecutor v. Duško Tadić, IT-94-1-T. https://doi.org/10.1017/s002078290003237x

International Criminal Tribunal for the former Yugoslavia (2008) *Judgement in the Case of Prosecutor v. Haradinaj et al.,* Prosecutor v. Hardinaj et al., Case no. IT-04-84-T.

International Criminal Tribunal for the former Yugoslavia (1995) *Separate opinion of judge Stephen on the Prosecutor`s Motion requesting protective measures for victims and witnesses*, Prosecutor v. Duško Tadić, Prosecutor v. Duško Tadić, IT-94-1-T.

International Criminal Court (2008) *Decision on victims` participation,* The Prosecutor v. Thomas Lubanga Dyilo, ICC-01/01-01/06-1119. https://doi.org/10.1017/s0020782900005702

International Criminal Court (2007) *Joint submissions of the Legal Representatives of Victims a/0001/06 to a/0003/06 and a/0105/06 on the modalities of victims` participation*

in the proceedings leading up to and during the trial, The Prosecutor v. Thomas Lubanga Dyilo, No. ICC-01/04-01/06-964-tENG. https://doi.org/10.1017/s000293000003774x

Jorda, C., De Hemptinne, J. (2002) 'The Status and Role of the Victim', in: Cassese, A., Gaeta, P., Jones, J. (eds.) *The Rome Statute of the International Criminal Court: A Commentary*. Oxford, New York: Oxford University Press, 1387-1419.

Kurth, M. (2009) 'Anonymous Witnesses Before the International Criminal Court: Due Process in Dire Straits', in: Stahn, C., Sluiter, G. (eds.) *The Emerging Practice of the International Criminal Court*. Leiden, Boston: Martinus Nijhoff Publishers, 615-634. https://doi.org/10.1163/ej.9789004166554.i-774.176

Le Roux-Kemp, A. (2010) 'Witness anonymity and the South African criminal justice system', *South African Journal of Criminal Justice,* 3, 351-370.

Leigh, M. (1996) 'The Yugoslav Tribunal: Use of Unnamed Against Accused', *American Journal of International Law,* 2, 235-238. https://doi.org/10.2307/2203685

Leigh, M. (1997) 'Witnesses Anonymity Is Inconsistent With Due Process', *American Journal of International Law,* 1, 80-83. https://doi.org/10.2307/2954143

Lusty, D. (2002) 'Anonymous Accusers: An Historical & Comparative Analysis of Secret Witnesses in Criminal Trials', *Sydney Law Review,* 24, 361-426.

Melaku, T. (2018) 'The Right to Cross-Examination and Witness Protection in Ethiopia: Comparative Overview', *Mizan Law Review, 12*(2), 303-324. https://doi.org/10.4314/mlr.v12i2.3

Momeni, M. (1997) 'Balancing the Procedural Rights of the Accused against a Mandate to Protect Victims and Witnesses: An Examination of the Anonymity Rules of the International Criminal Tribunal for the Former Yugoslavia', *Howard Law Journal,* 1, 155-180.

Ranđelović, V., Soković, S., Banović, B. (2023) 'International Criminal Law and International Criminal Justice Objectives and Purpose of Punishment in International Criminal Law Theory and Prastice', *Journal of Criminology and Criminal Law,* 1, 67-91. https://doi.org/10.47152/rkkp.61.1.4

Schabas, W. (2001) *An Introduciton to the International Criminal Court*. Cambridge: Cambridge University Press.

Turanjanin, V. (2021) 'Anonimni svedoci i zaštita ljudskih prava', *Usklađivanje pravnog sistema Srbije sa standardima EU*, 277-296. https://doi.org/10.46793/upssix.277t

Van den Wyngaert Hon, C. (2011) 'Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge', *Case Western Reserve Journal of International Law*, *44* (1), 475-496.

Journal of Criminology and Criminal Law, 63(3), 47-62
Review paper
https://doi.org/10.47152/rkkp.63.3.3
UDK: 343.81/.83:614.2(4-6EU)
341.231.14:343.261-052(4-6EU)

RECEIVED: 13 March 2025
ACCEPTED: 9 May 2025

Prisoners' right to healthcare and the practice of the European Court od Human Rights – What to expect?*

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Prisoners, as a marginalized and vulnerable group, must have access to healthcare. The protection of their mental and physical integrity and their human dignity depend directly on it. The right of prisoners to medical care entails numerous and complex obligations for the state. The aim of this paper is therefore to identify the main norms that bind European countries in the area of healthcare for prisoners. This study contains a systematic analysis of the relevant case law of the European Court of Human Rights. In order to ensure that prisoners' rights do not remain an abstract category, the European Court of Human Rights has specified both the nature and the scope of states' obligations in this area. The research findings show that setting binding standards in the area of healthcare is an extremely complex issue given the unequal resources and circumstances in different European countries. However, it is undisputed that the well-being of inmates must be taken into account, as well as the specific prison conditions, which have an additional negative impact on health. In particular, it should be borne in mind that prisoners should enjoy roughly the same level and quality of healthcare as any other citizen in the specific country. Authors conclude that states that do not fulfill their obligations to maintain and improve the health of prisoners violate their human rights.

KEYWORDS: prisoners, healthcare, human rights, European Court of Human Rights

* This article is the product of the project financed by the Ministry of Science, Technological Development and Innovation of the Republic of Serbia, contarct no. 451-03-137/2025-03/200096.

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Introduction

The prison population in Europe consists of about 1.5 million people (WHO, 2019). The average number of incarcerated people per 100.000 inhabitants in Europe is 107.3, ranging from 23 in San Marino to 246 in Georgia (WHO, 2023). Mental health problems, tuberculosis and other contagious diseases are much more prevalent among prisoners than in the rest of the population (Walter *et al.*, 2021; Bosworth *et al.*, 2022; Butler *et al.*, 2022). Studies show that the prevalence of HIV, hepatitis B and hepatitis C is three to ten times higher among prisoners than in the general population (Western, 2021; Nakitanda *et al.*, 2021). Prison conditions, such as extreme overcrowding, inadequate ventilation, malnutrition, and restricted access to medical care, increase the risk of numerous infectious diseases.

The prison population is seriously affected by drug problems, which is related to the fact that in 2016 one-sixth of prisoners in Europe were incarcerated for drug-related offenses (Stover *et al.*, 2021; Tomassini *et al.*, 2024; Lukić, 2024). High suicide rates in prisons and increased mortality rates from all causes have been documented in many countries (Fazel and Baillargeon, 2011, Zhong *et al.*, 2021; Lukić, 2024). According to the literature, suicide in prison is more common in the early stages of the sentence, it is frequently carried out while the prisoner is in some form of isolation, and is commonly committed by hanging. Younger inmates who have already shown signs of alcohol and drug abuse are also more prone to engage in such self-destructive behavior (Liebling, 2003, p. 22).

Furthermore, it is undeniable that prisoners tend to come from underprivileged social groups, so they often include people with low educational status, the homeless, the unemployed and those on benefits (Ginn, 2012; Western, 2021; Vandergrift and Christopher, 2021), which might have an impact on their health. Also, incarceration may worsen existing health problems. It is likely to assume that the multifaceted deprivation, such as social, psychological, and sensory, that characterizes prisons contributes to the escalation of preexisting mental health issues as well as the emergence of new ones (Pękala-Wojciechowska *et al.*, 2021; Tadić, 2024). Likewise, correctional personnel may interpret acts resulting from mental diseases as intentional infractions of prison rules, which could lead to punishment, since they are usually not trained to recognize the warning signs of mental health disorders (Cloud *et al.*, 2023).

The situation for incarcerated women might be extremely challenging. In particular women might become invisible and their unique health issues and requirements are overlooked because they typically comprise approximately 5% of the prison population in Europe (Augsburger *et al.*, 2022, Kovačević *et al.*, 2024).

It should also be borne in mind that the general public often believes that convicted persons are treated leniently and that they do not deserve to have their needs taken care of. There are stereotypes that inmates get to enjoy leisure, comfort and recreation (Wozniak, 2014, p. 317). Also, the doctrines of penal populism have the potential to strengthen these biases. Penal populism, which has gained popularity in recent decades, relies on the notion that to preserve law and order, as well as the safety of law-abiding citizens, offenders should be punished with harsher penalties (Bell, 2022; Kovačević and Atansov, 2024).

Given the aforementioned, the right to medical care for prisoners is an extremely important issue that is insufficiently discussed. The importance of the prisoner's haeathcare is also underlined by the fact that the process of societal reintegration of ex-offenders with impaired health is made even more difficult, which increases the risk of repeated violations of the law.

The United Nations Standard Minimum Rules for the Treatment of Prisoners- Mandela Rules

Although the paper's focus is on the protection of inmates' health in compliance with European standards, it is known that The Standard Minimum Rules of the United Nations for the treatment of prisoners are also implemented in Europe as the most significant international agreement pertaining to the status and human rights of inmates. These regulations are referred to as the Mandela Rules in honor of the former South African president, who spent a total of 27 years in prison as a political prisoner. Following the initial adoption on August 30, 1955, at the United Nations Conference on the Prevention of Crime and the Treatment of Offenders in Geneva, these regulations were updated by the UN General Assembly and revised by the United Nations General Assembly on 17 December 2015 after a five-year consultation process.

Rule number 24 implies that inmates have a right to free access to the required health services, that the state has to provide them with healthcare, and that convicts should receive the same quality of healthcare as the general population. The organization of prisoner healthcare should be closely linked to the overall healthcare system. Although national penitentiary healthcare systems vary in terms of whether the prison service and justice system or a state's general health administration is in charge of healthcare, prisons usually face organizational and resource limitations that impact both access to on-site care and use of outside healthcare facilities (Spycher *et al.*, 2021).

Mandela's Rule No. 25 states that providing medical treatment for inmates requires interdisciplinary teams with an adequate number of qualified staff members functioning independently and professionally. The institution must provide mental health treatment when needed, and dental care also. While Rule No. 28 addresses the need to provide special healthcare and services for women in prison during pregnancy, labor, and postpartum period. Rule No. 27 ensures the right to emergency medical care and help. According to Rule No. 30, inmates are entitled to a prompt medical assessment in the event of suspected abuse within the prison, risk of suicide attempt, or any other health issues associated with the prison environment.

The medical professional is required to notify the prison administration of any health issues that make it difficult or impossible for the inmate to complete the sentence, as well as any decline in health related to prison conditions. Inmates also have the right to a confidential consultation with a physician and to be provided with the complete information regarding their medical condition, diagnosis, and available treatments.

European regulations and the health of prisoners

The European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI.1950, abbreviated: ECHR) stipulates that everyone's right to life is protected by law (Art. 2). Furthermore, no one shall be subjected to torture or to inhuman or degrading treatment or punishment (Art. 3).

The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment provides for the establishment of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (also known as: CPT). The CPT examines the treatment of persons deprived of their liberty for the sake of strengthening the protection of these persons against torture and inhuman or degrading treatment or punishment. The basic standard that the CPT advocates is that prisoners are entitled to the same level of medical care as persons living in the community. The main issues addressed by the CPT during its periodic visits to European prisons are: access to a physician, equivalence of care, patient consent and confidentiality, preventive healthcare, professional independence and competence. When it comes to preventive healthcare, the CPT emphasizes that the role of prison medical services should not be limited to the treatment of sick patients, but that they should also be entrusted with the responsibility for social and preventive medicine.

Recommendation Rec (2006)2 of the Committee of Ministers to the Member States on the European Prison Rules (adopted by the Committee of Ministers on 11 January 2006 at the 952nd meeting of the Deputies of Ministers and revised and amended by the Committee of Ministers on 1 July 2020 at the 1380th meeting of the Deputies of Ministers) provides that prison authorities shall protect the health of all prisoners entrusted to their care and that medical care in prisons shall be organized in close liaison with the general healthcare administration of the community or nation. According to Rule No. 40, prison healthcare policy must be integrated into and compatible with national healthcare policy. In addition, the prison administration must ensure preventive measures so that prison medical services attempt to detect and treat physical or mental diseases or health problems from which prisoners may suffer. If medical care is not possible in a prison, prisoners who require specialist treatment are to be transferred to specialized facilities or civilian hospitals. Prisoners have the right to all necessary medical, surgical and psychiatric services, including those available in the community.

Case law of the European Court of Human Rights and the health of prisoners

When it comes to the healthcare for prisoners, the European Court of Human Rights (abbreviated: ECtHR) has dealt with violations of Article 3 of ECHR (prohibition of torture and inhuman and degrading treatment) and, to some extent, violations of Article 2 of ECHR, as the protection of the right to life may be directly conditioned by the prevention of ill-treatment or inappropriate treatment in the medical sector.

In relation to protecting the health and well-being of convicted persons, the ECtHR initially limited itself to serious violations of their rights and ill-treatment. Over time, the focus has shifted to the general living conditions of prisoners and the quality of healthcare, so the minimum threshold for the applicability of Art. 3 of ECHR has been gradually lowered, or, in other words, standards have been raised (Abbing, 2013).

Prisoners should enjoy the same protection as everyone, but this does not mean that they can expect the best possible healthcare in a particular state, as such protection is not provided for the general public either (Abbing, 2013). However, healthcare for prisoners should be at a level that truly enables the maintenance of their health, taking into account the special needs that life in an institution such as prison entails (Lines, 2006). States are obligated to ensure that the health and well-being of detainees are adequately protected, which implies a special responsibility for this matter, as the deprivation of liberty places prisoners in a dependent position, with limited options compared to the general public (Đukanović, 2024, p. 57). Prison is an atypical setting and the prison population is atypical of the general population, which means that it is not always appropriate or in the best interest of inmates to apply the standard of equality (Charles and Draper, 2012). For example, a prisoner on the waiting list for methadone is at greater risk than a non-prisoner of contracting blood-borne diseases while on the list. This risk is exacerbated by the high prevalence of needle sharing in prisons due to the lack of a needle exchange system (Charles and Draper, 2012).

Concerning the violation of the right to life, in the case of Mitić v. Serbia (App. no 31963/08, decision 22 January 2013, ECHR 2013-IV), the ECtHR found that the state is obliged not only not to take one's life, but also to take all measures to protect life, especially when it comes to vulnerable groups, such as prisoners. The government has special obligations in terms of preventing prisoner suicides, but the state cannot automatically be held responsible for a committed suicide unless the objective circumstances indicate that there was a relevant risk of self-harm (Mitić v. Serbia, § 49). The ECtHR concludes that for a positive obligation to arise regarding an inmate with suicidal tendencies, it must be established that the authorities knew, or ought to have known, of the existence of a real and immediate risk to the life of a specific person, and that they also failed to take measures within the scope of their powers (Mitić v. Serbia, § 46). Given that in Mitić v. Serbia the prisoner suffered from insomnia and mild anxiety, that he was regularly examined by a prison physician, that he had used the prescribed medicine, and that the circumstances did not indicate a significant risk of suicide, it cannot be considered that the suicide was conditioned by inadequate action of the authorities (Mitić v. Serbia). Also, when an incarcerated person suffers from psychological disorders and depression and when he has been provided with appropriate medical assistance, and despite it he has attempted suicide, it cannot be considered that inhumane treatment has occurred, nor that it was necessary to release the inmate (Kudla v. Poland, App. No. 30210/96, Decision 26 October 2000, §§ 94-99). Serving time in prison is inextricably linked to a certain level of discomfort, so the state is obliged to take measures to prevent increased suffering while taking into account the specific conditions and resources available in prison.

ECtHR states that authorities must ensure that a person is detained in conditions which are compatible with respect for his human dignity, and that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent to incarceration (Kudla v. Poland).

Over time, the ECtHR has changed its practice to the position that inhuman treatment does not only mean a gross violation of the prisoner's physical integrity, but that inhuman treatment can also occur when the government fails to provide the necessary treatment in a timely manner. In other words, inhumane treatment requires a minimum level of severity. Whether or not the minimum level of severity is met depends on the circumstances of the individual case, taking into account the duration of a particular treatment and the physical and mental effects, while in certain cases the prisoner's gender, age and general state of health are also taken into account (Hummatov v. Azerbaijan, App. no 9852/03 and 13413/04, Decision 29 November 2007. ECHR 2007-I. § 104, § 114). Also, the mere fact that the applicant was seen by a doctor and prescribed a certain form of treatment does not automatically lead to the conclusion that the medical assistance was adequate. Nevertheless, in addition to making sure the applicant was seen by a physician and that his complaints were taken seriously, the authorities also had to make sure that the conditions required for the prescribed therapy to be carried out had been established (Hummatov v. Azerbaijan, § 116). On the other hand, a prisoner cannot simply claim that he was not provided with adequate medical care, but must specify the exact health issue and the type of care that was lacking. Thus, in the Paladi v. Moldova case, it was established that Art. 3 of ECHR was violated, considering that during the applicant's stay in the institution, comprehensive treatment of type I diabetes (with mandatory use of insulin) and neurological disorders was not provided, although the applicant was provided with a certain form of medical care available in prison (Paladi v. Moldova. App. no 39806/06, Decision 10 March 2009, §§ 22-43, §§ 72-71).

Furthermore, it is indisputable that, in order to fully comply with the prohibition from Art. 3 of ECHR, the state is obliged to provide adequate and complete healthcare. Nevertheless, the practical definition of the term "adequate protection" is problematic. Thus, the state is required to apply due care, which does not mean that the prisoner's health must be improved or that the deterioration of health must be prevented. In the case of Goginashvili v. Georgia (App. no 47729/08, Decision 4 October 2011. ECHR 2011-III. §§ 76-78), the applicant pointed out that there came to an inhumane treatment due to the fact that, despite kidney disease and hepatitis, he was kept in prison, where a physician specialized in nephrology was not available. The ECtHR was of the opinion that in a situation where the prison administration has provided regular and periodic examinations by a nephrologist from an institution outside the prison, who did not conclude that the prisoner's health was deteriorating, there had been no violation of Art. 3 of ECHR (Goginashvili v. Georgia). Strictly speaking, even though the prisoner would benefit from constant supervision by a specialist, it is still necessary to take into account the conditions in the prison, as well as the efforts made by the prison administration to ensure that the inmate is adequately treated. Regarding the question of the applicant's conditional release on health grounds, the EC-

tHR reiterates that Art. 3 of ECHR cannot be construed as laying down a general obligation to release prisoners on health grounds. The decision to release a prisoner depends on the compatibility of a detainee's state of health with his or her continued detention, even if he is seriously ill, and the state's ability to provide appropriate medical treatment in prison (Goginashvili v. Georgia, § 79). The circumstances of the Goginashvili v. Georgia case, however, show that the prison authority has been able to cope with the applicant's serious renal disorders by having him treated in the prison hospital, thus rendering the question of his early release redundant.

On the other hand, the fact that the prisoner had been examined by a physician and that certain therapy had been applied does not automatically imply that the treatment was adequate. In other words, a timely and urgent diagnosis is necessary, as well as a comprehensive therapeutic strategy that will prevent further deterioration of health (Amirov v. Russia, App. no 51851/13, Decision 27 November 2014, ECHR 2014-I. § 84). If a prisoner was sporadically prescribed antibiotics in a state of acute tuberculosis, although there was no systematic monitoring of the general state of health, then this cannot be considered "adequate treatment". Also, adequate treatment may require periodic repetition of certain examinations and constant supervision over the treatment and the condition of the patient, so inadequate treatment exists in cases when treatment is mainly symptomatic (Hummatov v. Azerbaijan, § 109). Adequate treatment is missing when the prisoner was treated during his stay in prison, and even medically examined about 70 times, while his specific kidney problem was actually neglected over four years (Holomiov v. Moldova, App. No. 30649/05, Decision 7 November 2006, ECHR 2006-IV, §§ 117-122).

Inadequate treatment also exists when a prisoner with a disability has to rely on others to address his hygienic and other needs, given that no wheelchair is provided (Shirkhanyan v. Armenia, App. no 54547/16, Decision 22 February 2022, ECHR 2022-IV). In other words, if the state decides to imprison a person with a disability, then it must take certain measures to meet his specific needs. The ECtHR concludes that leaving a person with a serious physical disability to rely on his cellmates for assistance with using the toilet, bathing and getting dressed or undressed, contributed to the finding that the conditions of detention had amounted to degrading treatment (Shirkhanyan v. Armenia, § 152). However, when a prisoner who had no forearms was provided with mechanical prostheses, and afterward bionic ones, and when he was generally able to meet his basic needs independently, with certain help from other prisoners and employees, there was no inhumane treatment (Zarzycki v. Poland, App. no 15351/03, Decision 12 March 2013, ECHR 2013-IV). On the other hand, when a prisoner with limited mobility is transported with the help of police officers who are not adequately trained, this indicates degrading treatment (Hüseyin Yildirim v. Turkey, App. no. 2778/02, Decision 3 May 2007, ECHR 2007-IV).

Furthermore, adequate treatment implies that prisoners are provided with approximately the same level and quality of medical care as non-prisoners. However, this does not mean that prisoners can demand the best level of care and protection available in civilian clinics, given that one should take into account the limitations imposed by prison (Aleksanyan v. Russia, App. no. 46468/06, Decision 22 December 2008, ECHR

2008-I). Nevertheless, when a prisoner in an advanced stage of the disease is denied the transfer to a special AIDS clinic, even though the clinic is located not far from the penal institution, and when the treatment in the prison is insufficient, then one can speak of inhumane treatment (Aleksanyan v. Russia, §139). Also, when there was no timely application of Magnetic resonance imaging and when the prisoner did not receive systematic therapy to prevent the progression of multiple sclerosis, a violation of Art. 3 ECHR has occurred (Patrianin v. Russia, App. no. 12983/14, Decision 8 February 2014, ECHR 2014-I). On the other hand, if the state had tried to facilitate the performance of spinal surgery, but it did not happen for a long time, due to other health problems of the prisoner and delays to which the prisoner himself had contributed, there can be no question of inadequate treatment (Normantowicz v. Poland, App. no 65196/16, Decision 17 March 2022, ECHR 2022-I. §§ 89 -95).

Also, the very fact that the prisoner's health deteriorated, and even led to a fatal outcome, does not always imply a violation of human rights. Strictly speaking, the state's obligation to take care of an ill detainee is one of means, not of result. If the administration acted in a timely manner and applied all appropriate and available measures, while trying to provide adequate treatment, then the worsening of the prisoner's health does not constitute a violation of Art. 3 of ECHR.

As for respecting the views of medical experts outside the prison, the ECtHR considers that their opinion should be taken into account, especially if no expert within the institution deals with specific health issues. Thus, in the case of Wenner v. Germany (App. No 62303/13, Decision 1 September 2016, ECHR 2016-V. §§ 75-77) the ECtHR established that inhumane treatment occurred in the case when a prisoner, otherwise a long-term heroin addict, was not provided with substitution therapy, even though doctors outside the prison were of the opinion that, considering the effects of substitution and individual characteristics of the prisoner, such therapy is appropriate. Also, when it comes to prisoners suffering from drug addiction, special attention must be paid in prison to problems related to withdrawal syndrome and symptoms such as vomiting and dehydration (McGlinchey and others v. The United Kingdom, App. no 50390/99, Decision 29 April 2003, ECHR 2008-II). If there are disagreements regarding the form and type of treatment that is appropriate to apply, a violation of Art. 3 of ECHR may be implied by the denial of an additional expert examination requested by the prisoner. Generally speaking, a prisoner should be examined by an expert outside the institution, that is, an expert hired by the convict himself or his family, if there is a possibility to enable better and more appropriate treatment by doing so (Wenner v. Germany).

