Ivan JOVANOVIĆ[1]

Pregledni članak
UDK: 343.132(497)
Primljeno: 15. juna 2014. god.

INJURED PARTY AS PARTICIPANT IN INVESTIGATION AND REFORMED CRIMINAL PROCEDURE LAWS OF COUNTRIES IN THE REGION (Serbia, Croatia, BiH, and Montenegro)

1. Notion of Injured Party and General Remarks on Injured Parties as Participants in Investigations

The understanding of criminal procedure has evolved over time in such a manner that its purpose and aim are now viewed not only from the perspective of state's right to protect the public order by way of punishing criminal offenders, but also – and increasingly more - as the state's duty towards individuals (victims) to penalise the violations of their rights. The above situation has mostly been a result of the development of human rights on a global scale, primarily through the jurisprudence of international institutions that oversee the protection of human rights, in particular the European Court of Human Rights (ECtHR). That has led to the widening of the restorative role of criminal law and procedure, whose aim is to repair the injustice and harm done to the victim as much as possible by, *i.a*, acknowledging victims their status, expressing the sol-

1 Consultant; LL.M; Ph.D. candidate, Faculté de droit de l'Université de Gen□ve.
At the time of writing the article (March 2014) served as National Legal Officer managing the Criminal Jutice System Unit in Human Rights/Rule of Law Department of the OSCE Mission to Serbia. The opinions expressed in the article are those of the author and do not necessarily reflect the positions or the policy of the OSCE.
I wish to thank my former colleague from the OSCE Mission Ana Petrović-Jovanović for her valuable advises and to Mirko Lukić and Gloria Lazić for their kind assistance.

idarity of the state and community with victims, protecting them from any further victimisation, providing them with a role in the process of criminal justice, compensating for the harm, and restoring their trust into the government. Both the normative elaboration and major development of the concept of protection of victims in criminal proceedings have occurred at the international level, thereby making an impact on national legislations and jurisprudence.[2] The United Nations and the Council of Europe have adopted a number of recommendations concerning this subject matter and the European Union has adopted framework decisions and directives; also, recently this field has been influenced by the improvement of the victim's position before the International Criminal Court.[3] Nevertheless, international standards and recommendations still leave to countries a wide margin for making decisions about the degree and form of victim's participation in criminal proceedings and the extent in which victim's interests influence the decisions of authorities that conduct proceedings; as we shall see, even when they come from once federal systems, countries opt for a wide range of solutions.

The subject matter of this article is the position and rights of the injured party in the investigation, as defined and elaborated on in four national legal systems – those of Serbia, Montenegro, Croatia, and Bosnia and Herzegovina – whose regulations were available to the author.[4] These four national legislations that share a common legal legacy had in the previous ten years – starting with Bosnia and Herzegovina in 2003 and ending with the latest changes made to the criminal procedure in Croatia in 2013 – substituted the inquisitorial system with various models of the accusatorial system in which the investigation is entrusted to the prosecutor. The primary focus of the analysis will be on the solutions found in the new Criminal Procedure Code of Serbia adopted in 2011 (hereinafter – the *2011 CPC* or the *new Serbian CPC*), its comparison with the pre-

2 For more information on this, see Ksenija Turković, „Utjecaj međunarodnog kaznenog prava na razvoj prava žrtava međunarodnih kaznenih djela te žrtava općenito u Europskoj uniji i u Republici Hrvatskoj", Zbornik radova Pravnog fakulteta u Zagrebu/Collected Papers of Zagreb Law Faculty 5/2004 pp. 865-937, and Ivana Simović Hiber, „Nova shvatanja o položaju žrtve u krivičnopravnoj teoriji i procesnom pravu i alternativne krivične sankcije", u Pojednostavljenje forme postupanja u krivičnim stvarima i alternativne krivične sankcije, XLVI Regular Conference of Serbian Association for Criminal Law Theory and Practice, 2009, pp. 236-244.

3 The Statute of the International Criminal Court (Rome Statute) gave victims a number of rights, including the right to participate in the proceedings and apply for reparations, all of which marked a turning point in respect of the position of victims in international criminal law.

4 As regards Bosnia and Herzegovina, the Criminal Procedure Code of BiH (hereinafter BiH CPC), applied before the Court of BiH, is the one that is analysed in this paper, noting that the provisions of the criminal procedure laws of the Federation of BiH, Republika Srpska, and Brčko District regarding this matter are the same as the ones found in the BiH CPC.