Complicated health problems, disability, and old age do not oblige the state to release a prisoner from serving his sentence, nor to transfer him to a civilian hospital. There are three particular elements to be considered in relation to the compatibility of prisoners's health with staying in detention: the medical condition of the prisoner, the adequacy of the medical care provided in detention, and the advisability of maintaining the detention in view of the state of health (Mouisel v. France, App. no 67263/01, Decision 14 November 2001. ECHR 2001-I. § 40). Article 3 of ECHR cannot be construed as laying down a general obligation to release detainees on health grounds. It rather imposes an obligation on the state to protect

the physical well-being of persons deprived of their liberty. However, in the circumstances when the prisoner suffers from progressive leukemia, which cannot be treated in prison, and when he periodically goes to a civilian hospital to receive chemotherapy, where he is handcuffed, there has been a violation of Art. 3 of ECHR. In this way, the dignity of the prisoner was denied and excessive suffering was inflicted on him, which is not inextricably linked to a prison sentence (Mouisel v. France). Thus, sick or elderly prisoners do not have to be released from serving their sentence due to their condition, but the prison administration must provide conditions in which their impaired health will not be further aggravated (Enea v. Italy, App. no 74912/01, Decision 17 September 2009. §§ 58-59). If the overall state of health of the prisoner and the quality of care that can be provided to him in prison require it, the release of the prisoner may be the only appropriate solution (Enea v. Italy).

When it comes to infectious diseases, prisoners have the same rights as those suffering from all other diseases. Nevertheless, prisoners should be especially protected from disease transmission. In the case of a previously existing or newly established infectious disease, appropriate tests and all necessary examinations should be provided, based on which it will be determined what the current state of health of the convict is and what kind of therapy should be applied in the future. Thus, if the prisoner is indisputably suffering from hepatitis C, which was also established by the test conducted in the prison, it cannot be considered that she was provided with adequate care simply because she was allowed to be regularly examined by a physician in prison (Testa v. Croatia. App. no 20877/04, Decision 12 July 2007, ECHR 2007-I. § 52). In other words, when a hepatologist was not available in the prison, nor the liver biopsy had been performed, such treatment was not in accordance with modern standards related to the treatment of hepatitis C, and therefore such treatment was inhumane (Testa v. Croatia). Also, the ECtHR states that in the case of Testa v. Croatia there was a violation of Article 3 of ECHR because the prisoner went to the prison medical staff more than 50 times in order to ask to be excused from daily activities, although it is generally known that one of the symptoms hepatitis C causes is exhaustion, so the prisoner should have been allowed to rest whenever her condition required it and without insisting on a medical justification. In this case, the applicant also stated that inmates were made to work for fifteen hours per day and that before every meal they were lined up in the courtyard where, regardless of the weather conditions and often for a prolonged period of time, they waited to be allowed access to the canteen, although the applicant found it increasingly difficult to bear such line-ups on account of her illness (Testa v Croatia).

On the other hand, in the case of a prisoner suffering from HIV and hepatitis C, there was no inhumane treatment, when the necessary analyses and therapy were prescribed in a timely manner in the prison, and in accordance with the standards of medical science and profession, regardless of the fact that the prisoner was not satisfied with the implemented treatment (Fedosejevs v. Latvia. No 37546/06, Decision 19 November 2013, ECHR 2013-IV, § 50). The ECtHR states that it is not its task to rule on matters lying exclusively within the field of expertise of medical specialists, but instead, in order to determine whether Article 3 has been complied with, the court focuses on determining whether the domestic authorities

provided the applicant with medical supervision capable of effectively assessing his condition and setting up an adequate course of treatment for his diseases (Fedosejevs v. Latvia, § 49). In Fedosejevs v. Latvia ECtHR considers that, given the nature and seriousness of the applicant's ailments, his condition required regular and specialized medical supervision for the monitoring of the progression rate of his diseases, timely prescription of the therapies, and timely diagnosis and treatment of possible opportunistic infections, and It can be seen from the case-file that the tests were carried out every two to six months by doctors at a specialized center for infectious diseases, so that the ECtHR cannot conclude that the national authorities did not ensure proper medical supervision of the applicant's HIV infection (§ 50).

Also, authorities are obliged to carry out testing of convicted persons for preventive reasons, in order to adequately prevent the transmission of the disease through the prison population. In the case where a convicted person was diagnosed with hepatitis C infection only after the expiration of the three-year period after the symptoms had manifested, there was a violation of Art. 3 of ECHR (Jeladze v. Georgia, App. no 1871/08, Decision 18 December 2012, ECHR 2012-III. § 44).

Those suffering from mental illnesses also enjoy the right to adequate treatment, regardless of the fact that they are in prison or a prison hospital. Thus, the ECtHR determined that it is inhumane treatment when no pre-planned and comprehensive therapy was applied to a patient with paranoid schizophrenia (Strazimiri v. Albania, App. no. 34602/16, Decision 21 January 2020, ECHR 2020-II. § 109). Although the ECtHR does not get involved in evaluating the treatment protocols that are applied in the specific country, it is evident that "therapeutic abandonment" represents a violation of Art. 3 of ECHR.

Conclusion

In modern times, it cannot be disputed that prisoners enjoy the right to humane treatment and respect for their personal dignity. The treatment that contradicts this standard is unacceptable and opposed to modern civilizational progress. As time passes and as opportunities and resources for medical assistance and improvement of health increase, the prison population must also enjoy these benefits.

However, one cannot lose sight of the fact that prisoners are incarcerated in order to serve their sentence, and that the prison environment inevitably imposes certain restrictions, as a result of which it will simply not be possible to have the same medical care as on the outside. Also, we must not forget that deprivation of liberty itself causes certain sufferings and deprivations, and that these, by the very nature of things, are associated with serving the sentence and that their effects are mostly unfavorable for health. Confinement to limited space, monotony, the same daily routines, and the inability to move freely have an undeniable negative impact on the state of health, so the authorities must constantly search for ways to mitigate the consequences caused by it.

On the other hand, just as governments are obliged to strive to provide equal conditions for the treatment of prisoners, there is also an obligation to respect the specific

health problems that characterize the prison environment. Hence, it will often not be enough to provide identical healthcare for prisoners as for the general public, but it will be necessary to design a special mode of healthcare for convicts. Therefore, in order for prisoners to be equal with other citizens in exercising their right to healthcare, we should not deny the high prevalence of substance abuse and infectious diseases in prisons. Considering the enormous prevalence of HIV, hepatitis and tuberculosis infection, states are obliged to adequately approach these pressing problems. In the absence of measures that prevent the transmission of infectious diseases, the government directly endangers the health of prisoners.

When it comes to substance abuse, the state must not turn a blind eye to the fact that there is illegal drug consumption in prisons and that prisoners are exposed to enormous health risks through it. Also, considering that addiction treatment is much more complicated in prison conditions, the government must find ways to address the specific needs of drug addicts in prison.

In addition, states must recognize the fact that prisoners are often in worse health than the rest of the population. In many cases, this is due to their poor material circumstances, homelessness and unemployment. It is therefore not uncommon for prisoners to enter prison in an already impaired state of health. The protection of their health depends on the resources available in the prison, so the state must take a proactive stance to address their problems. Otherwise, the state will contribute to a further deterioration of prisoner's health, making it more difficult for prisoners to reintegrate into normal social life.

Finally, old age and disability are conditions that prisoners face just like everyone else. Given that inmates cannot rely on the support of family, friends, and the local community, special attention must be paid to meeting their needs. If the state cannot provide humane and dignified prison conditions for the elderly and people with disabilities, then release from serving the sentence becomes the only appropriate solution.

References

Abbing, H. (2013) 'Prisoners Right to Healthcare, a European Perspective', *European Journal of Health Law, 20*(1), 5-19. https://doi.org/10.1163/15718093-12341251

Augsburger, A. *et al.* (2022) 'Assessing incarcerated women's physical and mental health status and needs in a Swiss prison: a cross-sectional study', *Health & Justice*, *10*(1), 8. https://doi:10.1186/s40352-022-00171-z

Bell, E. (2022) 'Seizing the Populist Moment: Towards a New Penal Politics?', *The British Journal of Criminology*, *62*(5), 1077-1092. https://doi.org/10.1093/bjc/azac030

Bosworth, R. J. *et al.* (2022) 'HIV/AIDS, hepatitis and tuberculosis-related mortality among incarcerated people: a global scoping review', *International Journal of Prisoner Health*, *18*(1), 66-82. https://doi:10.1108/IJPH-02-2021-0018

Butler, A. *et al.* (2022) 'Prevalence of mental health needs, substance use, and co-occurring disorders among people admitted to prison', *Psychiatric Services*, *73*(7), 737-744. https://doi: 10.1176/appi.ps.202000927

Charles, A, and Draper, H. (2012) 'Equivalence of care" in prison medicine: is equivalence of process the right measure of equity?', *Journal of Medical Ethics, 38*(4): 215–218. https://doi: 10.1136/medethics-2011-100083

Cloud, D. H. *et al.* (2023) 'Public health and prisons: priorities in the age of mass incarceration', *Annual Review of Public Health*, *44*(1), 407-428. https://doi: 10.1146/annurev-publhealth-071521-034016

Đukanović, A. (2024) 'Right to Access Healthcare in Prisons: International Standards and Practice', In: Iljić, Lj. (ed.) *Prison life organization and security: Criminological, penological, sociological, psychological, legal, and security aspects*, Belgrade: Institute of Criminological and Sociological Research, 256-276. https://doi:10.47152/PrisonLIFE.D4.5.13

Fazel, S., and Baillargeon, J. (2011) 'The health of prisoners', *Lancet*, 377: 956-65. https://doi: 10.1016/S0140-6736(10)61053-7.

Ginn, S. (2012) 'The challenge of providing prison healthcare', *BMJ: British Medical Journal, 345*(7875): 26–28.

Kovačević, M. *et al.* (2024) 'Motherhood in prison - challenges and perspectives', In: Ćopić, S., and Batrićević, A. (eds.) *Prison Environment: A Female Perspective.* Belgrade: Institute of Criminological and Sociological Research, 65-78. https://doi:10.47152/PrisonLIFE.D4.7_3

Kovačevic, M., and Atanasov, S. (2024) 'Penalni populizam–nastanak, razvoj i budućnost', *Politeia*, 27, 45-58. https://doi: 10.5937/politeia0-52787

Liebling, A. (2003) *Suicides in prison*. Routledge: London. https://doi.org/10.4324/9780203218365

Lines, R. (2006) 'From equivalence of standards to equivalence of objectives: The entitlement of prisoners to healthcare standards higher than those outside prisons', *International journal of prisoner health*, *2*(4), 269-280. https://doi.org/10.1080/17449200601069676

Lukić, N. (2024). 'Kazna zatvora u Srbiji – trendovi i odlike zatvoreničke populacije', *Revija za kriminologiju i krivično pravo, 62*(2), 135-160, https://doi.org/10.47152/rkkp.62.2.6

Nakitanda, A. O. *et al.* (2021) 'Hepatitis B virus infection in EU/EEA and United Kingdom prisons: a descriptive analysis', *Epidemiology & Infection*, *149*, e59. https://doi:10.1017/S0950268821000169

Pękala-Wojciechowska, A. *et al.* (2021) 'Mental and physical health problems as conditions of ex-prisoner re-entry', *International journal of environmental research and public health*, *18*(14), 7642. https://doi:10.3390/ijerph18147642

Spycher, J. *et al.* (2021) 'Healthcare in a pure gatekeeping system: utilization of primary, mental and emergency care in the prison population over time', *Health & Justice*, *9*(1), 11. https://doi.org/10.1186/s40352-021-00136-8

Stover, H. *et al.* (2021) 'The state of harm reduction in prisons in 30 European countries with a focus on people who inject drugs and infectious diseases', *Harm reduction journal*, *18*(1), 67. https://doi.org/10.1186/s12954-021-00506-3

Tadić, V. (2024). 'Inmates education as a function of developing socio-emotional competences', *Revija za kriminologiju i krivično pravo, 62*(1), 63-88. https://doi.org/10.47152/rkkp.62.1.4

Tomassini, L. *et al.* (2024) 'Drug overdose deaths during prison riots and mental states of prisoners: a case study', *Frontiers in Psychiatry*, *15*, 1377995. https://doi:10.3389/fpsyt.2024.1377995

Vandergrift, L.A., and Christopher, P.P. (2021) 'Do prisoners trust the healthcare system?', *Health Justice*, 9, 15. https://doi:10.1186/s40352-021-00141-x

Walter, K. S. *et al.* (2021) 'The escalating tuberculosis crisis in Central and South American prisons', *The Lancet, 397*(10284), 1591-1596. https://doi: 10.1016/S0140-6736(20)32578-2

Western, B. (2021) 'Inside the Box: Safety, Health, and Isolation in Prison'. *The Journal of Economic Perspectives*. *35*(4), 97–122. https://doi.org/10.1257/jep.35.4.97

World Health Organization (WHO) (2019) Health in prisons: Fact sheets for 38 European countries (No. WHO/EURO: 2019-3694-43453-61042). World Health Organization. Regional Office for Europe.

World Health Organization (WHO) (2023) *Status report on prison health in the WHO European Region 2022.* Copenhagen: WHO Regional Office for Europe.

Wozniak, K. H. (2014) 'American public opinion about prisons', *Criminal Justice Review*, *39*(3), 305-324. https://doi.org/10.1177/0734016814529968

Zhong, S. *et al.* (2021) 'Risk factors for suicide in prisons: a systematic review and meta-analysis', *The Lancet Public Health*, *6*(3), e164-e174. https://doi.10.1016/S2468-2667(20)30233-4

Practice of the European Court od Human Rights

European Court of Human Rights. Aleksanyan v. Russia. No 46468/06 [Decision 22 December 2008]. ECHR 2008-I. §139.

European Court of Human Rights. Amirov v. Russia. No 51851/13 [Decision 27 November 2014]. ECHR 2014-I. § 84

European Court of Human Rights. Enea v. Italy. No 74912/01 [Decision 17 September 2009]. §§ 58-59.

European Court of Human Rights. Fedosejevs v. Latvia. No 37546/06 [Decision 19 November 2013]. ECHR 2013-IV. § 50.

European Court of Human Rights. Goginashvili v. Georgia. No 47729/08 [Decision 4 October 2011]. ECHR 2011-III. §§ 76-78

European Court of Human Rights. Holomiov v. Moldova. No 30649/05 [Decision 7 November 2006]. ECHR 2006-IV. §§ 117-122.

European Court of Human Rights. Hummatov v. Azerbaijan. No 9852/03 and 13413/04 [Decision 29 November 2007]. ECHR 2007-I. § 104, § 109, § 114.

European Court of Human Rights. Hüseyin Yildirim v. Turkey. No 2778/02 [Decision 3 May 2007]. ECHR 2007-IV.

European Court of Human Rights. Jeladze v. Georgia. No 1871/08 [Decision 18 December 2012]. ECHR 2012-III. § 44.

European Court of Human Rights. Kudla v. Poland. No 30210/96 [Decision 26 October 2000]. §§ 94-99.

European Court of Human Rights. McGlinchey and others v. The United Kingdom. No 50390/99 [Decision 29 April 2003]. ECHR 2008-II.

European Court of Human Rights. Mitic v. Serbia. No 31963/08 [Decision 22 January 2013]. ECHR 2013-IV. § 49.

European Court of Human Rights. Mouisel v. France. No 67263/01 [Decision 14 November 2001]. ECHR 2001-I. § 40.

European Court of Human Rights. Normantowicz v. Poland. No 65196/16 [Decision 17 March 2022]. ECHR 2022-I. §§ 89 -95.

European Court of Human Rights. Paladi v. Moldova. No 39806/06 [Decision 10 March 2009]. §§ 22-43, §§ 72-71.

European Court of Human Rights. Patrianin v. Russia. No 12983/14 [Decision 8 February 2014]. ECHR 2014-I.

European Court of Human Rights. Shirkhanyan v. Armenia. No 54547/16 [Decision 22 February 2022]. ECHR 2022-IV.

European Court of Human Rights. Strazimiri v. Albania. 34602/16 [Decision 21 January 2020]. ECHR 2020-II. § 109.

European Court of Human Rights. Testa v. Croatia. No 20877/04 [Decision 12 July 2007]. ECHR 2007-I. § 52.

European Court of Human Rights. Wenner v. Germany. No 62303/13 [Decision 1 September 2016]. ECHR 2016-V. §§ 75-77.

European Court of Human Rights. Zarzycki v. Poland. No 15351/03 [Decision 12 March 2013]. ECHR 2013-IV.

Pravo zatvorenika na zdravstvenu zaštitu i praksa Evropskog suda za ljudska prava

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Zatvorenici kao marginalizovana i ranjiva grupa moraju uživati pravo na zdravstvenu zaštitu. Od navedenog neposredno zavisi zaštita njihovog mentalnog i telesnog integriteta, te ljudskog dostojanstva. Pravo zatvorenika na zdravstvenu zaštitu implicira brojne i kompleksne obaveze države. Otuda je cilj rada da izdvoji ključne standarde koji obavezuju evropske države u domenu zdravstvene zaštite osuđenih. Metod koji je primenjen podrazumeva sistemsku analizu relevatnih evropskih dokumenata i slučajeva iz prakse Evropskog suda za ljudska prava. Kako prava zatvorenika ne bi ostala samo jedna apstraktna kategorija, Evropski sud za ljudska prava je konkretizovao kako vrstu, tako i obim obaveza koje države imaju u tom domenu. Rezultati istraživanja ukazuju da je postavljanje obavezujućih standarda izuzetno kompleksno pitanje, s obzirom na nejednake prilike u različitim evropskim državama. Ipak, nesporno je da se mora voditi računa o dobrobiti osuđenika, kao i o vrlo specifičnim zatvorskim uslovima koji dodatno negativno utiču na zdravlje. Posebno treba imati u vidu da zatvorenici treba da uživaju približno isti nivo i kvalitet zaštite, kao i ostali građani. Zaključujemo da one države koje ne ispunjavaju posebne obaveze u pogledu očuvanja i unapređenja zdravlja zatvorenika, zapravo povređuju njihova ljudska prava.

KLJUČNE REČI**:** zatvorenici, zdravlje, ljudska prava, Evropski sud za ljudska prava

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Journal of Criminology and Criminal Law, 63(1), 63-79
Review paper
https://doi.org/10.47152/rkkp.63.3.4
UDK: 343.272(497.6)

RECEIVED: 5 March 2025
ACCEPTED: 12 May 2025

Forfeiture of proceeds of crime in Bosnia and Herzegovina with special reference to the conduct of a financial investigation

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An efficient and energetic fight against crime, especially against specific forms of organized crime, which, by its nature, implies the acquisition of property benefits obtained through criminal offenses, at the same time implies and obligates the timely and efficient initiation and conduct of financial investigation. This investigation is an effective means of forfeiture of the proceeds of crime and is usually conducted in the phase of conducting a classic investigation when certain conditions are met, from which it follows that its initiation, implementation and conduct is not conditioned by raising and confirming of an indictment. The competent prosecutor of Bosnia and Herzegovina independently and autonomously decides on the initiation and conduct of financial investigation, so that it is not necessary to obtain any prior consent, approval or order from the competent court. The management and supervisory role during the conduct of financial investigation belongs to the competent prosecutor, who orders its conduct by issuing an order. In the implementation or enforcement sense, authorized police officers have a key and dominant role in timely, efficient and legal conduct of financial investigation, which includes the discovery of proceeds of crime, and the collection of necessary evidence for the efficient conduct and conclusion of criminal proceedings. The Criminal Procedure Code of Bosnia and Herzegovina does not specifically regulate financial investigations. This investigation is prescribed by special laws (lex specialis) at the level of the Entities of the Federation of BiH and the Republika Srpska, as well as Brčko District of BiH. However, at the state level, although the law does not directly define the initiation and conduct of financial investigation, it derives from the general concept of the investigation, so that it is applied when it comes to criminal offenses that involve the proceeds of crime.

KEYWORDS: property gain, financial investigation, prosecutor, authorized officials.

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Forfeiture of proceeds of crime - expediency and justification

Suppression of crime is still a complex task for competent authorities, subjects and law enforcement agencies, given the numerous and various challenges of modern age (Simović and Šikman, 2016, pp. 85-101). In every historical stage of the development of society, the perpetrators of criminal offenses tried to find the most appropriate ways, that is, certain modalities of committing crimes, trying to "outsmart" the law enforcement authorities (Karović, 2018, p. 836; Armoni, 2022, pp. 109-115; Boersma and Nelen, 2010). Information and communication technology is very useful, and the potential for crime in it is also very large (Syahril, 2023, p. 120).

There are numerous and diverse factors that in a certain way make impossible or difficult prevention and detection of criminal offenses, prosecution of perpetrators and bringing them to justice, and forfeiture of proceeds of crime, in accordance with the restrictive legal requirements and the prescribed procedure (Simović and Šikman, 2017, pp. 404-407; Simović and Simović, 2018, pp. 29-38). For the purposes of this paper, we will list only some of the most important factors that play a key role and have a dominant influence on the emergence and appearance of various criminal activities, which include the acquisition of property resulting from the very nature of certain criminal offenses and their practical operationalization (Chaikin and Sharman, 2009, pp. 140-141). In the first place, special attention deserves the rapid progress of information and communication technologies, including the Internet and all other possibilities made possible by cyber space, then very pronounced internal and external demographic changes, i.e. migrations that include the mobility of modern man but also forced migration of the population due to war and various disasters, very complex political and security relations, both on the internal, regional and international level, numerous and various economic problems, and other conditions and specificities that in a certain way favor the criminal activities that incorporate the acquisition of illegal property benefits (Simović and Simović, 2013, pp. 77-98; Vlasic and Noell, 2010; Webb, 2005; Zagaris, 2015, pp. 152-153). The previous reforms of the criminal procedure were aimed at achieving a higher degree of effectiveness in supression of crime, considering that the complete eradication of this complex social phenomenon as such is impossible (Karović, 2013, p. 163).

The phenomenological number, variety and prevalence of criminal offenses by the nature of things clearly confirm that criminality, or more precisely the operationalization of criminal activities, adapts very quickly and easily to current political, economic, demographic, social and other conditions and specificities (Abbott and Snidal, 2002; Alldridge, 2003, pp. 45-59). The ultimate goal of criminal activities is the acquisition of profit, i.e. property, which consequently results from the very commission of a certain criminal offenses, and thus implies the existence of illegally acquired property benefits (De Beco, 2011; Gathii, 2009; Golovanova, 2016, pp. 78-89). Analogous to the above, an adequate reaction implies and obligates finding proportionally necessary and adequate institutional responses and legal solutions of a substantive and procedural nature in terms of timely, efficient and legal detection of proceeds from crime and collection of necessary evidence

in terms of permanent (and extended) confiscation of proeeds from crime (Simović, 2016, pp. 195-235; Stessens, 2000; Stessens, 2001). Many international legal acts, and above all the Convention on the Suppression of Transnational Organized Crime, insist on the "forfeiture" of proceeds of crime, but it is a particular problem that these acts are of a very general character (Ignjatović, Škulić, 2019, p. 449).

Given the above, the legislator has numerous dilemmas and challenges regarding finding and prescribing adequate legal solutions of a procedural nature that are compatible with real investigative and evidentiary needs (Simović, Simović, Vulin, 2020). Classical or traditional means, methods, manners and institutional responses and legal solutions are insufficient or overcome, so that the competent authorities in charge of criminal prosecution would achieve the expected results (Ivory, 2014; Kamchatov, Timoshenko, Kamchatova and Buzu, 2021, pp. 189-201). In this sense, the initiation and conduct of financial investigation is imposed as an imperative (Pearson, 2001; Olaniyan, 2014; Puckett, 2010), in order to undertake certain activities in a timely and efficient manner, i.e. certain criminal procedural actions (general evidentiary actions and special investigative actions) which are primarily aimed at discovering and proving of these criminal offenses (Simović, 2003, pp. 75-100). Therefore, in addition to establishing or proving criminal liability (guilt) in accordance with procedural provisions, forfeiture of proceeds of crime is a specific criminal law measure that enables no one to retain property benefit, income, profit or other benefit from proceeds of crime (Boucht, 2017, pp. 16-18; Brun, *et al*., 2011).

Hypothetically observed, if the institute of forfeiture of proceeds of crime was not applied (Simović, 2013a, pp. 114-132), an extremely bad preventive-protective message would be produced and broadcasted in terms of special and general prevention, especially taking into account that, as a rule, it is about the commission of criminal offenses that imply the acquisition of enormous profits, which is practically impossible or difficult to quantify and precisely determine (Lafitskiy, Tsirin and Golovanova, 2014; Messick, 2017; Moiseienko, 2018). Therefore, if, in addition to the implementation of the classic criminal procedure aimed primarily at establishing, that is, proving the existence of criminal liability (guilt), forfeiture of proceeds of crime would not be applied as a specific criminal law measure, in that case the institutional state reaction to crime would not be proportionate or adequate.

The application of the measure of forfeiture of proceeds from crime is justified for both restorative reasons, because noone can acquire or retain the benefit of some form of "wrong" (Rose, 2011; Rose, 2016), as well as for preventive reasons, because the confiscation of property hurts criminals the most, i.e. making it possible that illegally acquired property will be confiscated devalues the motivation of potential perpetrators (Simović, 2013, pp. 9-32). Cumulative connection, expediency and conditioning, establishing or proving the existence of criminal liability (guilt), on the one hand, and the application of this specific criminal law measure in connection with forfeiture of proceeds of crime, on the other hand - practically enables the achievement of a certain purpose - "that crime does not pay" (Saadi and Machado, 2017, pp. 484-519; Shams, 2001, pp. 129-132;

Sharman, 2017). The state, through competent authorities, subjects and agencies for law enforcement, actually directly and practically shows and confirms its commitment and consistency in the plan of suppressing criminal offenses, which, by the nature of things, imply the acquisition of the proceeds of crime. In relation to what he acquired through a criminal offense, the perpetrator can never acquire any right, especially not property right (Stojanović, Kolarić, 2020, p. 100).

In this sense, the results of criminal justice in Bosnia and Herzegovina can and must be better, especially when it comes to the so-called capital cases of corruption, money laundering and other specific forms of organized crime (criminal offenses in the field of drug abuse, human trafficking, etc.), in order to practically confirm the commitment to suppress these criminal offenses in practice by achieving the expected results. The catalog of the mentioned criminal offenses deserves a special attention from the scientific and professional public, the non-governmental sector, but also citizens who, with reason, demand a timely and efficient (re)action of the competent authorities regarding the detection and proving of the existence of criminal offenses, and the prosecution of perpetrators in accordance with restrictive legal requirements.

The contemporary criminal law of Bosnia and Herzegovina, as well as the countries from the immediate environment and the region, has undergone significant and even radical changes in the last two decades, including very pronounced interventions by legislators in all three criminal (sub)systems - substantive, procedural and enforcement legislation (Karović, 2023, p. 639). The contemporary criminal procedure systems in Europe and the world establish and promote the protection of the rights and freedoms of every person, regardless of their national, ethnic, religious, racial or any other affiliation or personal characteristics (Zadorozhnaya, Karović, 2022, pp. 15-16).

In this sense, the question of the success and consistency of the criminal justice reform in terms of crime prevention arises, given that from general reform of the criminal justice system, i.e. drafting, adoption and entry into force of valid criminal laws and laws on criminal procedure at all levels of the exercise of power until today, a sufficient period of time has passed that can serve as a basis for a versatile and comprehensive analysis of the results of the work of criminal justice system and a critical review of existing legal solutions of a substantive and procedural nature. The institution of forfeiture of proceeds from crime is classified as a matter of substantive criminal law and is prescribed in the general part of the Criminal Code of Bosnia and Herzegovina. Therefore, the question arises of the justification and purposefulness of prescribing a special law at the state level that would prescribe provisions of a substantive, procedural and enforcement nature. It follows from the above that Bosnia and Herzegovina must provide and adapt adequate legal, i.e. normative framework in terms of practical application and the achievement of adequate (expected) results in relation to forfeiture of proceeds of crime. The situation is identical with the criminal justice systems of neighboring countries (exYu area) which face the same or similar problems and challenges.

Differentiation between temporary, permanent and extended forfeiture of proceeds of crime

Analyzing the current criminal laws in Bosnia and Herzegovina, the normative legal framework for the forfeiture of proceeds of crime is prescribed in Chapter XII of the Criminal Code of Bosnia and Herzegovina,[1] the Criminal Code of the Federation of BiH,[2] the Criminal Code of the Brčko District of BiH,[3] and Chapter VII of the Criminal Code of the Republika Srpska.[4] Also, at the entity level and Brčko District, there are special laws that regulate this matter, and these are: the Law on Confiscation of Property Resulting from the Commission of a Criminal Offense of the Republika Srpska,[5] the Law on Confiscation of Property Resulting from the Commission of a Criminal Offense of the Federation of BiH[6] and the Law on Confiscation of Property Resulting from Commission of a Criminal Offense of Brčko District of BiH.[7] The legislator has legally standardized the activity of criminal procedural entities starting from the detection phase, i.e. from the initial (preliminary) knowledge that indicates the existence of certain criminal event (criminal matter in the narrower sense), the initiation and conduct of criminal investigation, the conclusion of the investigation and raising of an indictment (criminal matter in the true sense), the main hearing, particularly including the evidentiary procedure as its central part, legal remedies, up to the adoption of a legally binding court decision that fully illuminates and resolves a certain criminal matter (Karović, Simović, 2021, p. 47).

When it comes to the forfeiture of the proceeds of crime, the legislator prescribed certain restrictive conditions that must be met in each specific case, so that the forfeiture of the proceeds of crime must be observed, first of all, through the prism of timely initiation and conduct of financial investigation, then undertaking general evidentiary actions and special investigative actions, and other necessary and purposeful activities in the investigation stage. Property benefits are not only money and certain items, but also services, use of certain items without providing an adequate equivalent countervalue, property interest, savings, etc., i.e. everything that has some kind of property benefit, that has financial effects (Stojanović, Škulić, Delibašić, 2018, p. 152).

[1] Official Gazette of Bosnia and Herzegovina, nos. 3/2003, 32/2003., 37/2003, 54/2004, 61/2004, 30/2005, 53/2006, 55/2006, 8/2010, 47/2014, 22/2015, 40/2015, 35/2018, 46/2021, 31/2023 and 47/2023.

[2] Official Gazette of the Federation of BiH, nos. 36/2003, 21/2004, 69/2004, 18/2005, 42/2010, 42/2011, 59/2014, 76/2014, 46/2016, 75/2017 and 31/2023.

[3] Official Gazette of the Brčko District of Bosnia and Herzegovina no. 19/2020 – consolidated text, 3/2024 and 14/2024.

[4] Official Gazette of the Republika Srpska, nos. 64/2017, 104/2018, 15/2021, 89/2021, 73/2023, Official Gazette of BiH, no. 9/2024 – Decision of the Constitutional Court of BiH and Official Gazette of the Republika Srpska 105/2024 – Decision of the Constitutional Court of BiH.

[5] Official Gazette of the Republika Srpska no. 66/2018 of 24 July 2018.

[6] Official Gazette of the Federation of Bosnia and Herzegovina, no. 71/2014.

[7] Official Gazette of the Brčko District of BiH nos. 29/2016 and 13/2019.

However, to properly understand the legal nature and purpose of forfeiture of proceeds of crime, it is necessary to establish a clear differentiation between temporary forfeiture of items and property as a classic evidentiary action, temporary security measure (freezing order), permanent forfeiture, but also extended forfeiture as a specific form of forfeiture that deserves a special attention in terms of evidence. Namely, the temporary forfeiture of items and property is a general evidentiary action which is typically applied when the requirements of substantive and formal nature prescribed by the legislator are met, or more precisely, it is applied on the basis of an order issued by the competent court at the request of the competent prosecutor. Given the above, this evidentiary action is carried out by the competent procedural entities, and it practically results from the application of other evidentiary actions, most often search of the apartment, premises, persons and belongings when it is certain that the application of this evidentiary action will find and confiscate items, that is, property referring to the specific criminal offense which is the subject of interest (for example, by searching business premises, certain items, documentation, etc. are found and confiscated).

The order for confiscation of items is issued by the court, on the proposal of the prosecutor or on the proposal of an authorized official who has approval from the prosecutor[8]. Items can also be temporarily confiscated without a court order, if there is a risk of delay, but the prosecutor (Simović, 2011a, p. 154-172) is obliged to file a request to the judge for subsequent approval within 72 hours.[9] On the other hand, the purpose of temporary security measures is to practically prevent the use, concealment, encumbrance or alienation of proceeds of crime by the perpetrator, his relatives, third parties, etc. At any time during the proceedings, the court may issue, at the proposal of the prosecutor, a temporary measure of forfeiture of property according to the Criminal Code of BiH, a measure of confiscation or other necessary temporary measure to prevent the use, alienation or disposal of that property.[10]

With regard to the application of the temporary security measure, it is necessary to emphasize the timeliness of taking the said measure, in order to prevent unwanted consequences. The timeliness of the application of a certain temporary security measure implies its initiation, proposal and practical application in the early phase of the financial investigation, i.e. in the procedural phase when the suspect, his relatives or third parties, realistically have no knowledge that certain investigative and evidentiary activities are being carried out. In this context, there is also a certain risk when initiating, proposing and applying security measures, given that certain rights (right to property) are restricted, and that the outcome of criminal proceedings is uncertain in terms of establishing or proving the existence of criminal offense and criminal liability (guilt). According to the legal nature, purpose and other specifics of temporary security measures, these measures have the sign of "temporary" for a reason, taking into account the possibility that

[8] Article 65(2) of the Criminal Procedure Code of BiH.

[9] Article 66(1) of the Criminal Procedure Code of BiH.

[10] For more details see Article 73 of the Criminal Code of BiH.

certain temporary measure applied in a specific criminal case does not have to grow or transform into a permanent forfeiture of proceeds of crime. The expediency and justification of the application of temporary security measure is temporary restriction in relation to property benefit for which there is a certain degree of suspicion that it stems from a certain criminal offense.

It follows from the above that it is necessary to make a proper assessment and make a decision on the application of certain temporary security measure in each specific criminal case, in order to avoid unjustified restriction of certain rights of citizens, considering the tendency of humanization of modern criminal procedural law, which manifests itself in the protection of basic human rights and freedoms. In this context, when initiating, proposing, making a correct and legal decision and practical application of temporary security measures, the catalog of rights and universal guarantees of a suspect or an accused person in criminal proceedings must not be ignored or disregarded.

Some security measures (prescribed, for example, in the Republic of Croatia and the Federation of BiH) are the prohibition of alienation and encumbrance of real estate or real rights registered on real estate, the prohibition of the suspect, the accused or a related person, to alienate, hide, encumber or dispose of movable property, by confiscating and entrusting these items to the authority responsible for the management of confiscated property, confiscation of cash and securities, an order to bank or other legal entity to give the suspect, the accused or related person to deny, on the basis of their order, the payment of funds from their account in the amount for which a temporary measure, a ban on alienation or encumbrance of shares, securities, shares in funds, etc. has been deteermined (Mujanović and Datzer, 2016, p. 31). Permanent (regular) forfeiture of proceeds of crime directly depends on and is conditioned by the outcome of the criminal proceedings in the context of establishing or proving the existence of a criminal offense and criminal liability during regular proceedings. Namely, the permanent forfeiture of proeeds of crime directly depends on the decision of the court that resolves the specific criminal matter.

In addition to the regular forfeiture, the legislator also prescribed the extended forfeiture of proceeds of crime (Simović and Simović, 2017, pp. 48-64; Simović, *et al.*, 2017) in the case when criminal proceedings are conducted for criminal offenses from Chapters XVII, XVIII, XIX, XXI, XXIA and XXII of the Criminal Code of BiH, when the court can also confiscate that property benefit, income, profit or other interest from the property benefit for which the prosecutor provides sufficient evidence to reasonably believe that such property benefit, income, profit or other interest from property benefit was obtained by committing these criminal offenses, and the perpetrator did not provide evidence that the benefit was obtained legally.[11] In this case, the burden of proof is (re)directed from the prosecutor to the executor, appreciating that the executor is obliged to provide certain or available evidence that a certain property benefit was obtained legally. In this way, the legislator ensured that the legal axiom is consistently complied with so that no one can keep the proceeds of

[11] Article 110a(1) of the Criminal Code of BiH.

crime, which, from the aspect of general prevention is a very expedient preventive message. This institute implies confiscation, not only of those property benefits for which it is proved in the court proceedings to originate from a specific crime, but also those assets that have not yet been proven in the court proceedings to have been acquired through the commission of a criminal offense, but for justified reasons, based on the evidence provided by the prosecutor, it is believed that these assets are also proceeds of crime (Smajić, 2019, p. 215).

Undoubtedly, the most significant innovation is the establishment of the possibility of inversion (shifting) of burden of proof to the perpetrator of the criminal offense in case of suspicion that the property was acquired through criminal activity (shared burden of proof), where the perpetrator must prove the origin of the income, i.e. the property (Radulović, 2014, p. 296). Forfeiture of proceeds of crime can be ordered by the court in the judgment declaring the accused guilty and in the decision on the application of an educational measure, as well as in the procedure in the case of insanity.[12]

Conduct of financial investigation: theoretical - implementation aspect

In the current criminal procedure laws in Bosnia and Herzegovina, the legislator did not directly define the term financial investigation, that is, he did not prescribe its content, structure and stages of action of competent procedural entities. The legal basis for conducting a financial investigation is prescribed under Articles 197 and 392 of the Criminal Procedure Code of Bosnia and Herzegovina. However, financial investigation arises from the classical investigation, which begins from the moment of learning about the existence of grounds for suspicion that a certain criminal offense has been committed (Simović, 2011, pp. 154-172). On the other hand, financial investigation, as a rule, starts from the moment of discovering the existence of certain activities that imply and include, in addition to the existence of certain criminal offense, also the suspicion in the existence of certain proceeds of crime. A comparative analysis of the police systems of neighboring countries (Serbia, Montenegro, Croatia, Slovenia, Macedonia), but also more widely (Simović and Jovašević, 2015, pp. 325-341), it is evident that the prevention and detection of criminal offenses is the primary activity of the police, i.e. authorized officials with an emphasis on crime prevention (Karović, Orlić, 2020, p. 117). The standard of proving the grounds of suspicion, as the lowest level of suspicion that a certain criminal offense has been committed, is based on the existence of a set of indirect facts and represents a starting point and a necessary condition for a certain real event in everyday life to be characterized as a criminal event (Karović, Simović, 2020, p. 210).

The ultimate goal of criminal activities is the acquisition of illegal profit (earnings), so it is quite realistic and justified to expect that numerous and diverse criminal offenses, by the nature of the criminal matter, the method of execution, the motive and other specifics, incorporate and imply the acquisition of proceeds of crime. In academic and professional discussions, it can be observed that there are two positions when it comes

[12]See Articles 389 and 396 of the Criminal Procedure Code of BiH.

to the understanding of financial investigation: on the one hand, financial investigation is special, and the second position is that the financial investigation arises from and forms an is an integral element of the classical investigation. In any case, the initiation and conduct of financial investigation is an initial activity that is primarily aimed at the detection, identification and determination of proceeds of crime, with the aim of their temporary and permanent forfeiture, in accordance with restrictive legal requirements.

With regard to the number, volume, complexity, dynamics and variety of investigative and evidentiary activities undertaken in the financial investigation by the competent procedural entities, the following stages of action can be observed: a) collection of information and data as well as the necessary documentation; b) processing and analysis of collected operational material; c) differentiation of legally and illegally acquired property benefits; d) determination of disparity (equalization of net worth), and e) conclusion drawing (results of investigation). A key issue that deserves special attention is when the financial investigation begins, given that the outcome directly depends on the timeliness of the initiation, implementation and conduct of the financial investigation, i.e. the results regarding the detection, identification and determination of proceeds of crime with the aim of their temporary and permanent confiscation in the end.

As a rule, the initiation of financial investigation begins in the early phase of the classic investigation, when certain activities that indicate the existence of certain proceeds of crime are recognized and determined. Therefore, after the commission of a certain criminal offense, the perpetrators most often redirect the proceeds of crime to other accounts of legal and natural persons of related and third parties, with the intention of concealment, but also of investing in certain activities (e.g. construction and sale of real estates, business premises, purchase of expensive items, etc.). Authorized police officials have the primary task of, after recognizing and determining certain activities, when conducting a classic investigation, timely inform the competent prosecutor in order to initiate and conduct a financial investigation that will be conducted in parallel with the classic investigation.

The financial investigation is managed by the competent prosecutor, who has a supervisory role over the work of authorized officials, as is the case with a classic investigation. Therefore, in the financial investigation, the competent prosecutor has a dominant investigative and evidentiary procedural role, as the only authority authorized by the law to initiate and conduct a financial investigation and to undertake adequate criminal procedural actions in order to collect the necessary evidence related to the existence of proceeds of crime. When conducting a financial investigation, it is necessary to ensure an adequate level of inter-institutional, inter-agency and international cooperation with competent authorities, subjects and law enforcement agencies with the aim of obtaining the necessary information and data, official documentation, etc. in a timely and efficient manner.

In the detection phase, when initial or primary information that indicate the existence of certain illegal activities that imply the existence of proceeds of crime are collected, the prosecutor and authorized police officials, upon approval by the competent prosecutor, have the possibility to collect the necessary information and knowledge from

the banks, which are obliged to act on their request. Namely, in this way, it is possible to preliminarily perform certain checks, and to determine the possible validity and justification for initiation and obtaining of an order from the competent court in connection with the implementation of certain criminal procedural actions (search of apartment and business premises, temporary security measures, etc.). The legal basis for such actions is contained in Article 104(1)(c) of the Law on Banks of the Federation of BiH[13] and Article 128(1)(3) of the Law on Banks of the Republika Srpska,[14] which prescribe an exception from keeping a bank secrecy and practically enable banks to respond to the request of the prosecutor, that is, the request of authorized police officers and provide the requested information.

The key investigative and evidentiary role in the conduct of financial investigation is performed by authorized police officials, to whom the competent prosecutor entrusts the execution of numerous and various criminal procedural actions. After issuing an order to conduct a financial investigation by the competent prosecutor, authorized officials collect, process, and analyze relevant information and data, as well as relevant documentation obtained, primarily, by the competent state authorities (tax administration, Indirect Taxation Administration of BiH, courts, competent ministries, directorates, municipalities, etc.).

The prescription of special investigative actions, as a separate category of evidentiary actions and their application in a practical sense, is proportionate response of the state, i.e. of the criminal prosecution authorities, to the increasingly complex forms of modern organized crime with the aim of more efficient fight against this type of crime and prosecution of criminally responsible persons (Karović, 2012, p. 25). In connection with the implementation of special investigative actions, it is necessary to focus special attention on the collection of useful information and data regarding the purchase and sale of currencies, the transfer of authorizations, etc. All aforementioned activities must be registered, i.e. documented, given that by applying special investigative actions, relevant knowledge can be discovered and collected regarding the way of operationalization of criminal activities, identify certain persons, determine locations, business premises, then conversations between the suspect and his relatives and third parties, mutual agreements, movements, etc.

Whether the state of affairs in the investigation has been sufficiently clarified for an indictment to be raised, is assessed by the prosecutor himself (Simović, Simović, Govedarica, 2021, p. 47). If the competent prosecutor assesses that the state of affairs in the investigation has been sufficiently clarified, he submits an indictment, which he sends to the judge for a preliminary hearing for competent action. Along with the indictment, the competent prosecutor submits the available material on the financial investigation and all the evidence on the proceeds of crime, with a proposal to confiscate it.

[13]Official Gazette of the Federation of Bosnia and Herzegovina, no. 27/17.
[14]Official Gazette of the Republika Srpska, nos. 4/2017, 19/2018, 54/2019 and 65/2024.

Conclusion

The forfeiture of proceeds of crime is an imperative in terms of supression of crime, especially specific forms of organized crime and criminality which, by the nature of the criminal matter itself, implies and understands the existence of certain proceeds of crime (corruption crimes, criminal offenses in the field of drug abuse, human trafficking, terrorism, etc.) (Simović and Simović, 2011, pp. 77-99). This paper emphasizes the justification and expediency, but also the forms of forfeiture of proceeds of crime, and the differentiation between temporary and permanent, or extended forfeiture of proceeds of crime.

Through this work, it can be seen that financial investigations are an extremely dynamic field that is develops further. Well-conducted financial investigations, which result in the permanent confiscation of illegally acquired property benefits realized through criminal activities are exceptional an effective tool, and the work of all state authorities, especially prosecutors' offices, should be focused on that path authorized officials. The main reason for this is the constant changes and improvement of concealment methods unlawfully acquired property benefits. Therefore, it is necessary in parallel with criminal investigations develop proactive management of financial investigations. This implies conducting a criminal investigation with simultaneous use of financial investigation methods, with the intention of detecting illegally acquired assets property benefits and obtaining evidence for existing and new criminal offenses. Financial investigations too should focus on legal entities, which represent a very complex aspect of financial investigations especially due to complex property and cash flows.

In this regard, at the entity level of the Federation of Bosnia and Herzegovina and Republika Srpska, as well as the Brčko District of Bosnia and Herzegovina, there are special laws that regulate this domain. The current legal framework and to some extent the developed practice for the most part enable the implementation of financial investigations, especially when they are integrated into systematic, planned and methodologically structured activities, and as such directly contribute to their realization one of the most important legal postulates according to which no one can keep the benefit he has acquired by committing a criminal act. On the other hand, a small number of initiated financial investigations in relation to the number of initiated criminal investigations, and in relation to the number of defendants - is the result of a lack of proactive approaches in determining modalities for improving financial data research i information about the property of the suspects, i.e. the accused, including legal entities. More effective implementation of financial investigations is a key imperative for better rule of law and in BiH. Although there are expressed institutional ambitions and greater commitment of certain holders judicial functions, it still cannot be said that financial investigations are carried out at a high level and efficient level. There are still serious shortcomings present at the institutional level, which manifest through insufficient human resources and their inadequate planning.

References

Abbott, K.W. and Snidal, D. (2002) 'Values and Interests: International Legalization in the Fight Against Corruption', *Journal of Legal Studies*, *31*(1), 141-178.

Alldridge, P. (2003) *Money Laundering Law: Forfeiture, Confiscation, Civil Recovery, Criminal Laundering and Taxation of the Proceeds of Crime*. Oxford: Hart Publishing.

Armoni, C. (2022) 'Sale of Confiscated Property (P. Köln inv. 7715+7710a)', *IWNW*, *1*(1),109-115. https://doi.org/10.21608/iwnw.2022.306439

Boersma, M. and Nelen, H. (2010) *Corruption & Human Rights: Interdisciplinary Perspectives*. Intersentia.

Boucht, J. (2017) *The Limits of Asset Confiscation: On the Legitimacy of Extended Appropriation of Criminal Proceeds*. Oxford: Hart Publishing. https://doi.org/10.5040/9781509907106.ch-002

Brun, J.P. *et al*. (2011) *Asset Recovery Handbook: A Guide for Practitioners*. Stolen Asset Recovery Initiative. https://doi.org/10.1596/9780821386347_ch07

Chaikin, D. and Sharman, J.C. (2009) *Corruption and Money Laundering: A Symbiotic Relationship*. London: Palgrave Macmillan.

De Beco, G. (2011) 'Monitoring Corruption from a Human Rights Perspective', *IJHR, 15*(7), 1107-1124. https://doi.org/10.1080/13642987.2010.497336

Gathii, J. (2009) 'Defining the Relationship between Human Rights and Corruption', *UpaJIntlL, 31*(1), 125-202.

Golovanova, N.A. (2016) 'Questions of management of confiscated property', *Journal of Russian law*, 10, 78-89. https://doi.org/10.12737/21525

Ignjatović, Đ. and Škulić, M. (2019) *Organizovani kriminalitet,* treće izmenjeno i dopunjeno izdanje. Beograd: Pravni fakultet Univerziteta u Beogradu.