vious 2001 Serbian CPC (hereinafter – the *2001 CPC*) and the laws of BiH, Croatia, and Montenegro. Certain solutions regarding the position of the injured party will also be analysed in the light of relevant international instruments. Attention will be concentrated on the rights enjoyed by injured parties during the investigation which are particularly important for understanding their position at this stage in the proceedings and opportunities afforded to them under the law to participate in the investigation or have influence on it or on the criminal proceedings in general. In the first place, the paper will consider certain procedural mechanism and institutions according to which the injured party's action has a constitutive function in respect of the proceedings, *i.e.* on which depends the initiation of the proceedings (such as private indictment or motion to prosecute) as well those according to which the applications of the injured party are accessory in character or a reaction to previous actions by the public prosecutor (such as objection or subsidiary indictment). Then, special attention will be devoted to the rights enjoyed by the injured party in situations when the prosecutor is allowed to depart from the principle of legality and proceed with the resolution of the criminal matter by reaching an agreement with a defendant - the so-called prosecutorial discretion and plea agreements between the prosecutor and the defendant. In addition, the paper will present some of the most important rights of the injured party, which may also be exercised during the stage of the main hearing, but which are of importance for the injured party's participation in or presence during certain actions undertaken during the investigation.

The term "injured party" is traditionally used in the criminal procedure terminology of Serbia and other countries of the former SFR Yugoslavia. On the other hand, international documents most commonly employ the term the "victim of crime" and assign a wider meaning to it (even though the ECtHR has not declared its position specifically on the issue of whether or not an injured party may at the same time be referred to as the victim).[5] Finally, the lay public uses the word "victim" and even jurists sometimes do, in particular when addressing a wider audience, as the plain meaning of term "injured party" can be associated with some kind of material damage and may sound too technical and

5 For instance, according to some international documents, the term victim denotes not only the person who has either individually or collectively suffered harm, but also the victim's relative as well as persons who have suffered harm in intervening to assist the direct victim. See: Declaration of basic principles of justice for victims of crime and abuse of power – General Assembly Res. 40/34, Annex 1985. The concept of victim is similarly defined in the Recommendation R (2006)8 of the Council of Europe (CoE) Committee of Ministers to member states on assistance to crime victims of 14 June 2006, para. 1.1. On the concepts of victim and injured party see also Goran P. Ilić, „O položaju oštećenog u krivičnom postupku", Annals of the Belgrade Faculty of Law, year LX, 1/2012, pp. 141-142.

depersonalizing, especially when serious offences, such as murders or rapes, are concerned. Equating these two terms in colloquial speech is not essentially wrong since any victim of crime has the status of the injured party in criminal proceedings, whereas the injured party has been a crime victim in the majority of cases. Nevertheless, these two terms are not always fully equivalent. A victim is not necessarily a participant in criminal proceedings, whereas the injured party may be someone who is not a criminal offence victim (*e.g.* the next of kin of a deceased victim of crime). The term "victim" is used more in the context of substantive law and criminology and victimology,[6] while the term "injured party" is used more within the procedural law frame of reference (although – as we shall see from the example of Croatia – that is not the case in every national system of criminal law).

The new 2011 Serbian CPC, which began to be applied to all criminal cases as of 31 October 2013, defines the injured party in the same manner as the previous 2001 Code as "a person whose personal or property right has been violated or jeopardised by a criminal offence."[7] The concept of the injured party is defined in exactly the same manner in the criminal procedure codes of Montenegro and BiH. The Croatian CPC is the only code among the ones in force in the four observed countries which, in addition to the concept of the injured party, has introduced the concept of the victim of crime into criminal procedure and defined it as follows: a victim is "the person who, due to the criminal offence committed, suffers physical and mental consequences, property damages or substantive violation of the fundamental rights and freedoms."[8] In keeping with that definition, the Croatian law defines the injured party (*oštećenik* – according to the terminology used in the Croatian CPC) as a victim and any other person whose personal or property right has been violated or endangered by a criminal offence and who participates in criminal proceedings

6 For more information about a broader concept of victim in Serbian literature, especially as a term used in victimology, see, for instance, Vesna Nikolić-Ristanović, „Različita shvatanja pojma žrtve i njihove konsekvence na odnos društva prema viktimizaciji", Temida, no 1, Year 15, March 2012, pp. 21-40.

7 Article 2, para. 1, item 11 of the Criminal Procedure Code (of the Republic of Serbia), Official Gazette of the Republic of Serbia, no. 72 of 28 September 2011, 101/11 (hereinafter – 2011 CPC) and Article 221 of the Criminal Procedure Code (of the Republic of Serbia), Official Gazette of the Federal Republic of Yugoslavia, no. 70/2001 and 68/2002 and Official Gazette of the Republic of Serbia, no. 58/2004, 85/2005, 115/2005, 85/2005 – other law, 49/2007, 20/2009 – other law, 72/2009 and 76/2010 (hereinafter – 2001 CPC).

8 Article 202, para. 10 of the Criminal Procedure Code (of the Republic of Croatia), Official Gazette, number 152/08, 76/09, 80/11, 121/11, 91/12, 143/12) – consolidated text as of 11 October 2011 (hereinafter - Croatian CPC).

in a capacity as injured party.[9] The injured party under the Croatian law therefore includes the aforementioned notion of victim, but it is not on account of that any different from the contents of the notion of injured party from other codes of criminal procedure in the region since the definition of that term found in these codes encompasses the notion of victim even though that very notion is not expressly mentioned or acknowledged by those Codes in criminal procedure terms.