Ivory, R. (2014) *Corruption, Asset Recovery, and the Protection of Property in Public International Law*. Cambridge: Cambridge University Press, https://doi.org/10.1017/cbo9781107415737

Kamchatov, K.V. *et al*. (2021) *Effective Effective Management of Seized and Confiscated Assets as a Condition for Providing Victims with Access to Justice and Fairness of Procedures Used in Criminal Proceedings: International and Russian Experience*. Atlantis Press.

Karović, S. (2012) 'Posebne istražne radnje u krivičnom procesnom zakonodavstvu Bosne i Hercegovine', *Civitas*, *2*(4), 22-34.

Karović, S. (2013) 'Tužilački koncept istrage u krivičnom procesnom zakonodavstvu Bosne i Hercegovine', *Zbornik radova Fakulteta pravnih nauka Svučilište/Univerzitet Vitez,* 4, 161-176.

Karović, S. (2018) 'Krivičnopravno suzbijanje organizovanog kriminaliteta u Bosni i Hercegovini – mogućnosti, izazovi i perspektive', *Zbornik radova Pravnog fakulteta u Splitu, 55*(4), 835-852. https://doi.org/10.31141/zrpfs.2018.55.130.835

Karović, S. (2023) 'Savremeni izazovi u krivičnom pravu Bosne i Hercegovine – očekivanja i stvarnost', u: Rajić Ćalić, J. (ur.) *Zbornik radova Uporednopravni izazovi u savremenom pravu – in memoriam dr Stefan Andonović*. Beograd: Institut za uporedno pravo u Beogradu, Pravni fakultet Univerziteta u Kragujevcu, 639-653. https://doi.org/10.56461/zr_23.sa.upisp_sk

Karović, S. and Orlić, S. (2020) 'Otkrivačka, istražna i dokazna uloga ovlašćenih službenih osoba u kaznenom postupku u Bosni i Hercegovini', *Policija i sigurnost, 29*(1-2), 112-125.

Karović, S. and Simović, M.M. (2020) 'Rasvjetljavanje i rješenje krivične stvari u krivičnom postupku Bosne i Hercegovine - raskol između normativnog i stvarnog', *Godišnjak Fakulteta pravnih nauka Panevropskog univerziteta „Aperion", 10*(10), 208-218.

Karović, S. and Simović, M. M. (2021) 'Kvalitativna komponenta u radu procesnih subjekata kao faktor efikasnosti krivičnog postupka u Bosni i Hercegovini', *Revija za kriminologiju i krivično pravo*, *59*(2), 45-60. https://doi.org/10.47152/rkkp.59.2.3

Lafitskiy, V.I., Tsirin, A.M. and Golovanova, N.A. (2014) *Prospects for the application of mechanisms for freezing, seizing and confiscating criminal assets, and mechanisms for managing confiscated assets (comparative legal research): a monograph*.

Messick, R. (2017) *Civil Society on Returning Stolen Assets to Highly Corrupt Governments*, *Global Anticorruption.* Available at: *https://globalanticorruptionblog. com/2017/02/ 15/to-experts-attending-february-14-16-meeting-on-managing-disposing-of-stolen-assets/*

Moiseienko, A. (2018) *The ownership of confiscated proceeds of corruption under the un convention against corruption*. Cambridge: Cambridge University Press. https://doi.org/10.1017/s002058931800012x

Mujanović, M. and Datzer, D. (2016) *Oduzimanje imovinske koristi pribavljene krivičnim djelima, Priručnik za praktičare*. Sarajevo: Centar za istraživanje politike suprotstavljanja kriminalitetu.

Olaniyan, K. (2014) *Corruption and Human Rights Law in Africa*. Oxford: Hart Publishing.

Pearson, Z. (2001) 'An International Human Rights Approach to Corruption' in: Larmour, P. and Wolanin, N (eds.) *Corruption and Anti-Corruption*. Asia Pacific Press, 30-61.

Puckett, B. (2010) 'Clans and the Foreign Corrupt Practices Act: Individualized Corruption Prosecution in Situations of Systemic Corruption', *GeoJIntlL*, 41, 815-852.

Rose, C. (2011) T'he Application of Human Rights Law to Private Sector Complicity in Governmental Corruption', *LJIL, 24*(3), 715-740. https://doi.org/10.1017/s0922156511000306

Rose, C. (2016) 'The Limitations of a Human Rights Approach to Corruption', *ICLQ, 65*(2), 405-428. https://doi.org/10.1017/s0020589316000038

Radulović, D. (2014) 'Oduzimanje imovinske koristi stečene krivičnim djelom u zakonodavstvu Crne Gore', *Strani pravni život*, *58*(2), 291-306.

Saadi, R. A. and Machado, D. O. (2017) 'Values of corruption: management of seized and confiscated assets', *Revista direito gv Law Review, 13*(1-2), 484-519. *DOI: 10.1590/2317-6172201719*.

Shams, H. (2001) 'The Fight Against Extraterritorial Corruption and the Use of Money Laundering Control', *Law and Business Review of the Americas, 7*(1), 129-132.

Sharman, J. C. (2017) *The Despot's Guide to Wealth Management: On the International Campaign against Grand Corruption*. New York: Cornell University Press. https://doi.org/10.7591/cornell/9781501705519.001.0001

Simović, N. M. (2003) 'Radnje i mjere procesne prinude i posebne istražne radnje u Zakonu o krivičnom postupku Bosne i Hercegovine u svjetlu borbe protiv organizovanog kriminaliteta'. *Kriminalističke teme* Sarajevo, *2*(3-4), 75-100.

Simović, N. M. (2011) 'Neka pitanja položaja i uloge tužioca u istrazi u krivičnom postupku Bosne i Hercegovine', in: Fatić, A. and Banović, B. (eds.) *Društveni aspekti organizovanog kriminala*. Beograd: Institut za međunarodnu politiku i privredu, 154-172.

Simović, N. M. (2011a) 'Neka pitanje položaja i uloge tužioca u istrazi u krivičnom postupku BiH', *Srbija i savremeni svijet: putevi i perspektive učvršćivanja spoljnopolitičkog, bezbjednosnog i spoljno-ekonomskog položaja Srbije u savremenim procesima u međunarodnoj zajednici*. Beograd, Institut za međunarodnu politiku i privredu, 154-172.

Simović, N. M. and Simović, M. V. (2011) 'Terorizam u praksi Evropskog suda za ljudska prava, Ustavnog suda Bosne i Hercegovine i bivšeg Doma za ljudska prava Bosne i Hercegovine', *Međunarodna naučno-stručna konferencija „Suprotstavljanje terorizmu – međunarodni standardi i pravna regulativa*", Kozara, 29–30. marta, 2011. Banja Luka: Visoka škola unutrašnjih poslova, 77-99.

Simović, N. M. (2013) 'Oduzimanje imovine pribavljene krivičnim djelom, sa posebnim osvrtom na odluke Ustavnog suda Bosne i Hercegovine', *Revija za kriminologiju i krivično pravo, 51*(1), 9-32.

Simović, N. M. (2013a) 'Osnovne karakteristike sistema krivične istrage u zakonodavstvu Bosne i Hercegovine i njen uticaj na pojednostavljenje krivičnog postupka', *Pojednostavljene forme postupanja u krivičnim stvarima – regionalna krivično-procesna zakonodavstva i iskustva u primjeni*, 20–21. jun, 2013. Beograd, 114-132.

Simović, N. M. and Simović, M. M. (2013) 'Oduzimanje imovine pribavljene krivičnim djelom, sa posebnim osvrtom na odluke Ustavnog suda Bosne i Hercegovine', *Oduzimanje imovine stečene krivičnim djelima u Bosni i Hercegovini*. Banja Luka, Visoka škola unutrašnjih poslova u Banjoj Luci, 77-98.

Simović, N. M. and Jovašević, D. (2015) 'Oduzimanje imovinske koristi u pravu Republike Srbije', in: *Nauka, društvo, tranzicija*, Nikšić, Centar za bezbjednosna, sociološka i kriminološka istraživanja Crne Gore Defendologija, 325-341.

Simović, N. M. (2016). 'Oduzimanje imovinske koristi stečene krivičnim djelom: međunarodni standardi i sudska praksa', *Pravo i pravda, 15*(1), 195-235.

Simović, N. M. and Šikman, M. (2016) 'Internacionalizacija suzbijanja organizovanog kriminaliteta', in: Ćirić, J. (ed.) *Suzbijanje organizovanog kriminala kao preduslov vladavine prava*. Institut za uporedno pravo, Hanns Seidel Fondacija, 85-101.

Simović, N. M. and Šikman, M. (2017) *Krivičnopravno reagovanje na teške oblike kriminaliteta.* Banja Luka: Pravni fakultet.

Simović, N. M. and Simović, M. V. (2017) 'Prošireno oduzimanje imovinske koristi i zaštita ljudskih prava', *Jačanje lokalnih kapaciteta u Federaciji Bosne i Hercegovine u borbi protiv korupcije i teških oblika kriminala putem oduzimanja imovinske koristi pribavljene krivičnim djelom,* Sarajevo, 48-64.

Simović, N. M. *et al*. (2017) *Prošireno oduzimanje imovinske koristi pribavljene krivičnim djelima: teorijski, međunarodno-pravni i komparativno-pravni aspekti*, prvo izdanje. Sarajevo: Centar za istraživanje politike suprotstavljanja kriminalitetu.

Simović, N. M. and Simović, M. V. (2018) 'Oduzimanje nezakonito stečene imovine pribavljene krivičnim djelom u Bosni i Hercegovini, sa posebnim osvrtom na Brčko Distrikt BiH', *Vještak, 5*(1-3), 29-38.

Simović, N. M., Simović, M. M. and Vulin, A. D. (2020) *Mehanizmi borbe protiv organizovanog kriminala i korupcije u Bosni i Hercegovini*. Laktaši: Grafomark.

Simović, M., Simović, V. and Govedarica, M. (2021) *Krivično procesno pravo II (Krivično procesno pravo – posebni dio)*, peto izmenjeno i dopunjeno izdanje. Istočno Sarajevo: Pravni fakultet Univerziteta u Istoćnom Sarajevu.

Smajić, E. (2019) 'Oduzimanje imovinske koristi stečene izvršenjem krivičnog djela u osnovnom i proširenom obliku', *Anali Pravnog fakulteta Univerziteta u Zenici, 12*(23), 207-235.

Stessens, G. (2000) *Money Laundering: A New International Law Enforcement Model*. Cambridge: Cambridge University Press. https://doi.org/10.1017/cbo9780511494567

Stessens, G. (2001) 'The International Fight Against Corruption', *Revue Internationale de droit penal*, *72*(3), 891-937. https://doi.org/10.3917/ridp.723.0891

Stojanović, Z., Škulić, M. and Delibašić, V. (2018) *Osnovi krivičnog prava, knjiga I*. Beograd: Službeni glasnik.

Stojanović, Z. and Kolarić, D. (2020) *Krivičnopravno suzbijanje organizovanog kriminaliteta, terorizma i korupcije*, drugo izmenjeno izdanje. Beograd: Pravni fakultet Univerziteta u Beogradu.

Syahril, M. A. F. (2023) 'Cyber crime in terms of the human rights perspective', *International journal of multicultural and multi religious understanding, 10*(5), 119-130. https://doi.org/10.18415/ijmmu.v10i5.4611

Zadorozhnaya, V. A. and Karović, S. (2022) 'Human Rights and Criminal Process: Modern Tendencies', *European and Asian Law Review*, *5*(3), 15-21. *DOI: 10.34076/27821668_2022_5_3_15*.

Vlasic, M. and Noell, J. (2010) 'Fighting Corruption to Improve Global Security: An Analysis of International Asset Recovery Systems', *Yale Journal of International Affairs*, *5*(2), 106-117.

Webb, P. (2005) 'The United Nations Convention Against Corruption: Global Achievement or Missed Opportunity?', *Journal of International Economic Law*, *8*(1), 191-229. https://doi.org/10.1093/jielaw/jgi009

Zagaris, B. (2015) *International White Collar Crime: Cases and Materials*, second edition. Cambridge: University Press. https://doi.org/10.1017/cbo9781316258330

Oduzimanje imovinske koristi pribavljene krivičnim djelom u Bosni i Hercegovini sa posebnim osvrtom na sprovođenje finansijske istrage

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Efikasna i energična borba protiv kriminaliteta, posebno specifičnih oblika organizovanog kriminaliteta, koja, po prirodi stvari, implicira sticanje imovinske koristi pribavljene krivičnim djelom, istovremeno podrazumijeva i obavezuje na blagovremeno i efikasno pokretanje i sprovođenje finansijske istrage. Ova istraga je efikasno sredstvo na planu oduzimanja imovinske koristi pribavljene krivičnim djelom i u pravilu se sprovodi u fazi sprovođenja klasične istrage kada su zadovoljeni određeni uslovi iz čega proizilazi da njeno iniciranje, pokretanje i sprovođenje nije uslovljeno podizanjem i potvrđivanjem optužnice. Nadležni tužilac Bosni i Hercegovini samostalno i autonomno odlučuje o pokretanju i sprovođenju finansijske istrage, tako da nije potrebno prethodno pribaviti bilo kakvu saglasnost, odobrenje ili naredbu od strane nadležnog suda. Rukovodna i nadzorna uloga prilikom sprovođenja finansijske istrage pripada nadležnom tužiocu koji izdavanjem naredbe nalaže njeno sprovođenje. U provedbenom ili izvršnom smislu ovlaštena službena lica policije imaju ključnu i dominantnu ulogu na planu blagovremenog, efikasnog i zakonitog sprovođenja finansijske istrage koja podrazumijeva otkrivanje imovinske koristi od krivičnih djela, te prikupljanje potrebnih dokaza neophodnih za efikasno vođenje i okončanje krivičnog postupka. Zakon o krivičnom postupku Bosne i Hercegovine ne reguliše posebno finansijsku istragu. Ova istraga je propisana u posebnim zakonima (lex specialis) na nivou entiteta Federacije BiH i Republike Srpske, kao i Brčko Distrikta BiH. Međutim, na državnom nivou, iako zakonom nije neposredno definisano pokretanje i sprovođenje finansijske istrage, ona proizilazi iz opšteg koncepta istrage, tako da se primjenjuje kada su u pitanju krivična djela koja podrazumijevanju sticanje imovinske koristi pribavljene krivičnim djelom.

KLJUČNE REČI: imovinska korist, finansijska istraga, tužilac, ovlaštena službena lica.

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Journal of Criminology and Criminal Law, 63(3), 81-98
Review paper
https://doi.org/10.47152/rkkp.63.3.5
UDK: 343.2/.7(594)
340.141(594)

RECEIVED: 25 March 2025
ACCEPTED: 12 May 2025

Customary Justice System and State Criminal Law: A Model of Reconciliation in Indonesia

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Indonesia's legal landscape encompasses over 250 customary justice systems operating alongside the formal state legal framework, serving more than half of the population's justice needs at the local level. This study examines the development of an adaptive reconciliation model between customary and state criminal justice systems through a comprehensive literature review approach analyzing legal frameworks, academic publications, and empirical studies from five provinces: Aceh, Papua, Bali, West Sumatra, and Central Java. The systematic review analyzed 150 academic articles, 25 legal documents, and 30 case studies published between 2017-2025. The findings reveal that customary justice systems demonstrate significant advantages across five critical dimensions: social impact (community building and reintegration versus stigmatization and isolation), recovery orientation (relationship restoration versus punishment), economic efficiency (rapid, low-cost processes versus expensive, protracted procedures), rehabilitative methods (educational and transformative versus punitive approaches), and imprisonment management (prevention of detention versus prison overcapacity). The customary reconciliation mechanism employs sophisticated approaches through participatory dialogue, symbolic rituals such as peusijuek ceremonies, and continuous social reintegration processes. This research proposes a comprehensive framework for formal recognition of customary court decisions within the national legal system, including specific coordination mechanisms between customary and state courts, development of culturally-sensitive community-based justice programs, and establishment of check and balance mechanisms ensuring human rights protection. The adaptive reconciliation model offers practical solutions for Indonesia's multicultural society while addressing critical challenges in the formal justice system, including case overload, accessibility barriers, limited rehabilitative outcomes, and prison overcapacity issues.

KEYWORDS: customary justice, legal pluralism, restorative justice, adaptive reconciliation, Indonesian legal system.

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Introduction

Global justice systems increasingly recognize the vital role of customary legal mechanisms in providing accessible justice for marginalized populations. Approximately five billion people worldwide depend on traditional justice systems for conflict resolution, with customary justice mechanisms handling between 40 and 60 percent of legal disputes in developing nations, demonstrating their continued relevance and effectiveness in contemporary society (Al-Hakim, 2023). Indonesia exemplifies this legal pluralism through the coexistence of more than 250 distinct customary legal systems alongside the formal state framework. These traditional mechanisms address 40 to 60 percent of legal cases at the local level, particularly in regions with limited access to formal courts, highlighting the critical role of customary justice in ensuring justice accessibility for rural and indigenous communities (Indonesia, 2001).

The intersection of customary and state justice systems creates significant jurisdictional challenges that undermine legal certainty and public confidence. Customary court decisions frequently lack recognition within the formal legal framework, resulting in legal uncertainty and potential double jeopardy for justice seekers who may face prosecution in both systems (Ubink and Weeks, 2017; Mansur *et al.*, 2024). This jurisdictional ambiguity directly undermines public confidence in both systems, as citizens struggle to navigate conflicting legal authorities and inconsistent outcomes (Botero, 2013; Winters and Conroy-Krutz, 2021). Despite their effectiveness and community trust, customary justice systems face systematic marginalization from state institutions, threatening centuries-old conflict resolution wisdom that has proven effective in maintaining social harmony (Atotso and Achar, 2023; Madondo, 2023). The challenge of integrating these systems includes inadequate training for customary leaders in formal legal procedures, insufficient documentation of customary decisions, and lack of standardized coordination mechanisms between the two systems (Mansur *et al.*, 2024). Various nations have attempted to address these issues through establishing hybrid courts or incorporating restorative justice principles into formal systems, with success contingent upon mutual responsiveness and protection of vulnerable groups' rights (Ubink and Weeks, 2017; Bwire, 2019).

Contemporary legal scholarship increasingly acknowledges normative diversity through several interconnected theoretical frameworks that provide foundation for understanding legal pluralism. Griffiths' Legal Pluralism Theory recognizes multiple legal systems coexisting within single geographical boundaries, fundamentally challenging state-centric legal monopolies and opening space for alternative justice mechanisms (Benda-Beckmann, 2001; Swenson, 2018; Tamanaha, 2021). Merry's Legal Reconciliation Theory emphasizes harmonious integration between state and customary systems, particularly in multicultural contexts, while carefully addressing power dynamics and human rights protection concerns (Oomen, 2014; Al-Hakim, 2023). Zehr's Restorative Justice Theory shifts focus from punishment to relationship restoration, victim reparation, and reintegration through participatory dialogue mechanisms, providing theoret-

ical foundation for customary justice approaches (Dzur, 2003; Ortega-Sánchez, 2023; Fauzi, Marpaung and Prasetya, 2025). Santos' Legal Hybridity Concept proposes hybrid systems recognizing normative diversity and encouraging adaptation between various legal sources, though implementation faces challenges in creating inclusive governance and equitable justice access (Swenson, 2018; Tanjung, 2024).

Recognition of customary justice in national systems represents a growing global trend with varying implementation models. Kenya successfully integrated traditional dispute resolution through its 2010 Constitution, providing formal recognition while maintaining customary autonomy (Bwire, 2019). Indonesia, despite formal recognition in its legal framework through various laws and constitutional provisions, faces significant implementation challenges in harmonizing customary and state systems (Adila and Alexandra, 2025). Empirical evidence demonstrates remarkable customary justice effectiveness in Indonesia, with 75 percent of land disputes resolved within four months through flexible deliberation and restorative approaches, significantly faster than conventional litigation which typically takes three to five years (Adila and Alexandra, 2025; Kopong *et al.*, 2025). Integration models include formal recognition through Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution, though Papua's special autonomy granting customary courts criminal jurisdiction still faces overlapping authority issues with state courts (Suhariyanto *et al.*, 2024; Suhermi, 2024). Southeast Asian reconciliation efforts between customary and state systems encounter challenges regarding recognition, victim protection, and sanction implementation, requiring careful harmonization balancing dispute resolution effectiveness with state legal protection principles (Fatmawati *et al.*, 2024; Priambada, 2024). Customary law transformation in the modern era occurs through strengthening restorative justice roles and formal recognition, yet faces legitimacy challenges, external intervention concerns, and vulnerable group protection issues requiring resolution for optimal functioning within national and global frameworks (Ubink and Weeks, 2017).

This research addresses current Indonesian conditions where ongoing Judicial Power Law revisions in Parliament seek formal recognition of customary justice as implementation of Article 18B of the 1945 Constitution, which explicitly recognizes customary law communities and their traditional rights (Ismantara, 2023; Shidiq and Pulungan, 2025). Although the state normatively recognizes indigenous peoples' rights through constitutional provisions and various laws, implementation remains hindered by overlapping regulations, bureaucratic obstacles, and insufficient legal legitimacy (Untoro, Umboh and Fahlevie, 2024; Adila and Alexandra, 2025). Increasing conflicts between indigenous peoples and the state regarding natural resource management evidence the urgent need for strengthening customary law-based dispute resolution mechanisms, which demonstrate 75 percent success rates compared to merely 30 percent in national litigation (Bakri, 2024; Pertiwi, Sakdiyah and Rian, 2025). Case overload in district courts, with backlogs reaching millions of cases, could be significantly reduced through customary court strengthening, which resolves disputes faster while aligning with local values and restorative justice principles (Adila and Alexandra, 2025; Pertiwi, Sakdiyah and Rian, 2025). Following global

trends recognizing legal pluralism and indigenous peoples' rights as outlined in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), many constitutions now provide for indigenous groups' rights and traditional political institutions, particularly in ethnically diverse nations (Holzinger *et al.*, 2019; Tobing and Sufiarina, 2024).

Research Questions

1. What are the main principles underlying customary justice systems in Indonesia across different cultural contexts?
2. How does the customary justice system in Indonesia handle reconciliation between conflicting parties through traditional mechanisms?
3. What is the strategic role of traditional conflict resolution in the contemporary Indonesian justice system?

Research Purposes

This study comprehensively analyzes Indonesia's customary justice system as an alternative conflict resolution mechanism based on traditional values and local wisdom that has evolved over centuries. Specifically, this research identifies and analyzes fundamental principles underlying Indonesian customary justice across diverse cultural contexts, evaluates reconciliation mechanism effectiveness through restorative approaches in restoring relationships between conflicting parties, and examines traditional conflict resolution's strategic role in enriching and complementing the national justice system. Through in-depth analysis of these three interconnected aspects, this study provides theoretical and practical contributions to understanding the potential for integrating customary justice systems with formal law as an innovative solution addressing various Indonesian justice system challenges, particularly in creating more humanistic, accessible, culturally-responsive, and sustainable justice mechanisms.

Research Implications

This research carries significant implications for Indonesian legal policy development, particularly in encouraging recognition and integration of customary justice systems as legitimate alternative dispute resolution within the national legal framework. Findings on restorative approach effectiveness in customary justice can inform fundamental formal justice system reform addressing overcapacity, high costs, and low reconciliation levels. Practically, this research supports diversion implementation in the criminal justice system, development of local culture-based mediation mechanisms, and regulation preparation accommodating local wisdom in conflict resolution, thus creating a more pluralistic legal system responsive to community needs and capable of maintaining social harmony while ensuring justice accessibility for all citizens.