The injured party may be a secondary participant in the proceedings - when the prosecutor brings criminal prosecution. He may also be or become a primary participant in the proceedings assuming two important roles – of the injured party as a prosecutor or as a private prosecutor. *Injured party as a prosecutor* (subsidiary prosecutor) is, according to the definitions of statutory terms from the new Serbian CPC (Article 2), defined as "the person who has taken over criminal prosecution from the public prosecutor", whereas a *private prosecutor* is "a person who has filed a private indictment in connection with a criminal offence prosecutable under the law by a private indictment."[10] The Croatian CPC defines these concepts in an almost identical manner. They are used in the Montenegrin Code as well, although they have not been specifically defined therein, just as they were used in the previous 2001 Serbian CPC without being specifically defined therein.[11] The CPC of Bosnia and Herzegovina does not include a statutory definition of either term since, as we will show below, the injured party in BiH may be neither a private nor a subsidiary prosecutor. The choice of these two terms has not been completely adequate and may lead to misunderstandings by the public, including the very injured parties, because in cases of criminal offences prosecuted by a motion by the injured party (by virtue of private indictment), the private prosecutor is at the same time the injured party, whereas in cases of offences prosecuted ex officio, the injured party as a prosecutor acts as an individual participant in the proceedings. We therefore side with those authors from the region who propose that it would be more appropriate to use some other statutory term when referring to the present injured party as the prosecutor, for instance a subsidiary prosecutor or the like.[12] In any event, the term "subsidiary prosecutor" will also be used as a synonym for the injured party as a prosecutor throughout this paper.

9 Article 202, para. 11 of the Croatian CPC.

10 Article

11 See Article 22, para. 1, item 6 of the Criminal Procedure Code (of Montenegro), Official Gazette of Montenegro, no. 57/2009 and 49/2010

12 See: Zoran S. Pavlović, "Neke specifičnosti oštećenog kao supsidijarnog tužioca (u kaznenom procesnom pravu Republike Srbije)", Zbornik radova Pravnog fakulteta u Splitu/Collected Papers of the Split Faculty of Law, Year 49, 3/2012. p. 618, and Goran Tomašević, Matko Pajčić, „Subjekti u kaznenom postupku: pravni položaj žrtve i oštećenika u novom hrvatskom kaznenom postupku", Hrvatski ljetopis za kazneno pravo i praksu, Zagreb, vol. 15, broj 2/2008, p. 835, fn. 69.

2. Injured Party's Rights during Investigation

Unlike the former 2001 CPC, the new Serbian CPC sets out a number of injured party's rights in one place (Article 50, paragraph 1). Among the rights enumerated in that Article, the ones relevant to the investigation include that the injured party is entitled to be informed about the dismissal of criminal charges or of public prosecutor's abandonment of prosecution; to file an objection (whenever allowed to) against the public prosecutor's decision not to undertake criminal prosecution or to abandon it; to be advised that he may take over criminal prosecution and present an indictment; to draw attention to facts and propose evidence relevant to the subject matter of evidentiary actions; to inspect files and examine objects used as evidence; to hire a proxy from the ranks of attorneys-at-law; as well as to file a motion and evidence in support of his restitution claim and a motion for imposing measures aimed at securing the claim.[13] The above list is not final given that injured parties may enjoy other rights as well, provided for in some other sections of the Code. In addition, the injured party is entitled to file a motion for initiating criminal prosecution.[14] Naturally, he has the right to file criminal charges (criminal complaint) as any other individual, so this right could not be subsumed under the rights whereby injured parties are given a special position in criminal proceedings. Some of the rights set forth in Article 50 of the new CPC, as well as other rights pertinent to the status of the injured party, will be separately analysed below. In addition to the above-mentioned rights, whose exercise or commencement thereof is related to the investigation, injured parties have a number of rights at the later stages and phases of the proceedings, which will not be covered in this paper.[15]

13 Article 50, para. 1, items 1 through 7 of the 2011 CPC.

14 Article 53 of the 2011 CPC.

15 Article 50 as well as some other Articles of the 2011 CPC set forth the rights enjoyed by injured parties for the duration of the main hearing. Thus, the injured party is entitled to attend the preparatory hearing and the main hearing; to participate in the presentation of evidence at the main hearing or away from the main hearing; to propose new evidence or supplemental evidence and to make a closing argument. Also, he may file an appeal against a decision on the costs of criminal proceedings and awarded restitution claim; he is entitled to be informed about the outcome of the proceedings and to be served with a final judgment. In addition, he may undertake other actions when thus allowed by the CPC, such as applying for protection from an insult, threat, or other form of attack, applying for the status of especially vulnerable or protected witness, restoration to a prior position (restitutio ad integrum) It is provided in general terms that the public prosecutor and the court have a duty to advise the injured party of all of his above-mentioned rights; also, it is provided that the prosecutor, when serving an order to conduct an investigation on the suspect and his defence attorney, has a duty to notify the injured party of initiating an investigation and to advise him of the said rights he enjoys throughout the duration of the entire criminal proceedings (Art. 297, para 3). The rights of injured parties at the main hearing are regulated in a similar manner both in Croatia and Montenegro.

Some international recommendations and other international legal instruments concerning victims of crime point to the direction and extent in which certain rights of injured parties discussed herein ought to be regulated. Thus, the Declaration of the UN General Assembly of Basic Principles of Justice for Victims of Crime and Abuse of Power provides among other things for "allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system."[16] Likewise, the Recommendation R (85) 11 of the Council of Europe's (CoE) Committee of Ministers on the Position of the Victim in the Framework of Criminal Law and Procedure provides in its section on the criminal prosecution of offences that the victim must be given the right to ask for a review by a competent authority of a decision not to prosecute or the right to institute private proceedings,[17] whereas the Recommendation R(87)18 instructs that a complainant - who can also be an injured party - should be notified whenever possible of a decision to waive or discontinue criminal prosecution in instances when a procedural mechanism of simplified procedure is applied.[18] The CoE's Recommendation R(2006)8 on Assistance to Crime Victims requires that victims are kept informed of the outcome of their criminal complaint.[19]

It is also important to mention – because of the accession of the countries in the region to the European Union and Croatia's membership therein – that the Directive 2012/29/EU of the European Parliament and of the Council adopted in 2012 whereby minimum standards on the rights, support, and protection of victims of crime were established (which has replaced the previous Council Framework Decision EU 2001/220/JHA in this field) expressly provides that the Member States are obligated to ensure that victims are notified of the instituting, course, and completion of proceedings in order to be able, among other things, to make a decision about their own participation therein and to ensure that victims have the right to challenge decisions not to prosecute and to a review of such decisions (this does not apply to cases of out-of-court settle-

16 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UN General Assembly A/Res/40/34, adopted on 29 November 1985, para. 6(b).

17 CoE Committee of Ministers, Recommendation R (85) 11 on the position of victim in the framework of criminal law and procedure, 28 June 1985, para. 7.

18 CoE Committee of Ministers, Recommendation R(87)18 concerning the simplification of criminal justice, 17 September 1987, para. 10.

19 CoE Recommendation R(2006)8 of 2006, (note no. 5 supra), para. 6.5.

ments reached by the prosecution under certain conditions).[20] Victims are in any case entitled to challenge such decisions if they are rendered by prosecutors, investigating judges, or law enforcement authorities, but not if such decisions are rendered by courts.[21] Despite the fact that it defines a number of rights for victims of crime that must be provided for in their national legal systems, the Directive explicitly allows the EU Member States liberty to regulate the scope and manner of victim's participation in the proceedings as they deem suitable.[22]

The European Court of Human Rights has mostly addressed the rights and position of the injured party from the aspect of the right to a fair trial, including as well the right to access to court, through the injured party's role in civil proceedings for the purpose of being awarded a restitution claim. Nevertheless, there have been cases in the ECtHR's jurisprudence in which the Court, while addressing the issue of the procedural element of guarantees related to the right to life under Article 2 of the European Convention on Human Rights, has found that it also included the injured party's right to be informed of the course of an investigation and to be involved therein, or more precisely, that victim's next of kin are entitled to be informed of the course of an investigation and to participate therein, which also includes asking questions, to the extent in which it is necessary for them to protect their own legitimate interests.[23]

2.1 Injured Party's Objection

A new right of the injured party, which among other observed countries exists only in one more country, namely in Bosnia and Herzegovina, was introduced by the Serbian 2011 CPC: that right is an objection to a public prosecutor's decision not to undertake criminal prosecution or to abandon it. This recent right has been a procedural substitute or compensation for a right to bring criminal prosecution in the course of proceedings, investigation included, previously enjoyed by injured parties under the 2001 Serbian CPC, which, as we will

20 Directive 2012/29/EU, establishing minimum standards on the rights, support and protection of victims of crime, the European Parliament and the Council, 25 October 2012 (hereinafter – EU Directive 2012/29), especially paragraphs 43 and 45 of the Preamble as well as Articles 6 and 11. Member states are required to harmonise their national regulations with the Directive by November 16, 2015.

21 Ibidem, para. 43 of the Preamble to the EU Directive.

22 Ibidem, para. 20 of the Preamble to the EU Directive.

23 European Court of Human Rights (ECtHR), Ayhan v. Turkey, 16 February 2011. para. 86, as well as Hugh Jordan v. UK, 4 May 2001, para. 109 and Ogur v. Turkey (20 May 1999), para. 92. Also, Edwards v. United Kingdom (2002).

see, has presently been limited. Until an indictment is confirmed, objection is the only procedural recourse whereby the injured party may assert and protect their interest that criminal prosecution is undertaken.