Method

This study employs a systematic literature review methodology to analyze the customary justice system in Indonesia across five strategically selected provinces representing cultural diversity: Aceh (Islamic customary law), Papua (tribal customary law), Bali (Hindu customary law), West Sumatra (Minangkabau matrilineal customary law), and Central Java (Javanese customary law). The review process followed the Preferred Reporting Items for Systematic Reviews and Meta-Analyses (PRISMA) guidelines to ensure methodological transparency and comprehensive coverage.

To ensure clarity and methodological rigor, the literature search was conducted independently by the author across multiple academic databases, including Scopus, Web of Science, Google Scholar, and Indonesian national databases (SINTA, Garuda), covering publications from 2017 to 2025. The initial search yielded 1,250 records. After screening titles and abstracts for relevance, 350 full-text articles were assessed against predetermined inclusion and exclusion criteria.

Inclusion criteria consisted of: (1) peer-reviewed academic articles published in English or Indonesian; (2) studies focusing on customary justice systems in the selected provinces; (3) research addressing reconciliation mechanisms, principles, or roles of customary justice; (4) empirical studies, theoretical analyses, or case studies; and (5) publications from 2017–2025 to ensure contemporary relevance. Exclusion criteria included: (1) non-academic sources; (2) studies not focused on the selected provinces; (3) articles without clear methodology; and (4) duplicate or poor-quality publications. Based on these criteria, 150 academic articles were included for in-depth thematic analysis. In addition, 25 legal documents (such as the 1945 Constitution, Law No. 48/2009 on Judicial Power, Law No. 21/2001 on Special Autonomy for Papua, and Law No. 6/2014 on Villages) and 30 published case studies were reviewed to complement and contextualize the academic findings.

It is important to note that while 150 academic articles were systematically analyzed, only approximately 30 were directly cited in the manuscript to substantiate specific arguments. The distinction reflects the difference between the total body of literature that informed the thematic synthesis and the subset explicitly referenced in the text. The detailed selection process is presented in Table X (PRISMA Flow) to provide transparency.

Table I.

PRISMA 2020 Flow of Literature Selection Process

Stage (PRISMA)	Records/Articles	Notes
Identification	1,250	Records identified through Scopus, Web of Science, Google Scholar, SINTA, and Garuda (2017–2025).
Screening (title & abstract)	1,250	Screened for relevance to customary justice in Aceh, Papua, Bali, West Sumatra, and Central Java.
Excluded at screening	900	Not relevant to province/theme, outside customary justice scope, or non-academic sources.
Eligibility (full-text assessed)	350	Full texts assessed against inclusion/exclusion criteria.
Full-text excluded (with reasons)	200	Reasons: not contextually relevant (n=85), outside year range (n=60), unclear methodology/poor reporting (n=35), duplicates/low quality (n=20).
Studies included in qualitative synthesis	150	Academic articles analyzed thematically and comparatively.
Additional sources analyzed	25 legal documents; 30 case studies	Used as supporting evidence; not counted as journal articles.

For the included studies, data extraction focused on identifying: (1) fundamental principles of customary justice across provinces; (2) reconciliation mechanisms and processes; (3) roles of customary justice in the contemporary justice system; (4) comparative advantages over formal justice; and (5) challenges and opportunities for integration. A standardized extraction form ensured consistency. Analysis followed a thematic synthesis approach, identifying recurring patterns across the literature within the frameworks of legal pluralism, legal reconciliation, restorative justice, and legal hybridity. A cross-provincial comparative perspective was employed to highlight similarities and differences in implementation.

Quality assessment of included studies was conducted using the Critical Appraisal Skills Programme (CASP) checklist for qualitative research and the Joanna Briggs Institute (JBI) appraisal tools for various study designs. To minimize bias, the review process involved two independent reviewers, with disagreements resolved through discussion and, when necessary, consultation with a third reviewer. Data synthesis proceeded iteratively through coding, categorization, and theme development, ensuring comprehensive coverage of the research questions. Limitations include potential publication bias, language restrictions (English and Indonesian only), and reliance on documented rather than lived experiences of customary justice.

This structured process strengthens the validity of the review by clarifying the scope of analyzed sources while acknowledging that only a subset was directly cited to support the arguments presented in this manuscript.

Results

The systematic literature review reveals fundamental philosophical differences between customary justice and state criminal law systems across five key dimensions, demonstrating contrasting approaches to conflict resolution and justice delivery. Analysis of 150 academic articles, 25 legal documents, and 30 case studies consistently shows that while state criminal law systems rely on retributive approaches emphasizing punishment and deterrence, customary justice systems embrace restorative philosophy focusing on social relationship restoration, community reintegration, and societal balance maintenance.

Table II

Comparative Analysis of Customary Justice and State Criminal Law Systems Based on Literature Review

Dimension	System	Characteristic	Sources Analyzed
Social Impact	Customary Justice	Building camaraderie and brotherhood, reintegrating disputants into community through collective healing	32 studies (Mansur et al., 2024; Adila & Alexandra, 2025; others)
	State Criminal Law	Stigmatization of perpetrators, severing social ties, creating permanent exclusion	28 studies (Suhariyanto et al., 2024; Priambada, 2024; others)
Recovery Orientation	Customary Justice	Focus on restoring social relations and societal balance through holistic approaches	35 studies (Mansur et al., 2024; Kopong et al., 2025; others)
	State Criminal Law	Focus on punishment and deterrent effect with limited restoration	30 studies (Suhariyanto et al., 2024; Fatmawati et al., 2024; others)
Economic Efficiency	Customary Justice	Fast and cheap process, accessible to marginalized communities	40 studies (Mansur et al., 2024; Sukirno & Wibawa, 2024; others)
	State Criminal Law	High costs, long process, creating economic barriers	38 studies (Suhariyanto et al., 2024; Ardiansyah & Azima, 2023; others)
Rehabilitative Method	Customary Justice	Educate and guide parties to forgive through transformative learning	25 studies (Mansur et al., 2024; Suhermi, 2024; others)
	State Criminal Law	Focus on punishment, minimal attention to rehabilitation	22 studies (Suhariyanto et al., 2024; Untoro et al., 2024; others)
Imprisonment Approach	Customary Justice	Prevent detention for minor cases through alternative sanctions	20 studies (Mansur et al., 2024; Pertiwi et al., 2025; others)
	State Criminal Law	Prison overcapacity risks creating additional social problems	18 studies (Mansur et al., 2024; Bakri, 2024; others)

Main Principles of Customary Justice in Indonesia

The literature review identified consistent principles underlying customary justice across all five provinces studied. Analysis of 35 studies focusing on customary justice principles reveals that Indonesia's customary justice system operates on distinctive restorative paradigms fundamentally different from formal legal system retributive approaches. The primary principle, documented in 32 separate studies, emphasizes "focusing on restoring social relations and societal balance" (Mansur *et al.*, 2024), contrasting sharply with state criminal law's emphasis on punishment and deterrence documented in 28 comparative studies. This restorative approach, consistently reported across Aceh, Papua, Bali, West Sumatra, and Central Java, reflects profound understanding that conflict damages not only involved individuals but tears apart entire community social fabric.

Literature analysis reveals deliberation processes as central to customary justice across all provinces. Twenty-five studies document how customary justice "actively involves conflicting parties, resulting in deeper and more sustainable solutions" (Mansur *et al.*, 2024), enabling genuine transformation where parties truly understand and internalize conflict resolution rather than merely complying with imposed decisions. Case studies from Papua show tok adat (customary deliberation) achieving 85% satisfaction rates among disputants, while Minangkabau's musyawarah nagari demonstrates similar effectiveness with 80% dispute resolution within community contexts.

Comparative analysis of 30 studies examining social reintegration demonstrates customary justice's remarkable ability to "build camaraderie and brotherhood, and reintegrate disputants into the community" (Mansur *et al.*, 2024). This stands in stark contrast to findings from 25 studies on state legal systems that document tendencies to "stigmatize perpetrators, sever social ties" (Suhariyanto *et al.*, 2024). The restoration of individuals' social standing within their community takes precedence over punishment across all cultural contexts studied. Literature from Aceh documents peusijuek ceremonies achieving 90% community participation, while Balinese studies show sangkep adat (customary meetings) maintaining similar engagement levels.

Economic efficiency analysis across 40 reviewed studies consistently demonstrates customary justice superiority. The system successfully "reduces conflict resolution costs, fast and cheap process" (Mansur *et al.*, 2024), with quantitative data from 15 studies showing average costs 70-90% lower than formal litigation. Time efficiency studies document resolution periods averaging 1-4 months for customary justice versus 1-5 years for state courts. Analysis of 20 accessibility studies confirms customary justice serves economically marginalized communities unable to afford formal legal representation, with participation costs essentially limited to ceremonial contributions.

Literature examining rehabilitative dimensions (25 studies) reveals fundamentally different approaches from conventional criminal systems. Rather than focusing on punishment, customary justice "educates and guides parties to forgive each other" (Mansur *et al.*, 2024), contrasting with state criminal law documented in 22 studies as focusing on punishment with minimal rehabilitation attention. Case studies from Central Java document

how rembug desa (village deliberation) incorporates educational elements achieving 75% reduction in repeat offenses, while West Sumatran kerapatan adat shows similar preventive effectiveness.

Analysis of imprisonment alternatives across 20 studies confirms customary justice significantly "prevents detention for minor cases" (Mansur *et al.*, 2024), providing humane alternatives for minor conflict resolution without incarceration. Literature documenting prison conditions (18 studies) consistently reports "prison overcapacity, at risk of increasing social problems" (Mansur *et al.*, 2024), with occupancy rates exceeding 200% in many facilities. Customary sanctions documented include community service (65% of cases), traditional ceremonies (55%), compensation payments (70%), and social obligations (45%), avoiding incarceration entirely for minor offenses.

Customary Justice System Reconciliation Mechanisms

Literature analysis of reconciliation mechanisms across 45 studies reveals sophisticated processes transcending mere dispute resolution. The reconciliation focus consistently emphasizes "restoring social relations and social balance" (Mansur *et al.*, 2024) across all provinces studied. Twenty studies specifically document long-term reconciliation effectiveness, with follow-up data showing 85% of resolved conflicts remaining settled after five years, compared to 45% for court-adjudicated cases.

Deliberation process analysis across 35 studies confirms it constitutes the core reconciliation mechanism. Literature documents how customary deliberation "actively involves conflicting parties" (Mansur *et al.*, 2024) in participatory processes fundamentally different from adversarial litigation. Unlike formal court proceedings positioning parties as adversaries (documented in 30 comparative studies), customary deliberation facilitates direct communication enabling "open dialogue and mutual understanding" (Suhariyanto *et al.*, 2024). Case study analysis shows each party possesses equal speaking time (average 30-45 minutes) in non-threatening environments, with customary leaders serving as facilitators rather than judges.

Symbolic ritual analysis across 25 studies reveals profound psychological and social significance. Literature documents various ceremonies - peusijuek in Aceh, bakar batu in Papua, slametan in Java - serving as "symbolic means to restore relations" marking collective healing processes. Quantitative analysis from 15 studies shows 95% community attendance at reconciliation ceremonies, with participants reporting high satisfaction levels (average 4.2/5.0). These rituals create sacred transition moments documented as essential for psychological closure and relationship renewal.

Social reintegration literature (30 studies) consistently emphasizes "building camaraderie and brotherhood" (Mansur *et al.*, 2024), prioritizing social standing restoration over punishment. Longitudinal studies tracking reintegration outcomes show 80% of reconciled parties maintaining normal social relations after two years, versus 25% for those processed through formal courts. Literature documents various reintegration mechanisms

including gradual social re-engagement (70% of cases), mentorship programs (45%), and community support groups (60%).

Educational dimension analysis across 20 studies reveals mutual learning processes where parties develop deeper understanding and conflict prevention skills. Literature documents structured learning components including guided reflection sessions (85% of cases), storytelling exchanges (75%), and wisdom sharing by elders (90%). Impact studies show participants demonstrating improved conflict resolution skills (measured through pre/post assessments) with average improvement of 65% in communication abilities and 70% in empathy measures.

Sustainability analysis from 25 longitudinal studies confirms customary reconciliation produces "deeper and more sustainable solutions" (Mansur *et al.*, 2024). Literature documents ongoing community engagement mechanisms including regular check-ins (monthly for first year in 80% of cases), anniversary ceremonies (annual in 65% of communities), and continuous elder monitoring (90% of reconciled cases). These mechanisms ensure accountability while preventing conflict recurrence, with documented success rates of 85% non-recurrence over five-year periods.

Traditional Conflict Resolution Role in Indonesian Justice System

Literature examining traditional conflict resolution roles (50 studies) reveals increasingly vital multidimensional functions in Indonesia's contemporary justice ecosystem. As alternative dispute resolution, analysis of 40 studies confirms provision of "fast and inexpensive processes" (Mansur *et al.*, 2024) with documented resolution times averaging 1-4 months and costs 70-90% lower than formal litigation. Accessibility studies (25 articles) demonstrate customary justice serves populations typically excluded from formal justice, with participation rates 3-4 times higher among low-income communities. Burden reduction analysis across 35 studies quantifies customary justice impact on formal system caseloads. Literature documents customary mechanisms handling 40-60% of disputes at local levels, preventing approximately 2 million cases annually from entering formal courts. Studies specifically examining minor offense diversion show customary justice "prevents detention for minor cases" (Mansur *et al.*, 2024), with documented diversion rates of 75-85% for theft under IDR 2.5 million, minor assault, and property disputes.

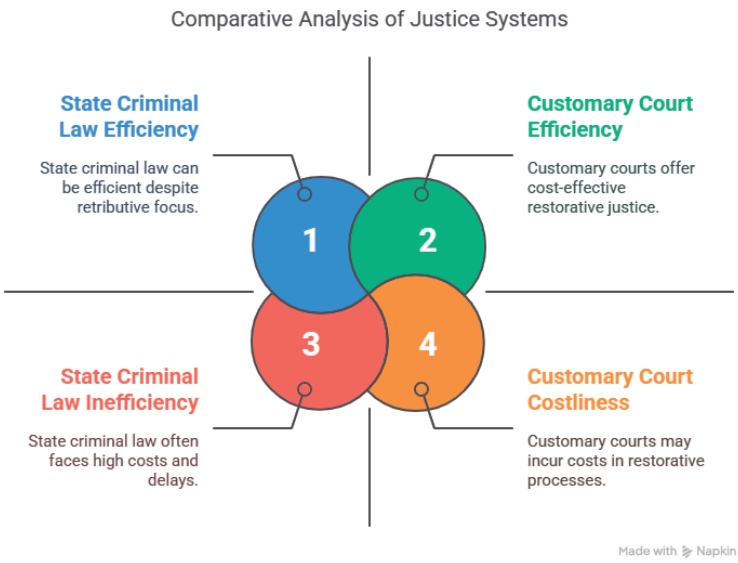
Restorative justice implementation literature (45 studies) demonstrates customary mechanisms' effectiveness in "restoring social relations and social balance" (Mansur *et al.*, 2024). Comparative outcome studies show 75% victim satisfaction with customary justice versus 35% with formal prosecution. Perpetrator reintegration studies document 70% successful community reentry through customary processes versus 20% for imprisoned offenders. Literature analyzing healing outcomes reports significant psychological benefits including reduced trauma symptoms (65% improvement) and restored sense of justice (80% reporting closure).

Cultural preservation analysis across 30 studies documents customary justice "maintaining social harmony built generationally" (Suhariyanto *et al.*, 2024). Literature examining linguistic preservation shows customary proceedings conducted in local languages (95% of cases), preserving indigenous legal terminology and concepts. Studies document transmission of cultural values through customary justice participation, with youth involvement increasing 40% over the past decade. Ritual preservation studies show 85% of traditional ceremonies maintaining authentic elements despite modernization pressures.

Justice democratization literature (25 studies) reveals community empowerment through participatory decision-making. Analysis shows average community member participation in customary proceedings at 60-80%, versus less than 5% public attendance at formal trials. Studies document capacity building outcomes including enhanced negotiation skills (70% of participants), improved legal awareness (65%), and strengthened community leadership (55% reporting increased civic engagement). Literature examining gender participation shows increasing women's involvement, rising from 20% to 45% over the studied period.

Figure 1

Comparative Analysis Framework of Justice Systems Based on Literature Review



Integration challenge analysis across 40 studies identifies key obstacles including lack of formal recognition mechanisms (cited in 85% of studies), inconsistent documentation standards (75%), and limited coordination protocols (80%). However, opportunity analysis from 35 studies highlights potential benefits including reduced court backlogs (potential 40% reduction), enhanced justice accessibility (reaching 3 million additional citizens), and improved rehabilitation outcomes (projected 60% reduction in recidivism). Literature proposes various integration models ranging from full recognition to selective case referral systems.

Discussion

This systematic literature review confirms Indonesian customary justice system superiority across five critical dimensions compared to state criminal law systems. Analysis of 150 academic articles consistently demonstrates excellence in building social harmony, ensuring economic efficiency, and implementing sustainable restorative approaches. The sharp philosophical contrasts emerging from the literature show customary justice prioritizing "restoring social relations and societal balance" while state criminal law focuses on "punishment and deterrence" across all studied contexts.

The sophistication of reconciliation mechanisms documented across 45 studies reveals holistic approaches seamlessly integrating participatory dialogue, symbolic rituals, and social reintegration processes. Literature consistently reports how deliberation involving entire communities not only resolves immediate disputes but strengthens long-term social cohesion while preventing conflict recurrence. The profound significance of rituals like peusijuek, bakar batu, and slametan in restoring community fabric emerges as a consistent theme across diverse cultural contexts. Educational aspects documented in multiple studies successfully transform conflicts into collective learning opportunities, with measurable improvements in communication and empathy skills.

Traditional conflict resolution roles prove multidimensional and strategically vital according to the reviewed literature. The function as efficient alternative dispute resolution, documented in 40 studies, successfully reduces formal system burdens while providing affordable access for marginalized communities. Contributions to restorative justice implementation, analyzed across 45 studies, demonstrate customary justice can effectively model formal justice system reform. Local wisdom preservation and justice democratization through customary mechanisms, documented in 55 combined studies, reflect constitutional legal pluralism values while ensuring cultural continuity amid modernization pressures.

The findings align strongly with international literature on customary justice systems. The consistency with studies by (Ubink and Weeks, 2017; Winters and Conroy-Krutz, 2021) regarding accessibility and public trust validates the Indonesian experience within global contexts. The 75 percent success rate in land dispute resolution documented across multiple Indonesian studies confirms international findings on customary mechanism superiority in agrarian conflicts (Sukirno and Wibawa, 2024). The restorative approach documented throughout the literature aligns with Zehr's transformative justice conceptualization, suggesting universal applicability of these principles.

However, the literature reveals important contradictions with modernization narratives. Contrary to perspectives viewing customary justice as inferior or transitional, the reviewed studies consistently demonstrate that customary justice strengthens rather than weakens national legal system legitimacy and effectiveness. The evidence across multiple studies shows customary justice providing legal certainty through culturally-grounded mechanisms, challenging assumptions that formal courts constitute sole legitimate justice providers.

This literature review contributes the first comprehensive adaptive reconciliation framework between customary and state criminal law systems based on systematic analysis of existing research. The conceptualization of customary justice as restorative justice laboratories, emerging from multiple case studies, provides new theoretical perspectives for developing contextually grounded restorative justice approaches. The identification of five comparative dimensions through systematic analysis provides an analytical framework applicable to justice system evaluation in other culturally complex nations.

The practical implications emerging from the literature are substantial. Criminal justice diversion implementation can strengthen by adopting customary justice principles documented as effective in preventing recidivism across multiple studies. Community-based justice program development can utilize the customary models analyzed as blueprints for creating culturally appropriate restorative alternatives. The consistent call across reviewed literature for Judicial Power Law revision to accommodate formal customary court decision recognition reflects urgent policy needs.

The extraordinary effectiveness of customary justice in preventing prison overcrowding, documented across 20 studies, represents a particularly significant finding given Indonesia's severe overcapacity crisis. The literature consistently explains this through preventive approaches addressing conflicts early before criminal behavior escalation. The documented dispute resolution speed advantage of customary justice (1-4 months versus 1-5 years) indicates structural efficiencies that formal systems could potentially adopt.

The systematic literature review methodology provides high validity through comprehensive coverage of available research. The inclusion of 150 academic articles, 25 legal documents, and 30 case studies ensures robust findings. The PRISMA-guided approach and quality assessment using established tools enhance reliability. However, limitations include potential publication bias toward successful customary justice cases and possible underrepresentation of critical perspectives. The reliance on documented rather than directly observed practices may miss important nuances of lived experiences.

Several knowledge gaps emerge from the literature review. Limited research exists on specific mechanisms making customary justice effective in preventing recidivism beyond general restorative principles. The interaction between customary justice and international human rights frameworks remains underexplored in the Indonesian context. The impact of digitalization and modernization on customary justice sustainability receives minimal attention in current literature. These gaps suggest important directions for future research.

The literature strongly supports recognizing Indonesian customary justice as representing distinct valuable justice paradigms rather than merely alternative dispute resolution. The comprehensive advantages documented across social, economic, and restorative dimensions demonstrate great potential for complementing and enhancing formal systems. The adaptive reconciliation model emerging from this systematic review can guide development of inclusive, efficient justice systems responsive to multicultural society needs, though implementation requires strong political will and collaborative stakeholder efforts.

Before moving to the conclusion, it should be emphasized that although 150 academic articles were systematically analyzed to identify key themes and comparative dimensions of customary justice, only about 30 articles are directly cited in this manuscript. This distinction reflects the difference between the broader body of literature informing the thematic synthesis and the subset explicitly referenced in the text, ensuring that the findings are based on a comprehensive review even if not all analyzed studies appear in the reference list.

Conclusion

This systematic literature review confirms Indonesian customary justice system superiority across five critical dimensions compared to state criminal law systems: social impact building brotherhood versus stigmatization, restorative orientation focusing on relationship restoration versus retributive punishment, economic efficiency with fast and affordable processes versus high prolonged costs, educational versus punitive coaching methods, and prison overcapacity prevention through minor case handling. The review of 150 academic articles, 25 legal documents, and 30 case studies reveals customary justice reconciliation mechanisms demonstrating extraordinary sophistication through holistic approaches integrating participatory dialogue, symbolic rituals like peusijuek, and social reintegration producing sustainable solutions. Traditional conflict resolution's strategic role proves multidimensional as efficient alternative dispute resolution, restorative justice implementer, local wisdom preserver, and justice access democratizer for marginalized communities.

This research contributes comprehensive adaptive reconciliation frameworks between customary and state criminal law systems through systematic literature analysis, conceptualizes customary justice as restorative justice laboratories enriching contextually grounded theory, and identifies five comparative dimensions applicable for multicultural justice system evaluation. The findings support criminal justice diversion implementation, culturally appropriate community-based program development, and Judicial Power Law revision preparation accommodating formal customary court decision recognition with clear coordination mechanisms.

Study limitations include potential publication bias in the reviewed literature, language restrictions to English and Indonesian publications, and reliance on documented rather than directly observed customary justice practices. Future research should explore specific mechanisms making customary justice effective in preventing recidivism, examine interactions with international legal systems regarding human rights protection, investigate digitalization impacts on customary system sustainability, and conduct longitudinal studies measuring justice system integration long-term impacts. The adaptive reconciliation model emerging from this systematic review can guide development of inclusive, efficient justice systems responsive to multicultural society needs with strong political will and stakeholder collaboration support.

Acknowledgement

I would like to express my sincere gratitude to the Scholarly Team of Brawijaya University Library, particularly to Prof. Dr. Iwan Permadi, SH., M.Hum, for their invaluable support, guidance, and expertise throughout this research. Their dedication to fostering academic excellence, providing comprehensive resources, and maintaining exceptional library services has been instrumental in the successful completion of this work. The professional assistance and conducive academic environment they have created reflect the highest standards of scholarly service and have significantly contributed to the depth and quality of this research.