Injured parties are entitled to file an objection if - in connection with a criminal offence prosecuted ex officio - a public prosecutor dismisses criminal charges (criminal complaint), or discontinues an investigation, or abandons criminal prosecution before the confirmation of an indictment.[24] When the public prosecutor renders any such decision, he is obligated to notify the injured party thereof within eight days and to advise him that he may file an objection to an immediately superior public prosecutor (Article 51, para. 1 of the 2011 CPC). Article 51, para. 1[25] should be construed or applied to the relation between public prosecutor and injured party together with Article 284, para. 2 which governs the dismissal of criminal charges. This is on account that the latter requires from the prosecutor, in addition to his duty to notify the injured party of the dismissal of criminal charges within eight days and advise him of his rights - which is also laid down in the above-mentioned Article 51, para. 1 - to notify the injured party of the reasons for such dismissal of criminal charges. In that respect, articles that govern the discontinuance of investigations (Article 308) and abandonment of criminal prosecution after the completion of an investigation (Article 310, para. 4) also lay down that the prosecutor has a duty to notify the injured party thereof so that he could file an objection afterwards; however, neither of these two articles mentions that the notification should include reasons for such decision by the prosecutor. That could be an oversight on the part of the legislator due to which articles addressing the same prosecutor's duty have not been laid down in an identical manner. In any case, even though the work of prosecutors is made easier in practice because of Article 51, para. 1, given they are not required to provide injured parties with reasons for their decisions, the prosecution service should be guided by the article of the Code that grants more rights to citizens (injured parties in this instance) in respect of that matter and to provide a rationale as required under the said paragraph. 2 of Article 284.

24 A public prosecutor may render a decision to abandon criminal prosecution in the period from the completion of an investigation until the bringing of an indictment, and then after the confirmation of the indictment, while abandonment is not allowed in the period from the bringing of an indictment to is confirmation, G. P. Ilic, M. Majić, S. Beljanski, A. Trešnjev, Komentar Zakonika o krivičnom postupku (Commentary to the Criminal Procedure Code), IV edition, Belgrade, 2013 (hereinafter – Commentary to the Serbian CPC), p. 716.

25 If the title of a law or code is not specified next to a provision, that provision pertains to the Serbian 2011 CPC.

When a public prosecutor receives a report about an incident (e.g. a report about traffic accident and record of accident scene investigation) instead of criminal charges, and finds that there are no grounds for bringing prosecution, he is not under such circumstances required to notify the injured party thereof or advise him of his rights.[26] This follows from the provision contained in Article 51, para. 1 and Article 284, para. 2 of the CPC in which the prosecutor's decision is characterised as the dismissal of criminal charges (criminal complaint) and not a decision against initiation of the prosecution and hence no duty on the prosecutor's part has been laid down to inform the injured party that he has not found any grounds for initiating prosecution.[27]

The public prosecutor shall also notify the injured party that an investigation has been completed (Art. 310, para. 1 of the 2011 CPC). The injured party is entitled to file an objection if the prosecutor does not issue an indictment within 15 days, or within 30 days in particularly complex cases, after the completion of the investigation (Article 331, para. 3). In such a situation, the prosecutor does not render a decision or in other words he does not take any action, i.e. he remains "silent" and identical time limits are set for filing an objection by the injured party: eight days from the expiry of the time limit for issuing an indictment or three months from the completion of the investigation.[28]

The Code requires that the prosecutor shall inform the injured party even when he dismisses criminal charges on grounds of defendant's compliance with his obligations in cases of conditionally deferred prosecution. In such situations, the injured party has no right to file an objection and neither is he entitled thereto in cases of dismissal of criminal charges on grounds of purposefulness or fairness.

The Code gives the injured party a time limit of eight days to file an objection, starting from the day on which he receives a notification from the public prosecutor and advice of the right to file an objection or from the expiry of the time limit for issuing indictment after the completion of an investigation (Article 51, para. 2 and Article 331, para. 3). When the injured party has not been notified that the investigation was completed, the objective and preclusive time limit for filing an objection is set at three months from the day on which the prosecutor dismisses criminal charges, discontinues an investigation, or

26 Priručnik za primenu Zakonika o krivičnom postupku/Handbook on Application of Criminal Procedure Code, S. Bejatović. M. Škulić, G. Ilić (eds.), Serbian Association of Public Prosecutors and Deputy Public Prosecutors, Belgrade 2013, p. 221.

27 Ibidem.

28 Article 331, para. 3 of the 2011 CPC.

abandons criminal prosecution,[29] or issues an order for completing the investigation.[30] It should be mentioned that even if the injured party were notified within those three months, his objection would be precluded by the expiry of the eight-day time limit - which applies in such cases - and not by the expiry of the three-month time limit.[31] As can be seen from the above, the exercise of the injured party's right to file an objection is contingent on the prosecutor's timely notification of his decision against undertaking or in favour of abandoning criminal prosecution. Prosecutors do not face any procedural consequences under the provisions of the Code if they fail to discharge the duty in question, although such an omission could possibly constitute grounds for disciplinary action against the public prosecutor or deputy prosecutor. In any event, the exercise of this right in practice will depend on how professional, responsible to his vocation and ethical each prosecutor is. For that reason, it would certainly be useful if injured parties, for their part, actively followed as much as possible the proceedings in connection with their criminal matter so as to preclude any possible omissions by prosecutors and losing their right as a result of exceeding the set time limit.

In all of the above-mentioned cases, the immediately superior prosecutor is the one who renders a decision on the injured party's objection within 15 days from the date of receiving the objection and he may either deny or grant it by issuing a decision (Article 51, para. 3 and Article 331, para. 4). Neither an appeal nor any further objection is allowed against such a decision. The above-mentioned 15-day time limit is instructive and the injured party does not have at his disposal any special procedural recourse to force the superior prosecutor to render a decision on the objection in the event he exceeds the set time limit for any reason whatsoever. If the prosecutor to whom the injured party has addressed grants the objection, he will by the same decision give a mandatory instruction to the competent lower public prosecutor to undertake or resume criminal prosecution.[32] If the investigation has been completed and no indictment is issued, he will order him to issue an indictment.[33] When the Law on Public Prosecution Service is taken into account, the immediately superior prosecutor could, after granting the objection, issue a mandatory instruction only on condition that he found that the previous decision by the lower-ranking prose-

29 Article 51, para. 2 of the 2011 CPC.

30 Article 331, para. 3 of the 2011 CPC.

31 Analogous to the decision by the Supreme Court of Cassation, Kzz.19/12, of 28 March 2012. This decision pertained to the 2001 CPC and exceeding the eight-day time limit after the injured party had been notified of the prosecutor's abandonment of criminal prosecution.

32 Article 51, para. 3 of the 2011 CPC.

33 Article 331, para. 4 of the 2011 CPC,

cutor (to dismiss criminal charges, discontinue the investigation, abandon prosecution, or not to issue an indictment) was unlawful.[34]

The injured party is entitled to file an objection in summary proceedings as well, under the same conditions as set out in Article 51, if the public prosecutor abandons criminal prosecution before the scheduling of the main hearing or the sentencing hearing (pursuant to Article 497, para. 1). The majority of proceedings before basic courts in Serbia will be conducted as summary proceedings given the number of offences to which this type of simplified procedure is applied.[35] As regards summary proceedings, the injured party has the right to file another objection, specifically if within six months from the day of receiving criminal charges the public prosecutor fails to file a motion to indict or notify him that he has dismissed the charges (Article 499, para. 3). A time limit for filing this type of objection is also three months and it is also calculated not from the day of dismissal of criminal charges, but from the day of expiry of the six-month time limit, starting from the day on which criminal charges are filed.[36] That represents yet another narrowing of the rights enjoyed by injured parties in comparison with the previous 2001 CPC because in this instance as well the objection has replaced the former option given to the injured party to assume prosecution as a subsidiary prosecutor (by filing a motion to indict with the court) if the public prosecutor failed to file the motion to indict or notify him that he had dismissed criminal charges within the timeframe of one month after receiving the charges (Article 437 of the 2001 CPC). In such cases as well, the prosecutor had remained "silent" as when he would not issue an indictment after the conclusion of an investigation in regular proceedings. Under the former CPC, no time-limit for initiating proceedings by virtue of a motion to indict was imposed in such situations on the injured party after the expiry of the foreseen one-month deadline.

Among the four observed national legislations, injured party's objection exists only in one more country, namely Bosnia and Herzegovina, but it has been differently termed (as a complaint). When a prosecutor issues an order not to conduct an investigation or to discontinue it, of which he is required to notify the injured party within three days (and at the same time he has a duty to

34 See Article 118, para. 1 of the Law on Public Prosecution Service, no. 116 of 22 December 2008, 104/09, 101/10, 78/11, 101/11, 38/12, 121/12, 101/13, 32/14.

35 The legislator has widened the scope of offences processed in summary proceedings in the new CPC so to encompass those punishable with imprisonment of up to eight years (it was up to five years under the former CPC) or a fine as their principal penalty, which is justifiable from the perspective of simplification and efficiency of proceedings.