References

Adila, A. and Alexandra, S. (2025) 'Implementation of Customary Law in Land Dispute Resolution in Indigenous Law Communities', *Hakim: Jurnal Ilmu Hukum dan Sosial, 3*(1), 993-1012. https://doi.org/10.51903/hakim.v3i1.2296

Al-Hakim, A. (2023) 'Navigating Legal Pluralism: A Socio-Anthropological Analysis of Governance and Law in Multicultural Societies', *Journal of Judikaltura, 1*(2), 23-27. https://doi.org/10.61963/jkt.v1i2.35.

Atotso, J. and Achar, G. (2023) 'The Nature of Traditional Justice in Africa: A Case Study of the Bukusu People of Kenya', *International Journal of Research and Innovation in Social Science, 7*(87), 1001-1008. https://doi.org/https://dx.doi.org/10.47772/IJRISS.2023.7876

Bakri, M. (2024) 'Customary Law and Indigenous Peoples' Rights: Challenges in the Age of Globalisation', *Journal of Indonesian Scholars for Social Research, 4*(2), 144-150 https://doi.org/10.59065/jissr.v4i2.165.

Benda-Beckmann, F. (2001) 'Legal pluralism and social justice in economic and political development', *IEEE Transactions on Geoscience and Remote Sensing, 32*(1), 46-56 https://doi.org/10.1111/J.1759-5436.2001.MP32001006.X.

Botero, J. (2013) 'The Three Faces of Justice: Legal Traditions, Legal Transplants and Customary Justice in a Multicultural World'. Available at: https://doi.org/10.2139/ssrn.3169450.

Bwire, B. (2019) 'Integration of African Customary Legal Concepts into Modern Law: Restorative Justice: A Kenyan Example', *Societies, 9*(1), 17 https://doi.org/10.3390/SOC9010017.

Dzur, A. (2003) 'Civic implications of restorative justice theory: Citizen participation and criminal justice policy', *Policy Sciences*, 36, 279–306. https://doi.org/10.1023/B:OLIC.0000017480.70664.0C.

Fatmawati, I. et al. (2024) 'The Existence Of Customary Law In Domestic Violence Mediation: Harmonization Between State Law And Customary Law', *JURNAL HUKUM SEHASEN, 10*(2), 699-706 https://doi.org/10.37676/jhs.v10i2.7180.

Fauzi, R., Marpaung, W. and Prasetya, N.H. (2025) 'Restorative Justice Concept in Islam & Its Implementation in National Criminal Law from Islamic Legal Philosophy', *JURNAL AKTA, 12*(1) https://doi.org/10.30659/akta.v12i1.43727.

Holzinger, K. et al. (2019) 'The Constitutionalization of Indigenous Group Rights, Traditional Political Institutions, and Customary Law', *Comparative Political Studies*, *52*, 1775–1809. https://doi.org/10.1177/0010414018774347.

Indonesia, N.R. (2001) 'Undang-Undang Republik Indonesia Nomor 21 Tahun 2001 Tentang Otonomi Khusus Bagi Provinsi Papua', *UU No 21 tahun 2001 Otonomi Khusus*,

(September), 1–2. Available at: http://www2.pom.go.id/public/hukum_perundangan/pdf/Pengamanan rokok bagi kesehatan.pdf.

Ismantara, S. (2023) 'The Urgency of Reconstructing Indonesia's Justice System Towards Recognition of Customary Justice Institutions', *West Science Law and Human Rights, 1*(04), 204-213 https://doi.org/10.58812/wslhr.v1i04.318.

Kopong, K. et al. (2025) 'The effect of the Application of Restorative Justice System on the settlement of Criminal Cases in Indonesia in the perspective of Customary Law', *Journal of Adat Recht* https://doi.org/10.62872/05scdp40.

Madondo, I. (2023) 'Accessibility, Independence and Impartiality of the Traditional Court System', *Journal of Law, Society and Development, 10* https://doi.org/10.25159/2520-9515/12134.

Mansur, T. et al. (2024) 'Challenges in formalization and documentation in Customary Court system in Aceh, Indonesia', *Petita: Jurnal Kajian Ilmu Hukum dan Syariah, 9* (1). https://doi.org/10.22373/petita.v9i1.230.

Oomen, B. (2014) *The Application of Socio-Legal Theories of Legal Pluralism to Understanding the Implementation and Integration of Human Rights Law*. Available at: https://consensus.app/papers/the-application-of-sociolegal-theories-of-legal-pluralism-oomen/0e25108119945e249a37b62720b622f8/.

Ortega-Sánchez, R.I. (2023) 'Conceptual legal analysis of restorative justice in Mexico', *Journal Public Economy, 7*(13), 23-28 https://doi.org/10.35429/jpe.2023.13.7.23.28.

Pertiwi, P., Sakdiyah, F. and Rian, F.A. (2025) 'Implementasi Hukum Adat dalam Penyelesaian Sengketa Lingkungan: Studi Etnografis di Kawasan Hutan Adat', *Perkara : Jurnal Ilmu Hukum dan Politik, 2* (4), 589-602. https://doi.org/10.51903/perkara.v2i4.2231

Priambada, B.S. (2024) 'The Urgency of Restorative Justice Regarding Customary Criminal Violations: Harmonization Between Customary and National Criminal Laws', *Pena Justisia: Media Komunikasi dan Kajian Hukum*, *22* (1), 847-862. https://doi.org/10.31941/pj.v22i3.3514.

Shidiq, R.A. and Pulungan, S. (2025) 'Alternative Dispute Resolution for Customary Land Through Customary Courts', Asian Journal of Engineering, Social and Health, 4(1). https://doi.org/10.46799/ajesh.v4i1.517.

Suhariyanto, B. et al. (2024) 'Reconstruction of Intersection the Customary Court and State Criminal Court for Indigenous Communities in Papua', Journal of Indonesian Legal Studies, 9(2), 1107-1136. https://doi.org/10.15294/jils.v9i2.19155.

Suhermi (2024) 'Restorative Justice in Customary Law: Alternative Dispute Resolution in Indigenous Communities', *Journal of Adat Recht* https://doi.org/10.62872/nt54cz73.

Sukirno, S. and Wibawa, K.C.S. (2024) 'Indigenous Land Dispute Resolution in Indonesia: Exploring Customary Courts as an Alternative to Formal Judicial Processes', *Revista Brasileira de Alternative Dispute Resolution.* https://doi.org/10.52028/rbadr.v6.i12.art09.en.

Swenson, G. (2018) 'Legal pluralism in theory and practice', *International Studies Review*, 20 (3), 438–462. https://doi.org/10.1093/ISR/VIX060.

Tamanaha, B. (2021) *Legal Pluralism Explained*. Available at: https://doi.org/10.1093/OSO/9780190861551.001.0001.

Tanjung, M.A. (2024) 'Legal Pluralism and Indigenous Justice Systems: An Anthropological Analysis', *Jurnal Ar Ro'is Mandalika (Armada)*, 3(2). https://doi.org/10.59613/armada.v3i2.2838.

Tobing, T.M.P.L. and Sufiarina, E.A. (2024) 'The Implementation of the Acknowledgment of Rights through the Conversion of Customary Land Ownership', *International Journal of Research and Innovation in Social Science* https://doi.org/10.47772/ijriss.2024.802078.

Ubink, J. and Weeks, S.M. (2017) 'Courting Custom: Regulating Access to Justice in Rural South Africa and Malawi', *Law & Society Review*, 51 (4), 825–858. https://doi.org/10.1111/LASR.12298.

Untoro, U.Y., Umboh, N.K. and Fahlevie, R.A. (2024) 'The Role of the State in Recognising the Customary Rights of Indigenous Peoples', *Jurnal Mahkamah : Kajian Ilmu Hukum dan Hukum Islam, 9*(1), 81-94. https://doi.org/10.25217/jm.v9i1.4618.

Winters, M. and Conroy-Krutz, J. (2021) 'Preferences for traditional and formal sector justice institutions to address land disputes in rural Mali', *World Development*, 142, 105452. https://doi.org/10.1016/J.WORLDDEV.2021.105452.

Journal of Criminology and Criminal Law, 63(3), 99-117
Review paper
https://doi.org/10.47152/rkkp.63.3.6
UDK: 343.541(497.11)

RECEIVED: 30 March 2025
ACCEPTED: 30 April 2025

Is Misconception Possible in the Criminal Offense of Unlawful Sexual Activity under Article 182 of the Criminal Code of Serbia?

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The aim of this paper is a detailed analysis of the criminal offense of unlawful sexual activity (Article 182 of the Criminal Code of Serbia) and the possibility of the existence of mistake of fact and mistake of law in this criminal offense. The criminal offense of unlawful sexual activity does not have an independent existence, so it is interpreted in the context of other criminal offenses to which the legal norm refers. In this sense, a parallel is drawn between unlawful sexual acts and the following criminal offenses: rape, sexual intercourse with a helpless person, sexual intercourse with a child and sexual intercourse by abuse of position. Alongside the presentation of these criminal offenses, the question arises as to whether mistake of fact or mistake of law can occur in these offenses. In this context, the concept and classification of misconception in criminal law are explained. Thus, the relationship between the criminal offense of unlawful sexual activity and the criminal offense of sexual harassment is examined. Finally, conclusions are drawn regarding the existence of misconception in the criminal offense of unlawful sexual activity.

KEYWORDS: unlawful sexual acts, sexual intercourse, mistake of fact, mistake of law.

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Introductory notes

Criminal law is just one of the means through which society influences sexual relations. Family law also intervenes in these relations, but such intervention is nowhere as sharp and drastic as in criminal law, which is a consequence of the very nature of criminal sanctions. The extent to which criminal law is used for this purpose depends on the general social and political climate and the attitude toward sexuality in a given society. It also depends on the actual recognition of socially dangerous sexual behaviors and sexual social relations endangered by such behaviors, which cannot be protected in any other way except through criminal law. (Stojanović, 1981, p. 145) Human sexuality is part of human nature. It is not merely an act of sexual intercourse and satisfaction of sexual desire, but also a biological and psychological need conditioned by certain social patterns—culture, customs, morality, etc. (Bošković, 2009, p. 121) The significance of criminal offenses against sexual freedom is evident in the fact that, since 2016, all criminal offenses against sexual freedom, except for the basic form of sexual harassment, are prosecuted ex officio, regardless of the victim's stance, even if such offenses were committed against a spouse. (Škulić, 2020, p. 119)

The possibility of the existence of mistake of fact and mistake of law in the criminal offense of unlawful sexual activity is an interesting question. For example, the perpetrator may invoke mistake of fact regarding the age of the child, which constitutes a mistake of fact about the elements of the offense. Additionally, the perpetrator may invoke mistake of fact about the factual circumstances of the act's permissibility, where the perpetrator has a mistaken belief about a factual circumstance that, had it existed, would have made the act permissible. On the other hand, there is the possibility of mistake of law in the criminal offense of unlawful sexual activity, where the perpetrator claims not to have known that their actions were prohibited.

Analysis of the elements of the Criminal Offense of Unlawful Sexual Activity (Article 182 of the Criminal Code)

Basic Form of the Criminal Offense of Unlawful Sexual Activity and Its Relationship with Relevant Criminal Offenses

The criminal offense of unlawful sexual activity has a subsidiary character in relation to other criminal offenses against sexual freedom, which consist of sexual intercourse or acts equated with sexual intercourse. The subsidiary nature of unlawful sexual acts is also evident in the way the essential elements of this criminal offense are normatively constructed in the Criminal Code (hereinafter: CC, *Krivični zakonik RS,* 2005), where reference is made to the essential elements of other criminal offenses against sexual freedom, whose acts consist of sexual intercourse or acts equated with sexual intercourse. Consequently, it is necessary that sexual intercourse or an act equated with it did not

occur. Thus, the primary criminal offenses against sexual freedom are rape, sexual intercourse with a helpless person, sexual intercourse with a child, and sexual intercourse by abuse of position, while unlawful sexual acts are subsidiary and secondary in relation to them. (Škulić, 2019, p. 392)

According to the legal text, the act of execution of the criminal offense of unlawful sexual activity is any other sexual act, which excludes sexual intercourse or an act equated with sexual intercourse. The criminal offense of unlawful sexual activity exists if the elements of any of the relevant criminal offenses against sexual freedom are fulfilled (rape - use of force, qualified threats, threats to reveal something harmful to the victim's honor or reputation, or to a person close to them, or threats of other serious harm; sexual intercourse with a helpless person - the act is committed by exploiting the victim's state of helplessness; sexual intercourse with a child - the act is committed against a child; and sexual intercourse by abuse of position - the act is committed by abuse of position in relation to an adult or by abuse of position or authority in relation to a minor entrusted to the perpetrator for education, upbringing, care, or nursing). (Delić, 2024, p. 126)

Like most foreign legislations, the CC does not define the concept of unlawful sexual acts, leaving open the question of what constitutes the act of execution of this criminal offense. It is undisputed that it cannot be sexual intercourse or an act equated with it, but it remains unclear whether any other act committed in a situation described in Articles 178 - 181 qualifies as an unlawful sexual act. (Stojanović, 2020, p. 605) For example, in one case, the defense counsel, challenging the legality of the conviction, argued that the act of execution of the criminal offense of unlawful sexual activity was not fully defined, nor was the concept of unlawful sexual acts in the CC. However, the Supreme Court of Cassation concluded that sexual acts existed when the accused "grabbed the victim by the right hand and began shaking her, then grabbed her by the shoulders and pushed her to the ground, sat on her, began tearing her shirt, put his hand under her shirt and touched her breasts, covered her mouth with his hand, lay on top of her, pressed her legs with his, removed her shirt, and completely exposed her upper body, touching and squeezing her breasts with one hand."(Judgment of the Supreme Court of Cassation, Kzz 433/2015 dated 05/26/2015)

Thus, the act of execution of the criminal offense of unlawful sexual activity is not precisely defined, so judicial practice has established criteria for determining the concept of lewd acts (a term previously used in our legislation) - one subjective and one objective criterion. The subjective criterion consists of the intent to satisfy or arouse sexual desire, and the objective criterion consists of violating existing norms of sexual morality. In an older ruling, which remains relevant in judicial practice today, it was stated that lewd acts are "those acts that are not sexual intercourse or unlawful fornication but are aimed at satisfying sexual desire and are indecent, improper, or perverse and exceed the boundaries accepted by normal standards." Interpreting the objective criterion is problematic because there are no reliable parameters to distinguish acts prohibited by sexual morality from those that morality does not prohibit. A wide range of acts can be considered, from forcing the victim to undress to acts that represent the beginning of sexual

intercourse in a broader sense or acts bordering on anal or oral coitus, which themselves cannot constitute the act of execution of this criminal offense. These are acts that generally do not achieve sexual satisfaction but rather arouse sexual desire or satisfy it to a lesser degree than sexual intercourse or acts equated with it - for example, hugging, kissing, touching various parts of the body, especially the genital area, etc. (Stojanović, 2020, p. 606) In judicial practice, it has been argued in an appeal that the verdict was unclear because it did not state that the accused committed the acts to satisfy or stimulate sexual desire. However, the appellate court held that these circumstances do not constitute a legal element of the criminal offense of unlawful sexual activity. (Judgment of the High Court in Užice, Kž 141/2020 dated 13.10.2020.)

Whether a particular act constitutes an unlawful sexual act sometimes depends on the objective nature of the act and the circumstances under which it was committed. For example, physical contact does not always have to be aimed at satisfying sexual lust but can be a sign of friendship, joy, or some other close feeling toward a person not based on sexual grounds. Everything depends on the prior relationship between the parties, so some acts that might objectively be characterized as lewd may not be assessed as such if the prior relationship between the parties was so close that such acts are considered "normal" between them. On the other hand, some acts that may not objectively be considered lewd may be qualified as such if they are committed suddenly against a completely unfamiliar person. (Atanacković, 1978, p. 186)

It is debatable whether the criminal offense of unlawful sexual activity includes cases where the victim is forced or induced to perform an act that serves to satisfy the perpetrator's sexual desire, such as the victim performing an act on themselves, the perpetrator, or a third party. In such cases, the perpetrator does not perform any act except coercion or inducement. In some of these situations, the perpetrator arouses or satisfies their sexual desire without any physical contact with the victim. The legal provision stipulates that the perpetrator is the one who performs the sexual act and if it were to include the victim performing such acts on themselves, on the perpetrator, or on a third party, this would constitute an extensive interpretation of the incrimination. (Stojanović, 2020, p. 607) Thus, the criminal offense of unlawful sexual activity covers only the active form of sexual acts, meaning the perpetrator performs the sexual act on the victim's body. Therefore, this criminal offense does not exist in cases such as the following, which may instead constitute a misdemeanor against public order and peace: "The accused unfastened his pants, exposed his genitals to the victim, then showed her the genitals of a lamb, and afterward demanded that she remove her underwear and show him her 'pee-pee,' which she refused to do." (Judgment of the Court of Appeal in Belgrade, Kž2. 4806/2012 dated 17.10.2012.) Exhibitionism does not fall under the criminal offense of unlawful sexual activity, not even in situations where the accused, to satisfy his sexual desire, removed his underwear on the street in front of two unfamiliar minors, exposing his genitals, which caused them fear. As the court noted: "There is no criminal offense of unlawful sexual activity because this criminal offense presupposes only the active form of sexual acts." (Judgment of the Appellate Court in Kragujevac, Kž1 1254/2016 dated 07.09.2016.)

The question arises as to when the criminal offense of unlawful sexual activity is completed. According to judicial practice: "The criminal offense is completed by the execution of the unlawful sexual act, bearing in mind that this criminal offense often represents a prelude to the commission of other criminal offenses against sexual freedom. The distinction is then made based on the intent of the perpetrator, meaning it is necessary to determine whether the perpetrator's intent was directed solely at performing an unlawful sexual act or at sexual intercourse or an act equated with it.» (Delić, 2024, p. 119)

The subjective element of the criminal offense includes direct intent and the corresponding purpose, which is not explicitly provided for in the text of the norm but arises from the nature of the criminal offense, i.e., the nature of the act of execution. This is the intent to satisfy or arouse sexual desire. The act of execution is undertaken so that the perpetrator can satisfy or arouse their sexual desire through it. (Delić, 2024, p. 127)

Since the legislator refers to relevant criminal offenses, it is necessary to determine the relationship with these offenses to define the criminal offense of unlawful sexual activity.

Criminal Offense under Article 182 and Criminal Offense under Article 178, Paragraphs 1 and 2, and the Existence of Misconception

All sexual offenses, as punishable behaviors that infringe on freedom of decision in the sexual sphere or pathological phenomena in human sexuality, have undergone significant changes over time. Criminal law in the past largely criminalized human behaviors in this area, but today it focuses only on extremely dangerous or socially unacceptable sexual behaviors. Criminal legislation has seen either decriminalization in this area, the emergence of new criminalizations, or entirely new understandings of criminalization—such as rape. (Cetinić, 1995, p. 200)

The criminal offense of rape in its basic form consists of coercing another into sexual intercourse or an act equated with sexual intercourse by using force or threatening to immediately attack the life or body of that person or a person close to them. Rape essentially constitutes forced sexual intercourse or a forced act equated with sexual intercourse. (Lazarević, Škulić, 2017, p. 129) As mentioned earlier, sexual intercourse or an act equated with it does not constitute the act of execution of the criminal offense of unlawful sexual activity, but we must define it to know what cannot be considered "any other sexual act."

In criminal law, the term "sexual intercourse" refers to the penetration of the male genital organ into the female genital organ. Sexual intercourse does not have to be completed in a physiological sense; partial penetration is sufficient. On the other hand, mere contact between the genital organs is not enough to constitute sexual intercourse. However, in practice, it is sometimes difficult to determine whether there is even partial penetration or merely contact between the male and female genital organs. In some court rulings, it is held that sexual intercourse exists even when the male organ has not penetrated the victim's vaginal canal, while in other rulings, it is held that even the beginning

of penetration into the victim's vaginal canal does not constitute sexual intercourse. The act of execution of rape, in addition to sexual intercourse, may consist of another act equated with sexual intercourse. A major problem here is determining which acts are equivalent in significance to sexual intercourse and which are other sexual acts that, if undertaken using coercion, would constitute the criminal offense of unlawful sexual activity. This concept can be interpreted restrictively or extensively. A restrictive interpretation would consider "another act equated with sexual intercourse" to include only the penetration of the male genital organ into the anal or oral orifice of the passive subject, while an extensive interpretation would also include other types of penetration. The decisive criterion would be whether such acts, based on a comprehensive assessment of their overall effect, manner of manifestation, and accompanying phenomena, can be compared to sexual intercourse, i.e., vaginal coitus—a criterion accepted, for example, in Austrian judicial practice. However, this would blur the clear boundary with the criminal offense of unlawful sexual activity. For example, inserting a finger, fist, or object into the vagina or anal orifice of the passive subject is considered an act equated with sexual intercourse in the judicial practice of countries that accept the aforementioned criterion. On the other hand, according to judicial practice, merely partial insertion of a finger lasting very briefly is insufficient to equate it with sexual intercourse. (Stojanović, 2020, p. 587) We believe that caution is needed when defining the concept of "another act equated with sexual intercourse" and that it should not be expanded, as this would encompass the majority of acts, raising the question of what would then be considered an unlawful sexual act.

For the criminal offense of rape to exist, it is necessary for the perpetrator to use force or threats against the passive subject. Force involves the use of physical strength to overcome serious or expected resistance. Judicial practice holds that the existence of force must be assessed based on the overall situation in the criminal offense of unlawful sexual activity. (Aksentijević, 2018, p. 15)

A contentious issue concerns the resistance of the passive subject. Resistance is "only a means to prove that force was used," meaning "the existence of resistance proves force, but not vice versa - the absence of resistance does not necessarily mean that force was not used." (Škulić, 2016, p. 107) However, judicial practice has concluded that the absence of resistance of a certain intensity indicates that force was not used. There is no criminal offense of rape, nor of unlawful sexual activity, if the person consents or merely expresses opposition to sexual intercourse/another sexual act but their behavior indicates consent. (Aksentijević, 2018, p. 16)

A particular problem is distinguishing the criminal offense of unlawful sexual activity from the attempt to commit criminal offenses under Articles 178 to 181. The perpetrator's intent is accepted as the criterion for this distinction, meaning if the perpetrator's intent was directed at committing one of the criminal offenses under Articles 178 to 181, there will be an attempt to commit those offenses. If not, but there was still an intent to arouse or satisfy sexual desire, there will be unlawful sexual activity. Additionally, the objective nature of the acts undertaken must be considered—whether the acts

objectively, by their nature, are related to sexual intercourse or an act equated with it and are directed toward them as preceding acts. (Stojanović, 2020, p. 608) Thus, there is a criminal offense of unlawful sexual acts, not an attempt at sexual intercourse, when the "accused held the minor victim with one hand in the area of her back while with the other hand, over the pants she was wearing, touched and squeezed her, trying to remove her pants and lie on top of her." (Judgment of the Appellate Court in Niš, Kž1 259/2016 dated 27.05.2016.) On the other hand, there is an attempted criminal offense of rape, not unlawful sexual activity, when the "accused first began kissing the victim on the neck, then put his hand under her blouse and grabbed her breasts, then pushed his fingers into her genital organ, and finally, after failing to achieve an erection, pulled her hand to his genital organ, asking her to stimulate him; the accused intentionally began undertaking acts of coercion using force to commit rape against the victim but did not complete the criminal offense due to the victim's persistent and consistent resistance, as she resisted, moved, pulled up her pants and panties, and begged him to stop." (Judgment of the Supreme Court of Cassation, Kzz 886/2018 dated 04.12.2019.)

Regarding misconception in unlawful sexual acts, the following should be noted: in our legal system, until the adoption of the 2006 Criminal Code, a material-formal concept of criminal offense and psychological theories of guilt were accepted, so guilt was reduced to the perpetrator's mental attitude toward the act and was determined based on their awareness and will. At that time, mistake of law as a consequence of this understanding, did not affect the existence of guilt or the criminal offense, but represented a facultative basis for mitigating or exempting from punishment. The Criminal Code adopted a formal concept of criminal offense and guilt, according to mixed psychological-normative theories, represents the perpetrator's mental attitude toward the act for which they can be reproached. (Delić, 2008a, p. 161) The normative concept of guilt is based on the idea that guilt cannot be understood solely as the perpetrator's set of mental contents regarding the act but rather signifies society's value judgment about such content—its condemnation, reproach. (Vuković, 2017, p. 501) In other words, one cannot be reproached and subjected to criminal sanctions for violating a certain norm if they could not have known that norm under the circumstances of the specific case. (Stojanović, 2005, p. 24) According to mixed theories, the psychological content is always the starting point, supplemented by normative elements, so guilt is the unity of the real, material, subjective, psychological substrate and the objective, value-based, legal judgment about it, which has a socio-ethical dimension and whose content is determined by the dominant social morality. In short, guilt represents the unity of the ontological and the normative. (Delić, 2009a, p. 240) Thus, guilt is a complex category consisting of imputability, intent and negligence, and awareness of unlawfulness. According to the legal provision, guilt exists if the perpetrator, at the time of committing the criminal offense, was imputable and acted with intent, and was aware or should and could have been aware that their act was prohibited. Just as the perpetrator must have preserved the capacity for reasoning and decision-making and the appropriate mental attitude toward their act, the condition of guilt also includes their belief that they are doing something legally

impermissible. While intent is directed toward the elements of the offense, awareness of unlawfulness is examined independently of it, so even in the case of unreasonable mistake of law, the perpetrator could be held liable for an intentional offense. Awareness of unlawfulness and mistake of law are complementary concepts, so mistake of law is possible only if the perpetrator lacks such awareness. (Vuković, 2024, p. 256)

According to the legal provision, awareness of unlawfulness exists if the perpetrator was aware that their act was prohibited. Although there are differing opinions in theory about what this specifically entails, it should be understood that awareness of unlawfulness exists if the perpetrator is aware of the legal prohibition of the act, i.e., they have the awareness that they are committing behavior prohibited by law, meaning the perpetrator is aware, in a layperson's terms, that they are committing a wrong. The existence of awareness of unlawfulness does not mean that the perpetrator must know the legal norm in its specific form, i.e., they must know the text of the law prohibiting or prescribing certain behavior, as only a lawyer—and not every lawyer—could then be guilty. (Delić, 2008b, p. 187) For the perpetrator's awareness of the unlawfulness of their behavior, it is not sufficient to be aware of the social harmfulness of the behavior they are undertaking or that it violates moral norms, but it is also not necessary to be aware that the behavior is prescribed as a specific criminal offense. On the one hand, being satisfied with the perpetrator's knowledge that some behavior is socially harmful is too little, and on the other hand, requiring awareness that some behavior, in addition to being prohibited by law, is prescribed as a specific criminal offense is too much. The prevailing view adopts a compromise solution: awareness that some behavior is contrary to law in general, i.e., prohibited by law in general, without necessarily encompassing awareness that the behavior is prescribed as a criminal offense. It is sufficient for the perpetrator to believe that some behavior constitutes a misdemeanor. (Stojanović, 2006, p. 11)

It is not enough that the perpetrator's conscience tells them that their act contradicts moral and social norms, as it is possible for the perpetrator to be troubled by their conscience regarding the act, but still believe that their behavior is legally permissible. The idea that behavior violates elementary social norms or the inner voice that rules (e.g., sexual) morality are being transgressed will indicate that, in the specific case, the misconception, if it existed at all, was at least unreasonable, and the perpetrator does not deserve mitigation of punishment. (Vuković, 2024, p. 257)

There are different views on the nature of the concept of misconception. According to one opinion, in misconception, there is a mistaken belief about some circumstance, whereas in ignorance, there is a lack of belief about some circumstance. Thus, ignorance represents a negative state of consciousness, a lack of knowledge, while misconception represents a positive state of consciousness, albeit based on a mistaken belief, erroneous knowledge. According to another, more acceptable view, the term misconception in the narrow sense denotes erroneous knowledge, while in the broad sense, it denotes ignorance, so in criminal law, the term misconception should be used in the broad sense, i.e., as ignorance, because in the criminal law sense, misconception includes both those who have a mistaken belief/awareness and those who have no belief at all. (Delić, 2009b,

p. 753) Misconception is any lack of awareness, and it is irrelevant whether it appears as the absence of any belief about some actual circumstance, as ignorance, or merely as a mistaken belief about some actual circumstance. Some consider the latter case as «true» misconception, i.e., misconception in the «strict» sense. (Živanović, 1937, p. 61) Misconception should be distinguished from doubt, which is characterized by a conflict of beliefs and judgments, preventing conviction. As long as there is doubt, there is no true misconception, as misconception requires conviction in the accuracy of the belief. (Tahović, 1961, p. 191)

Unlike mistake of fact, where the perpetrator is not aware of what they are doing, in mistake of law, they are aware of it but do not know that what they are doing is legally impermissible, i.e., prescribed as a criminal offense. For example, if the perpetrator of incest is not aware of the kinship relationship, there is mistake of fact, whereas if such awareness exists but the perpetrator believes it is not prohibited, then it is mistake of law. (Babić, Marković, 2008, p. 314)

A judge of the Federal Court in Germany, Thomas Fischer, noted that behind the few lines of two provisions on mistake of fact about the elements of the offense and mistake of law in the German Criminal Code lies a legal-dogmatic, historical, and factual-scientific cosmos, which one could easily spend half a lifetime studying. Mršević states that this is an institute that is neither less applied nor more disputed in terms of its application. (Vuković, 2019, p. 94) Thus, although mistake of law is addressed in only one article of the Criminal Code, it is clear that this is a complex topic with many contentious issues.

Types of mistake of law are direct and collateral. The perpetrator is in direct mistake of law if they do not know that the act they are undertaking constitutes a criminal offense, i.e., they do not know that their behavior is contrary to the requirements of the legal order. The perpetrator is aware of the actual circumstances of their act, but lacks awareness of its unlawfulness. (Đokić, 2008, p. 232) This is a type of mistake of law directed at the element of the act's foreseeability in the law. It may happen that the prohibition is entirely unknown to the perpetrator, as they do not know that blackmailing the victim, even without coercion, by threatening to reveal a family secret unless they consent to sexual relations, is punishable, or the perpetrator is unaware of the provision that supplements the blanket disposition. (Vuković, 2024, p. 266) Collateral mistake of law exists when the perpetrator knows that certain behavior is a criminal offense, but mistakenly believes that an existing circumstance constitutes a ground for excluding unlawfulness or misjudges the existence of legal conditions for applying such a ground. The perpetrator has taken something as a ground for excluding unlawfulness that does not have such meaning, i.e., is not recognized by the legal order as a ground for excluding unlawfulness. (Đokić, 2008, p. 233) Misconception is collateral because the mistaken belief about the prohibition of behavior arises through imagined grounds for justification, not directly. Direct mistake of law is unlikely in the case of well-known criminal offenses, while collateral mistake of law is very possible—as in the case of murder committed under orders. (Đokić, 2008, p. 266)

There are criminal offenses (*mala in se*) that encompass behaviors impermissible in almost all societies and historical stages, such as murder, rape, robbery and similar criminal offenses, where the possibility of mistake of law is excluded. On the other hand, mistake of law may appear in *mala prohibita*, which are offenses whose unacceptability is not so obvious, and this includes the criminal offense of unlawful sexual activity. For these criminal offenses, the social harmfulness and criminality are not as pronounced and are not easily recognizable, as the recognition of their wrongfulness does not stem from the contradiction of the act with elementary moral norms. Therefore, in such situations, a series of circumstances are considered, such as the special characteristics of the perpetrator, their profession and occupation, the perpetrator's attitude toward the act, and similar. In this regard, it can be said that misconception would be reasonable if the perpetrator's behavior was conscientious, i.e., if every reasonable and conscientious person would have fallen into such misconception under the same circumstances. Misconception is unreasonable if it concerns a perpetrator who, considering all the circumstances of the case and their own characteristics, did not show the necessary degree of caution to recognize the prohibition of their act. (Babić, Marković, 2008, p. 316) Thus, in the criminal offense of rape, the perpetrator could not invoke the institute of mistake of law, given that it is a classic criminal offense prescribed everywhere as such. On the other hand, in the criminal offense of unlawful sexual activity, we believe that mistake of law is possible. It is generally known that rape is punishable, but it is not known that other sexual acts are also punishable, provided the other mentioned conditions are met. In the context of playful behavior, the perpetrator may claim that they could not have known that what they were doing was not permitted, especially at the moment when a new criminal offense is introduced. The perpetrator could argue that they did not know that what they were doing was prohibited because it seemed socially acceptable to them. However, if the perpetrator was aware of the legal norm but unclear about what exactly constitutes unlawful sexual acts, so they did not know what was punishable, there would be no mistake of law, given that the perpetrator had doubts about what they were doing. It is unlikely that the perpetrator could invoke reasonable mistake of law, given the development of technology and the availability of information; only someone completely "cut off" from the world, illiterate, etc., could invoke reasonable mistake of law, in which case they certainly could not have avoided that misconception. On the other hand, foreign nationals may invoke that in the legislation of their country of origin, such acts are not punishable, so they did not know that according to the Criminal Code, this constitutes the criminal offense of unlawful sexual activity. This is possible because unlawful sexual acts are not classic criminal offenses like, for example, rape, murder, i.e., they are not criminalized everywhere. Cases of unreasonable mistake of law will be more common, as the perpetrator could have inquired with anyone, not just professors, judges, lawyers, etc., i.e., they could have found out in multiple ways that what they were doing was punishable.

Criminal Offense under Article 182 and Criminal Offense under Article 180, Paragraph 1, and the Existence of Misconception

One of the elements of the criminal offense of sexual intercourse with a child and unlawful sexual acts is the characteristic of the passive subject—a child. In these criminal offenses, there is no form of coercion, but the criminal offense is committed with the "consent" of the passive subject. Although this is not consent in the true sense, there must be no force or qualified threat, as this would constitute the most severe form of the criminal offense of rape. (Stojanović, 2020, p. 600) In other words, the use of force or threats against a minor victim is not a necessary condition for the existence of the extended criminal offense of unlawful sexual activity or sexual intercourse with a child. Thus, in a court ruling: "the use of force or threats is not necessary, given that the act of execution of this criminal offense consists of performing a sexual act with a child, i.e., a person under the age of 14, and since the victim was under 10 years old at the time of the criminal offense, all the essential elements of the extended criminal offense of unlawful sexual activity under Article 182, paragraph 2, in relation to Article 180, paragraph 1, are present." (Judgment of the Supreme Court of Cassation, Kzz 1136/2021 dated 03.11.2021.) Also, if the act is committed against a helpless person under the age of 14, it will constitute the most severe form of the criminal offense of sexual intercourse with a helpless person. (Stojanović, 2020, p. 600)

The criminal offense of unlawful sexual activity with a child exists even when the accused kisses and caresses the victim's hair with the intent to satisfy their sexual desire. Judicial practice states that the accused committed unlawful sexual activity with a child when he: "invited the victim to go upstairs to try on his children's jeans, asking her to do so in his presence, which the minor victim refused and tried to leave the room, but he prevented her by standing in the doorway and holding her hands, and then, with the intent to satisfy his sexual desire, kissed the victim on the cheek several times and stroked her hair multiple times, telling her he loved her, that he had dreamed of her the night before, even though he was aware that he was committing unlawful sexual acts with a child, and wanted to do so, and was aware that his act was prohibited." (Judgment of the Supreme Court of Cassation, Kzz 349/2017 dated 11.05.2017.)

The criminal offense of sexual intercourse with a child must be distinguished from the criminal offense of unlawful sexual activity. For example, the accused who, to satisfy his sexual desire, removed the underwear of a male child and placed the child's genital organ in his mouth committed the criminal offense of sexual intercourse with a child, not unlawful sexual activity; as stated in the court ruling: "the accused took the victim to the basement, removed his shorts and underwear, knelt down, took out the genital organ and placed it in his mouth, moving his mouth around the minor victim's genital organ, then unfastened his zipper, took out his own genital organ, and showed it to him; the accused could not have been in mistake of fact regarding the child's age, given that the child's appearance, height, voice, speech, and physique clearly indicated that it was a child." (Judgment of the Court of Appeal in Kragujevac, Kž1 846/2018 dated 13.09.2018.)

A problem that arises in the criminal offense of unlawful sexual activity and the criminal offense of sexual intercourse with a child is the existence of mistake of fact regarding the age of the passive subject. This is possible especially in cases where the passive subject was not significantly below the age limit and physically appeared to be at least 14 years old. Considering that unreasonable mistake of fact here excludes guilt, for the existence of the criminal offense, it is not sufficient that the perpetrator could have ascertained the passive subject's age in a certain way, and the question arises whether there is a duty to determine the age before engaging in sexual relations with another person. (Stojanović, 2020, p. 600) The answer was provided by judicial practice, which states: "for the existence of the criminal offense of sexual intercourse with a child, it is not sufficient that the perpetrator could have ascertained the passive subject's age in a certain way, nor was the accused obliged in the specific case, considering all the circumstances, to determine the victim's age before engaging in voluntary sexual relations with her." (Judgment of the Court of Appeal in Kragujevac, Kž1. from 27.03.2014)

In Serbian and former Yugoslav criminal law theory, mistake of fact is distinguished in the broad and narrow sense, and so is the Criminal Code, which speaks of mistake of fact regarding some factual circumstance that constitutes an element of the criminal offense and mistake of fact regarding some factual circumstance that, had it existed, would have made the act permissible. (Vuković, 2013, p. 17) Mistake of fact about the elements of the criminal offense, like mistake of law about the grounds for excluding unlawfulness, can be reasonable or unreasonable. In unreasonable mistake of fact, the perpetrator in the specific situation could not have had a correct belief about the relevant factual circumstance. If, according to the circumstances of the specific case and the perpetrator's personal characteristics, the perpetrator could and should have had a correct belief about the relevant factual circumstances that constitute the elements of the criminal offense, there will be unreasonable mistake of fact or mistake of fact due to negligence. (Stojanović, 2020, p. 163) unreasonable mistake of fact excludes intent, but not negligence. This is possible only if the legislator has provided liability for negligence and the conditions for negligence are fulfilled in the specific case. Given that liability for negligence is not provided for the majority of offenses, the court's conclusion that the perpetrator acted in factual misconception will usually exclude the existence of the criminal offense. In the case of reasonable mistake of fact, unreasonable mistake of fact is not presumed but must also be proven. (Vuković, 2024, p. 250) It can be said that mistake of fact is the negation of intent, as a perpetrator who commits a criminal offense in mistake of fact can never be the perpetrator of a criminal offense with intent. (Srzentić, Stajić, Lazarević, 1996, p. 277)

In criminal legislation and theory, it has generally been uncontroversial that mistake of fact affects guilt, i.e., excludes both intent and negligence if it is reasonable and establishes liability only for negligentia if it is unreasonable. The effect of mistake of law is contentious. Some argue that *error vel ignorantia iuris non excusat*, while others believe that it is unjust to punish those who, for justified reasons, were unable to know about the prohibition of the act, given that the impossible cannot oblige anyone. (Atanacković,

1977, p. 57) For mistake of law to exclude guilt, and thus the criminal offense, it must be established that the perpetrator could not have avoided the misconception about the prohibition of the act, i.e., they were not obliged and could not have known about the prohibition of the act. Unreasonable mistake of law does not exclude guilt and exists if the perpetrator did not know that the act was prohibited, but should and could have known. The perpetrator is in misconception due to negligentia. Given that there is potential awareness of unlawfulness here, guilt is not excluded, but unreasonable mistake of law represents a facultative basis for mitigating punishment (Đokić, 2008, p. 239). In short, mistake of law would be the negative side of awareness of unlawfulness as an element of guilt, while mistake of fact would be the negative side of intent, more precisely its intellectual component, and the division of mistake of law into unreasonable and reasonable would be the other side of the division of awareness of unlawfulness into actual and potential. (Delić, 2008b, p. 188) In one case, the defense counsel invoked reasonable mistake of law regarding the victim's age, arguing, among other things, that both the accused and the victim belonged to the Roma national minority and had different cultural characteristics, and that the victim had said she was 17 years old when she was actually 13 years, 11 months, and 27 days old. The court in that case concluded that: «the accused, who was 22 years old at the time of the criminal offense, and whose emotional and social maturity, according to the expert's findings, was consistent with his calendar age, must have known, due to close family relations with the victim, that he was engaging in sexual relations with a minor, and therefore was not in mistake of law that was reasonable; the fact that the accused belongs to the Roma community with all its customs and life habits is irrelevant since it was unquestionably concluded that the accused could and should have known that his act was prohibited, and therefore did not act in reasonable mistake of law." (Judgment of the Appellate Court in Kragujevac, Kž1 403/2021 dated 22.07.2021.) On the other hand, in a similar case, the Appellate Court in Belgrade took the following position: "considering the circumstances under which the act was committed and the personal characteristics of the accused related to his level of education, personal situation, his family circumstances and environment, the accused could not have known that engaging in sexual relations with a person under the age of 14 was a criminal offense; attention is also drawn to the fact that due to the hyper-criminalization of behavior in modern society, insisting on the principle that ignorance of the law excuses no one is unsustainable, and considering the peculiarities of the Roma national minority (the environment from which the accused comes), which relate to early engagement in sexual relations and early establishment of life partnerships, the accused was not obliged and could not have known that engaging in sexual relations with a person under the age of 14 was prescribed as a criminal offense." (Judgment of the Court of Appeal in Belgrade Kž1 392/2019 dated 10.06.2019.) However, the Supreme Court of Cassation, regarding that ruling, concluded: "the accused has a third-grade secondary education—unlike many members of his ethnic community, lived abroad, and used a computer; even if the accused, due to his socio-cultural background, did not know about the prohibition of sexual relations with children, information about the inadmissibility

of sexual relations with children is easily accessible through the media and indicates that the accused should and could have known." (Judgment of the Supreme Court of Cassation, Kzz 1345/2019)

Criminal Offense under Article 182 and Criminal Offenses under Article 179, Paragraph 1, and Article 181, Paragraphs 1, 2, and 3, and the Existence of Misconception

One of the elements of the criminal offense of sexual intercourse with a helpless person and unlawful sexual acts is the characteristic of the passive subject—a helpless person. The passive subject does not accept sexual intercourse of their own free will; they are either unaware of the sexual act or are in such a state that they cannot actively resist the person performing the sexual intercourse. The essential characteristic of the criminal offense of sexual intercourse with a helpless person is that the sexual intercourse must be committed by exploiting a certain state in which the passive subject finds themselves. (Lazarević, 1981, p. 381) These states are: mental illness, retarded mental development, other mental disorders, helplessness, or any other state rendering the person incapable of resistance. Thus, the criminal offense of unlawful sexual activity exists when the perpetrator performs any other sexual act on a helpless person. The perpetrator could invoke mistake of fact in the sense that they did not know that the person was helpless, as well as legal misconception regarding the fact that they did not know that their behavior constituted another sexual act, which is punishable.

The central characteristic of the criminal offense of sexual intercourse by abuse of position and the criminal offense of unlawful sexual activity is the relationship of subordination or dependence. The relationship of subordination implies the subordination of two persons, in which the superior, based on some regulation or contract, is authorized to issue certain orders and instructions to the subordinate, who is obliged to carry them out. On the other hand, in a relationship of dependence, it does not necessarily involve persons with different positions in the hierarchy, but includes all other situations where one person factually depends on another, for example, the relationship between medical staff and a patient. Given that the law does not define when a state of subordination or dependence exists, this is a factual question decided by the court. (Vuković, Đokić, 2015, p. 890) The abuse of position and the relationship of dependence and subordination of the passive subject is an essential element of the criminal offense of unlawful sexual activity, and in the absence of this essential element, the accused's improper sexual behavior is legally qualified as sexual harassment. Judicial practice states that it is sexual harassment when: "it has not been proven beyond a reasonable doubt that the accused abused his position in relation to the victims; it is necessary that it involves a more serious form of abuse of position and a significant degree of dependence or subordination; the victims were not in a relationship of dependence and subordination in relation to the accused, as they voluntarily chose to undergo gynecological examinations in the accused's private practice, and such examinations were financed according to their choice of doctor, and

it cannot be concluded beyond a reasonable doubt that the accused abused his position." (Judgment of the High Court in Užice, Kž 194/2021 dated 11.01.2022.) As stated in judicial practice: "the use of force and the accused's disturbance in the sexual sphere as a teacher are not essential elements of the criminal offense of unlawful sexual activity in relation to Article 181." (Judgment of the Court of Appeal in Kragujevac, Kž1 5066/2013 dated 26.11.2013.)

Thus, the criminal offense of unlawful sexual activity exists when the perpetrator, by abusing their position, induces another sexual act from a person who is in a relationship of subordination or dependence with them. Consent here is not based on coercion or an undisputed lack of the other's will, as in the case of relations with a child or a mentally ill person. Here, it is often not about exploiting a state of necessity of the victim, but about an exchange of services, where the victim consents to the relationship expecting to receive some favor or privilege in return from the perpetrator. (Vuković, Đokić, 2015, p. 889) In one ruling, the first-instance court stated that the accused: "performed a sexual act with the intent to satisfy his sexual desire, and was the minor victim's homeroom teacher, who was entrusted to him for education, by meeting the victim near her apartment, touching her multiple times with his hand in the apartment, and then kissing her on the forehead," (Judgment of the Supreme Court of Cassation, Kzz 226/2018 of 21.02.2018.) while the Supreme Court of Cassation issued an acquittal, as it was not explicitly stated that the act was committed by abuse of position, which is a legal element of the offense. Referring to the above, in the case of sexual intercourse by abuse of position and the criminal offense of unlawful sexual activity, it is difficult to imagine the existence of misconception, as it is impossible that the perpetrator did not know that the person was entrusted to them.

Aggravated and Most Severe Forms of the Criminal Offense under Article 182

The aggravated form of the criminal offense exists if, as a result of the acts under paragraphs 1 and 2 of Article 182, the passive subject suffers serious bodily injury - a criminal offense qualified by a more severe consequence, or if the act is committed by multiple persons - a qualifying circumstance, or if the act is committed in a particularly cruel or particularly humiliating manner - a qualifying circumstance. When a more severe consequence results from the criminal offense, for which the law prescribes a more severe penalty, that penalty may be imposed if the perpetrator acted with negligence in relation to that consequence and exceptionally with intent if this does not fulfill the elements of another criminal offense. (Vuković, 2024, p. 271) Thus, if serious bodily injury is covered by negligence, the aggravated form of this criminal offense will exist. On the other hand, if there is intent in relation to serious bodily injury, there will be a concurrence of the criminal offense of unlawful sexual activity and the criminal offense of serious bodily injury. Multiple persons mean at least two persons - this is a qualifying circumstance that must be covered by intent. There is an opinion that in this case, two or more persons in the same situation independently fully fulfill the elements of the criminal offense, i.e., each of them intentionally applies coercion and another sexual act. Accordingly,

each person is the perpetrator of the criminal offense, which excludes the possibility of co-perpetration. (Delić, 2024, p. 102) The most severe form of the criminal offense exists if, as a result of the acts under paragraphs 1 and 2 of Article 182, the death of the person against whom the act was committed occurs—a criminal offense qualified by a more severe consequence. In relation to the death of the passive subject, there must be negligence. If the death of the passive subject is covered by intent, there will be a concurrence of the criminal offense of unlawful sexual activity and the criminal offense of murder.