36 Commentary to the Serbian CPC, op. cit., p. 1058.

inform him about reasons for his decision), the injured party in BiH is entitled to file a complaint with the prosecutor's office within eight days from the date on which he receives such notification.[37] In contrast to the Serbian CPC, the BiH Code provides neither for a procedure to be followed upon a complaint nor for the form of a decision rendered in connection therewith, although it can be concluded based on the nature and character of the complaint that - in the similar manner as in Serbia - the prosecutor's office may either issue a decision that the complaint is well-founded and order that an investigation be conducted or a decision that the complaint is unfounded and inform the injured party accordingly.[38]

Unlike the new Serbian CPC and the CPC of Bosnia and Herzegovina, the former 2001 Serbian CPC did not provide for a possibility of injured party's objection during an investigation nor do laws governing criminal procedure in Montenegro and Croatia provide for it at present. The reason for that is simple: they specifically give injured parties a stronger right and a more powerful mechanism for protecting their interests and controlling prosecutor's actions during an investigation and that is the possibility of taking over criminal prosecution.

The existence of a possibility for filing an objection is in accordance with the above-mentioned recommendations from the UN General Assembly's Declaration of Basic Principles of Justice for Victims of Crime to allow victims to present their views and concerns which must be considered when they affect victims' personal interests; it is also in line with the CoE Recommendation R (85) 11 that it should be ensured that victims have the right to request that competent authorities review decisions on not initiating criminal prosecution. The very procedural tool of objection established as a partial substitute for taking over criminal prosecution is also in line with the above recommendation by the Council of Europe which allows its member states to opt for laying down either of those two possibilities available to victims of crime. As regards its compliance with the EU acquis communautaire, the objection also satisfies a requirement set out the above-cited EU Directive of 2012/29 to ensure that victims have the right to a review of prosecutors' decisions not to prosecute offenders.[39]

37 Criminal Procedure Code of Bosnia and Herzegovina (consolidated text) – Official Gazette of Bosnia and Herzegovina, no. 3/03, 32/03, 36/03, 26/04, 63/04, 13/055, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09) (hereinafter – the BiH CPC) Article 216, para. 4 and Article 224, para. 2.

38 Miodrag Simović, "Main Characteristics of the Criminal Investigation System in the Legislation of Bosnia and Herzegovina and its Impact on the Simplification of Criminal Proceedings" in Ivan Jovanović, Miroljub Stanisavljević (eds.), Simplified Forms of Procedure in Criminal Matters: regional criminal procedure legislation and experiences in application, OSCE Mission to Serbia, Belgrade, 2013, p. 130.

39 EU Directive 2012/29, Article 11, para. 1.

However, in order for this right to be exercised, it is crucial that a victim is informed by the prosecutor about the outcome of criminal charges filed by him or about the prosecutor's decision not to initiate criminal prosecution or to desist therefrom, as set forth by the CoE Recommendation R(2006)8 and EU Directive 2012/29 (Article 6, para. 1 - Right to receive information about their case) and as requested by the European Court of Human Rights in its previously mentioned decision whereby it has found that victim's next of kin has the right to be informed about the course of an investigation.[40]

The introduction of objection into the new Serbian CPC is justified as a component of the right to receive a reasoned court decision as an element of the right to a fair trial,[41] but this tool has also been met with criticism for not being purposeful.[42] One of main arguments in favour of such criticism has been that the prosecution service is structured as a strictly hierarchical institution in which superior prosecutors constantly oversee the actions of lower-ranking prosecutors, for which reason the actions of superior prosecutors would not be impartial due to the fact that they would review decisions of their subordinates whose work they should in any case monitor according to the nature of their work and so they would have to acknowledge their own mistake(s).[43] Criticism may also be founded on a supposition that a prosecutor who is ordered by a superior prosecutor to prosecute an offender has already stated his position on that same criminal matter when he decided against initiating or continuing with criminal prosecution in the first place; as a result, despite the mandatory instruction from an immediately superior public prosecutor, there is still a risk that that same prosecutor will not be committed to representing the prosecution and collecting evidence that would lead to a well-founded indictment or will not issue an indictment for which he previously believed that it was unfounded. In addition to that, the prosecutor in charge could not file an objection to the instruction he received even if he believed that such an instruction was unlawful or unfounded, whereas if he should fail to act according to the mandatory instruction, that fail-

40 See notes no. 5, 20, and 23 supra.

41 Goran P. Ilić, op. cit., p. 153, fn. 77.

42 Criticism is also centred on the fact that the Law on the Public Prosecution Service does not include any such instructions as a special type of mandatory instructions, which is why such type of the instruction should be specifically regulated through amendments to the Law on the Public Prosecution Service and to the Rulebook on Administration in Public Prosecutor's Offices. See Goran Ilić "Position of the Public Prosecutor According to the New Serbian Criminal Procedure Code" in Ana Petrović, Ivan Jovanović (eds.), New Trends in Serbian Criminal Procedure Law and Regional Perspectives (normative and practical aspects), OSCE Mission to Serbia, Belgrade 2012, p. 74, and Handbook on Application of Criminal Procedure Code, op. cit., p. 216.