According to judicial practice, the qualified form of the criminal offense of unlawful sexual activity does not exist when: "the accused put his hand over the victim's mouth, put his other hand under her underwear and inserted a finger into her genital organ, and the victim managed to remove his hand from her mouth and began to scream, after which the person removed his hand from her genital organ, and when she broke free from him, that person hit her in the area of her left eye, which was closed; but these injuries occurred after the accused had satisfied his sexual desire, and according to the intensity of the force, it cannot be said that there was physical torture of the victim, in which case it would have been the qualified form of the criminal offense in question." (Judgment of the Court of Appeal in Kragujevac, Kž1 588/2014 dated 05/26/2014.)

Criminal Offense under Article 182 and Criminal Offense under Article 182a

The criminal offense under Article 182a is defined as sexual harassment of another person. Here, the legislator, as in the case of the criminal offense of stalking, uses a specific normative technique of "subsequent definition" of the act of execution of the criminal offense, which is first stated in the basic and aggravated forms as a general clause, and then a definition of sexual harassment is provided in the third paragraph. (Škulić, 2016, p. 119) Sexual harassment is defined as any verbal, nonverbal, or physical behavior that aims to or represents a violation of the dignity of a person in the sphere of sexual life and causes fear or creates a hostile, humiliating, or offensive environment. In relation to acts involving physical contact with the passive subject, it is contentious to distinguish them from the criminal offense of unlawful sexual activity, given that the most common acts constituting unlawful sexual acts are cited as "hugging, kissing, touching various parts of the body, especially the genital area, etc." Considering that for unlawful sexual acts the commission is prescribed to be undertaken under the same conditions set out in the articles prescribing other criminal offenses against sexual freedom, meaning the use of force or threats, exploitation of the passive subject's state of helplessness, or abuse of position, sexual harassment would exist if a sexual act is undertaken on the passive subject's body outside these situations. Thus, the use of force and overcoming resistance so that the perpetrator can kiss the passive subject would constitute the criminal offense of unlawful sexual activity due to the use of coercion, while the same act would constitute sexual harassment if the perpetrator took advantage of the passive subject's surprise and undertook the act without using coercion. (Đokić, 2017, p. 552) We can conclude that sexual harassment represents a kind of lighter form of unlawful sexual acts, and therefore a concurrence between these two criminal offenses is not possible. (Stojanović, 2020, p. 609)

Conclusion

The presentation and analysis of the legal description of the criminal offense of unlawful sexual activity, as well as the criminal offenses to which the legal norm refers, show that the existence of mistake of fact and mistake of law is possible in these offenses. Based on everything stated above, we can conclude that our legislator, regarding mistake of law, has adopted a modern and, above all, humane solution by providing that reasonable mistake of law excludes guilt. Criminal law, like judicial practice, must follow progressive approach and trends. In this sense, criminal law must valorize and revalorize its institutes, and when justified, undertake radical qualitative and quantitative interventions. The legislator has proven with this solution that it is justified to abandon some traditional institutes, especially when it can reasonably be considered that the newly adopted concepts are more humane, fairer and more effective. (Delić, 2008b, p. 189)

Our judicial practice has so far interpreted and applied the institute of misconception very restrictively. Basically, it should be determined whether the perpetrator was in misconception (mistake of fact or mistake of law) and afterwards whether they were in it for justified reasons. Consequently, it should be determined whether it is justified to mitigate the perpetrator's punishment or exempt them from punishment. Unfortunately, it is often claimed without sufficient arguments that the perpetrator was not in misconception, and thus it is not discussed whether they were in misconception for justified reasons. (Stojanović, 2006, p. 17) It is very important to determine the existence of misconception, especially reasonable misconception, which excludes the existence of the criminal offense. Also, unreasonable mistake of fact can exclude the existence of the criminal offense if the legislator has not prescribed a negligent form, as in the case of the criminal offense of unlawful sexual activity.

References

Aksentijević, J. (2018) *Nedozvoljene polne radnje (član 182. Krivičnog zakonika)*. Master rad. Pravni fakultet Univerziteta u Beogradu, Beograd.

Atanacković, D. (1977) 'Pojam zablude u krivičnom pravu'. *Jugoslovenska revija za kriminologiju i krivično pravo, 1*, 41–63.

Atanacković, D. (1978) *Krivično pravo, Posebni deo*. Beograd: Pravni fakultet u Beogradu.

Bošković, M. (2009) 'Kriminološka obeležja krivičnih dela protiv polnih sloboda', *Zbornik radova Pravnog fakulteta u Novom Sadu,* 43(2), 121–141. https://zbornik.pf.uns.ac.rs/wp-content/uploads/2018/12/doi_10.5937_zrpfns43-0032.pdf

Babić, M., Marković, I. (2008*) Krivično pravo, Opšti dio*. Banja Luka: Pravni fakultet Banja Luka, Univerzitet u Banjoj Luci.

Cetinić, M. (1995) 'Prilog diskusiji o potrebi izmene inkriminacije silovanja' *Problemi reintegracije i reforme Jugoslovenskog krivičnog zakonodavstva*. Budva, 7,8,9, jun, 1995. Beograd: Institut za kriminološka i sociološka istraživanja200–204.

Delić, N. (2008) 'Svest o protivpravnosti kao konstitutivni element krivice', *Anali Pravnog fakulteta u Beogradu*, 56 (2), Beograd, 161–179.

Delić, N. (2008) 'Teorije krivice i krivičnopravni značaj pravne zablude', in: Ignjatović, Đ. (ed). *Stanje kriminaliteta u Srbiji i pravna sredstva reagovanja, II deo* Beograd: Pravni fakultet Univerziteta u Beogradu, 171–190.

Delić, N. (2009) 'Opšti pojam krivičnog dela u Krivičnom zakoniku Srbije' in: Ignjatović, Đ. (ed), *Stanje kriminaliteta u Srbiji i pravna sredstva reagovanja, III deo*, Beograd: Pravni fakultet Univerziteta u Beogradu, 223–243.

Delić, N. (2009) 'Pravna zabluda' *Pravni život*, 9, , 751–769.

Delić, N. (2024) *Krivično pravo, Posebni deo*. Beograd: Univerzitet u Beogradu – Pravni fakultet.

Đokić, I. (2008) 'Pravna zabluda', in: Ignjatović, Đ. (ed) *Stanje kriminaliteta u Srbiji i pravna sredstva reagovanja*, *II deo*, Beograd: Pravni fakultet Univerziteta u Beogradu, 231–240.

Đokić I. (2017) 'Kriminalnopolitička opravdanost inkriminisanja polnog uznemiravanje u Republici Srbiji', *Crimen*, (Beograd), 8(3), 539–558.

Lazarević, Lj. (1981) *Krivično pravo, Posebni deo*. Beograd: Savremena administracija.

Lazarević, J., Škulić, M. (2017) 'Nove inkriminacije protiv polne slobode u Krivičnom zakoniku Srbije'. *Bilten Vrhovnog kasaciong suda*, 2, Beograd, 122–150.

Srzentić, N. *et al*. (1996) *Krivično pravo Jugoslaviije Opšti deo*. Beograd: Savremena administracija.

Stojanović, Z. (1981) *Kriterijumi određivanja inkriminacija–uopšte i u sferi seksualnih odnosa*. Doktorska disertacija. Univerzitet u Ljubljani – Pravni fakultet, Ljubljana.

Stojanović, Z. (2005) 'Pojam krivičnog dela u novom Krivičnom zakoniku', *Branič*, 117 (3-4), 5–25.

Stojanović, Z. (2006) 'Pravna zabluda u novom Krivičnom zkoniku', *Revija za kriminologiju i krivično pravo*, 3, 9–18.

Stojanović, Z. (2020) *Komentar Krivičnog zakonika*. Beograd: Službeni glasnik.

Škulić, M. (2016) 'Silovanje bez prinude, proganjanje i polno uznemiravanje - nove buduće inkriminacije', *Bilten Višeg suda u Beogradu*, 87, 101–123.

Škulić, M. (2019) *Krivična dela protiv polne slobode*. Beograd: Službeni glasnik.

Škulić, M. (2020) *Krivično procesno pravo*. Beograd: Univerzitet u Beogradu – Pravni fakultet.

Tahović, J. (1961) *Krivično pravo Opšti deo*. Beograd: Savremena administracija.

Vuković, I. (2013) 'Stvarna zabluda u širem smislu i srpsko krivično zakonodavstvo–teorijski okvir', *NBP*, *Žurnal za kriminalistiku i pravo,* 18(2), 17-26.

Vuković, I., Đokić, I. (2015) 'Obljuba zloupotrebom položaja nastavnika'. *Teme*, 3, 887–902.

Vuković, I. (2017) 'Materijalni pojam krivice iz ugla krivičnog prava', *Crimen* (Beograd), 8(3), 501–516.

Vuković, I. (2024) *Krivično pravo, Opšti deo*. Beograd: Univerzitet u Beogradu – Pravni fakultet.

Vuković, N. (2019) *Pravna zabluda u krivičnom pravu*. Beograd: Službeni glasnik.

Živanović, T. (1937) *Osnovi krivičnog prava Kraljevine Jugoslavije*. Beograd: Pravni fakultet u Beogradu.

Journal of Criminology and Criminal Law, 63(3), 119-121
Book Review

Kolaković-Bojović, M. & Stevanović, I. (2025) *Conference Proceedings of the National Scientific Conference "Expert Evidence in Criminal Proceedings"*, Palić, 12–13 June 2025. Institute of Criminological and Sociological Research

Maša Marković[a]

The thematic conference proceedings "Expert Evidence in Criminal Proceedings" include 17 original scientific and review papers as part of the national scientific conference of the same title, held on 12–13 June 2025 in Palić. The conference was organised by the Institute of Criminological and Sociological Research, with the support of the Ministry of Science, Technological Development and Innovation of the Republic of Serbia and the Judicial Academy in Belgrade.

As emphasised in the foreword, the selection of the conference theme and the topics addressed in the proceedings are based on the understanding that expert evidence constitutes one of the key evidentiary actions in criminal proceedings. The quality, lawfulness and efficiency of expert assessments significantly impact judicial decision-making. Accordingly, the papers aim to critically present the existing statutory framework, expose the challenges experienced by expert witnesses, public prosecutors and judges in practice and formulate specific recommendations for improving the normative and institutional framework in the field of expert evidence.

Although the papers in the proceedings are not formally divided into thematic chapters, their content allows a preliminary classification. The first section of the publication focuses on the challenges arising from the application of digital and financial forensics in expert evidence, especially in the context of rapid technological development and increasingly complex forms of crime. Through a multidisciplinary approach by the representatives of the professional and academic community, expert witnesses and professors of law and economics, the papers discuss: the role of artificial intelligence in expert evidence; the importance of forensic analysis of financial statements in detecting and prosecuting fraud; the use of digital forensics in financial investigations and the specific challenges of acoustic expert assessments in criminal proceedings. Across all papers, authors underline the need for legislative reform, institutional strengthening, continuous professional development and the establishment of effective intersectoral cooperation as a precondition for lawful and efficient proceedings.

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A significant part of the thematic proceedings consists of papers that address the increasing importance of psychosocial expert evidence in criminal proceedings, particularly in the context of victim protection and the right to a fair trial. In both original scientific and review papers authored by judges, attorneys and professors of law, the following topics are analysed: the importance of psychological assessments of victims in light of the new concept of the criminal offense of rape, with emphasis on victim-specific responses and the issue of consent; the role of expert advisers in criminal proceedings; the victim's right to request psychiatric expertise for the purpose of ensuring special protection during testimony and compensation claims within criminal proceedings and the weight of evidence and legal nature of expert reports provided by the Center for Human Trafficking Victims' Protection. All authors share the view that psychosocial expert evidence is not only essential for factual accuracy, but also for ensuring the consistent application of the principle of fairness and protection of procedural rights in criminal justice systems.

One of the central sections of the proceedings addresses the complexity and significance of medical expert testimony, especially in cases requiring the interpretation of specific clinical and forensic findings. The authors, specialists in forensic medicine, gynaecology and obstetrics, toxicology and related medical fields, analyse a range of issues, including: the use of medical expertise in homicide cases; the role of forensic medicine in clarifying the fate of missing persons; the distinction between medical error and clinical complications in gynaecological and obstetric practice; toxicological challenges in cases of driving under the influence of psychoactive substances and the complexity of assessing whiplash injuries. The papers set out recommendations for standardising methodological approaches and advancing forensic practices as essential conditions for effective protection of procedural rights and safeguarding trust in the healthcare and judicial systems.

The final thematic section provides an overview of contentious issues in the field of traffic-technical expert evidence in misdemeanour proceedings, with particular reference to case law related to negligent driving, excessive speed and overtaking. Additionally, readers are introduced to papers addressing: the importance of vehicle inspections for the reliability of expert findings; the potential of modern software tools in the reconstruction and analysis of traffic accidents and specific aspects of technical inspections relevant for the precise assessment of such incidents. The authors underscore the need for continuous professional development of expert witnesses in digital technologies, as well as specialised training for public prosecutors and judges to ensure accurate evidentiary assessment in cases involving modern vehicles. All contributions reaffirm that technically precise, methodologically sound and legally relevant traffic-technical expert evidence serves as a foundation for reliable fact-finding and lawful decision-making in criminal and misdemeanour proceedings.

In view of the above, the collected papers "Expert Evidence in Criminal Proceedings" provide a comprehensive and critical overview of the theoretical, normative and institutional aspects of one of the most important evidentiary mechanisms in contemporary

criminal justice. Through a multidisciplinary perspective, with contributions from professionals in law, medicine, economics and traffic engineering, the volume formulates concrete recommendations for improving financial, medical, psychosocial and traffic-technical expertise in criminal proceedings. Consequently, this publication serves as a valuable resource not only for legal professionals, but also for a wider audience seeking a deeper understanding of the current state and future development of expert evidence.

AUTHOR GUIDELINES

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The Journal of Criminology and Criminal Law is triannual, peer reviewed scientific journal with over 60-year long tradition, co-published by the Institute of Criminological and Sociological Research, Belgrade, and the Serbian Association for Criminal Law Theory and Practice. According to the categorization of the Ministry of Science, Technological Development and Innovation, the Journal is categorized as M51 (Prominent/outstanding journal of national importance). The Journal includes articles in the field of criminal law, criminology, penology, victimology, juvenile delinquency, and other sciences that study etiology, phenomenology, prevention, and repression of crime. Moreover, the Journal is indexed in the prestigious global databases: ERIHPLUS, Dimensions, HeinOnline, and Crossref.

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Graphs and figures should be legible in terms of size and resolution. The legend explaining symbols should be positioned within the boundaries of the graph or figure.

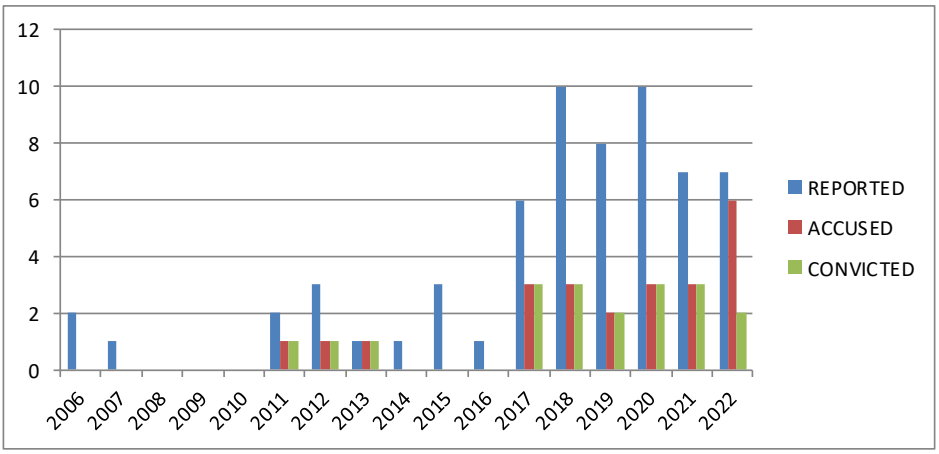
Table 3

Differences in tattooing status

	Odds Ratio for a tattoo (Yes/No)	**95% Confidence Interval**		**p**
		Lower	Upper	
Country of birth (Greece vs abroad)	2.243	0.813	6.192	0.11
Having children (Yes vs No)	0.773	0.328	1.821	0.555
Having a child <18 years (Yes vs No)	2.429	1.104	5.343	0.025
Conviction for a violent crime (Yes vs No)	2.748	0.624	12.112	0.166
History of drug-addiction (Yes vs No)	4.505	1.507	13.464	0.004
Alcoholism (Yes vs No)	1.050	1.013	1.089	0.194
Smoking (Yes vs No)	7.533	2.509	22.611	<0.001
Psychiatric medication (Yes vs No)	2.036	0.720	5.757	0.173
History of attempted suicide (Yes vs No)	1.455	0.147	14.429	0.748

Figure 1

The ratio of the number of reported, accused, and convicted for a criminal offense under Article 266 of the Criminal Code in the period 2006-2022.



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Example: (Stevanović, 2009, p. 152) or Stevanović (2009, p. 152).

If the author(s) name appears in the text as part of the body of the assignment, then the year will follow in round brackets, e.g. According to Stevanović (2009). If the author(s) name does not appear in the body of the text, then the name and date should follow in round brackets, e.g. The terminology has been called into question when it was discovered... (Stevanović, 2009).

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In some instances you may need to cite more than one piece of work for an idea. If this occurs, you should separate the references with a semicolon and cite them in chronological order, e.g. This point has been shown by numerous authors...(Jones, 2014; Smith, 2017).

When citing in-text, include the names of up to three authors. If there are four or more authors for the work you are citing then use the name of the first author followed by "*et al.*", e.g. This was shown to be the case when Taylor et al. (2015)...Or, the study shows...(Taylor et al., 2015).

For items where the author is a corporation/organization, cite the name of the organization in full, e.g. World Health Organization...(2016), unless their abbreviation is well–known, e.g. The governance of the network...(BBC, 2017).

If a work is designated as Anonymous or there is no author, use the title in italics in place of the Author, e.g. (*Law on Criminal Proceedings*, 2008).

If no date can be found, then you would state that there is no date.

If you are directly quoting from a source, then you should include the page number in your citation. A short quotation (under two lines) should be within the body of the text and in quotation marks. If the quote is more than two lines, then it should be presented as a new paragraph which is preceded by a colon and indented from the rest of the text. You do not need to use quotation mark.

If you are omitting materials from an original source, use three dots [...] to indicate this.

When citing a secondary source state the reference used first followed by 'cited in' and the original author: When citing a secondary source, the original source is cited first and then 'cited in' the source from which the quote was taken

Example: (Nikolić-Ristanović, 2011, cited in Ćopić, 2020, p. 120).

Rules for citing references in the reference list

All references cited in the paper should be written in Latin alphabet, following Harvard Citation Style, at the end of the paper, in the Literature section. Use the following setting: *Paragraph – Indentation – Hanging*.

Bibliographic entries are listed in alphabetical order according to the last name of the first author. In the case of multiple works with the same last name of the first author, references are listed alphabetically by the first name or initials. If there are multiple bibliographic entries by the same author, the criterion is the publication year, listed in chronological order, from earlier publications to more recent ones, following the rule: (a) bibliographic entries with no date/"n.d.", (b) dated bibliographic entries, and (c) bibliographic entries "in press". In the case of co-authored works with the same first author, the co-authored works

should be listed after the single author works, according to the last name of the next author. If there are two or three authors use "and" between the names rather than "&". If a bibliographic entry has no author, the name of the institution or the title of the work takes the first position. Prefixes such as certain or indefinite articles (e.g., a, the) are not considered when determining the order.

For references with four or more authors, include only the first author followed by *et al.* written in italics.

If a DOI number is available for reference, it should be provided in link format.

Example: https://doi.org/10.47152/rkkp.58.3.1

The list of references must not contain units which are not quoted in the paper and must contain all the units that are quotes including laws, reports, and web pages (web pages should be under the section Online Sources within the bibliography).

Books

Books with a single author

Author Surname, INITIAL(S). (Year) *Title*. Edition (if not first edition). Place of publication: Publisher.

Example: Milutinović, M. (1977) *Penology*. Belgrade: Savremena administracija.

Books with two or three authors

Author Surname, INITIAL(S)., Author Surname, INITIAL(S). and Author Surname, INITIAL(S). (Year) *Title*. Edition (if not first edition). Place of publication: Publisher.

Example: Pavićević, O., Bulatović, A., and Ilijić, Lj. (2019) *Otpornost – asimetrija makro diskursa i mikro procesa*. Beograd: Institut za kriminološka i sociološka istraživanja.

Books with four or more authors

First Author Surname, INITIAL(S). *et al.* (Year) *Title*. Edition (if not first edition). Place of publication: Publisher.

Example: Carrington, K. *et al.* (2018) *Southern Criminology.* London: Routledge.

Chapter in edited publications

Chapter Author Surname, INITIAL(S). (Year) 'Title of chapter', in Editor(s) Surname, Editor(s) Initial. (ed. or eds.) *Title of book*. Edition (if not first). Place of publication: Publisher, Page numbers.

Example: Blagojević, M. (2013) `Transnationalization and its Absence: The Balkan Semiperipheral Perspective on Masculinities`, in: Hearn, J., Blagojević, M. and Harrison, K. (eds.) *Transnational Men: Beyond, Between and Within the Nations.* New York: Routledge, 261-295.

Journal articles

Author of article Surname, INITIAL(S). (Year) 'Title of article', *Title of Journal*, Volume(Issue), Page range (if available). doi:

Example: Wright, R. F. (2017) `Reinventing American prosecution systems`. *Crime and Justice, 46*(1), 395-439. https://doi.org/10.1086/688463

Conference papers

Author(s) of paper Surname, INITIAL(S). (Year) 'Paper title', *Conference title.* Place of conference, Date of conference. Place of publication: Publisher, Page numbers.

Example: Batrićević, A. Paraušić, A., Kubiček A (2020) `Prison Based Educational Programs as a Means to Promote Ex-Prisoners` Right to Labour`, *International Scientific Conference "Towards a Better Future: Human rights, Organized crime and Digital society", Conference Proceedings, Volume II, International scientific conference*, Bitola, 03 October, 2020. Bitola: "St. Kliment Ohridski" University, Faculty of Law Kicevo, 140 – 154.

Dissertation

Author Surname, INITIAL(S). (Year) *Title.* Award and Type of qualification. Awarding body.

Example: Durr, M. (2023) *Urbanising the Security-Development Nexus: A Revisited Perspective on Segregation Governance in Miskolc, Hungary.* Doctoral dissertation. Durham University.

Laws and other legal documents

Title of the act (Year) Source of publication.

Example: *Law on Criminal Proceedings*, Official Gazette RS, No.58/04.

Web page

Web page with the individual author

Author Surname, INITIAL(S) (Year site was published/last updated) *Title of web page*. Available at: URL (Accessed: date).

Example: Rosen, M. (2021) *Michael Rosen Biography*. Available at: https://www.michaelrosen.co.uk/for-adults-biography/ (Accessed: 26 April 2021).

Web page with a group or organisation as author

Group or Corporate author (Year site was published/last updated) *Title of web page*. Available at: URL (Accessed: date).

Example: UNICEF. (2020) *COVID-19: Considerations for Children and Adults with Disabilities*. Available at: https://www.unicef.org/media/125956/file/COVID-19-response-considerations-for-people-with-disabilities-190320.pdf (Accessed: 24 May 24, 2024)

Web page with no author

Title of web page (Year site was published/last updated). Available at: URL (Accessed: date).

Example: Law on Execution of Criminal Sanctions, RS Official Gazette, No. 55/2014 & 35/2019 (2020). Available at: https://www.mpravde.gov.rs/files/LAW_ON_EXECUTION_OF_CRIMINAL_SANCTIONS.pdf (Accessed: 13 July 2023).

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343

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(Beograd : Birograf Comp). - 24 cm
Dostupno i na: http://www.iksi.ac.rs/revija.html
. - Tri puta godišnje. - Je nastavak: Jugoslovenska revija za kriminologiju i krivično pravo = ISSN 0022-6076

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