43 Ibidem.

ure would, pursuant to the Law on Public Prosecution Service, constitute a disciplinary violation.[44] Such criticism is not unfounded looking from the perspective of criminal procedure policy, but the legislator's choice is completely legitimate and allowed from the normative point of view.[45]

2.2 Taking over Criminal Prosecution by Injured Party (Subsidiary Indictment)

In principle, one of the most important and prominent rights traditionally enjoyed by injured parties has been a possibility to take over criminal prosecution if prosecutors decided not to initiate criminal proceedings or to desist therefrom. In such situations, injured parties acted as prosecutors instead of public prosecutors or as *subsidiary prosecutors*. The right to file a subsidiary indictment was legislated already by the first Yugoslav Code of Criminal Procedure before Court passed in 1929, whereas afterwards it was absent only from the 1948 CPC; today, it is present in all the countries that have emerged after the dissolution of the former SFRY with the exception of BiH. The new 2011 Serbian CPC has retained that right, but it has been considerably restricted and reduced only to the taking over of criminal prosecution (*i.e.* filing a subsidiary indictment) upon the confirmation of an indictment, but not during an investigation. Although injured parties in Serbia currently do not enjoy this right in the course of the investigation, we will briefly comment on it because of its relevance and in order make a comparison with the other countries in the region.

The 2011 CPC thus lays down that if a public prosecutor declares that he is withdrawing charges after the confirmation of an indictment, the court will ask the injured party whether he wishes to assume criminal prosecution and represent the prosecution (Article 52, para. 1).[46] A time limit before which injured parties must state their position has also been established in this case as in the case of objections: eight days from the date on which they receive notification and advice from the court, and if they have not been informed, the preclusive

44 Commentary to the Serbian CPC, op. cit., pp. 205-206. See Article 104, para. 1(4) of the Law on Serbian Public Prosecution Service.

45 The EU Directive allows that such decisions are reviewed by immediately superior bodies, while decisions originally passed by the highest prosecutorial authority in a country may be reviewed by that same authority. It is thus not required that courts shall review prosecution's decisions. EU Directive 2012/29, para. 43 of the Directive's Preamble.

46 In any case, the public prosecutor may withdraw the charges from the moment of indictment's confirmation until the conclusion of the main hearing, as well as during a hearing before a court of second instance (but in case of latter solely with consent from defendant).

and absolute time limit is three months from the day of public prosecutor's statement that he withdraws the charges.[47] If an injured party states that he will assume criminal prosecution, the court will proceed with or schedule a main hearing.[48] On the other hand, if the injured party does not state his position within the above timeframe or states that he does not wish to take over criminal prosecution, the court shall issue a ruling discontinuing the proceedings or pass a judgment whereby charges are denied.[49] An injured party who could not attend a preparatory hearing or the main hearing or who could not inform the court of his change of residence in a timely manner for justifiable reasons has the right to apply for restoration to a prior position (*restitutio ad integrum)* within eight days from the date on which an obstacle ceases to exist, but not exceeding the absolute time limit of three months (Article 226, para. 1, item 2).[50] In the further course of proceedings, the injured party may withdraw the charges before the conclusion of the main hearing or a hearing before a second instance court; his statement whereby he withdraws the charges is irrevocable. If an injured party should pass away within the timeframe provided for making a statement on assuming prosecution or in the very course of the proceedings, his legal successors shall have the right to take over prosecution.[51]

After assuming criminal prosecution, an injured party as a prosecutor is entitled, among other things, to represent the prosecution, file motions for and evidence in support of his restitution claim, and undertake other actions as specified by the Code in the further course of the proceedings before a court of law while acting alone or through his proxy. In general, he enjoys all the rights which would otherwise be enjoyed by a public prosecutor (including, for instance, the right to alter the legal qualification of an offence),[52] except for those that public prosecutors have in their capacity as public authority (Article 58 of the 2011 CPC). As opposed to prosecutors, injured parties may not count on assistance from the police or other state authorities in collecting evidence,

47 Article 52, para. 2 of the

48 The court first needs to establish that a specific individual has the status of an injured party because if an individual who could not have that status assumed criminal prosecution after the dismissal of criminal charges, that would constitute a substantive violation of criminal procedure because it will be considered that there was no authorised prosecutor in that specific case. Commentary to the Serbian CPC, op. cit., p. 207, citing the case-law of the Supreme Court of Serbia, Kž2, no. 2229/05 of 19 January 2006 and Supreme Court of Serbia, Kzz. no. 153/06 of 2 March 2007.

49 Article 52, para. 3 of the

50 Commentary to the Serbian CPC, op. cit., p. 208.

51 Article 57 of the 2011 CPC.

52 Supreme Court of Serbia, Kzz.17/97 of 16 December 2002.

nor are all those authorities obligated to provide them with information and notifications.[53] Similarly, they are not allowed to conclude plea agreements with defendants. On the other hand, there are some actions that may be undertaken by injured parties as subsidiary prosecutors but not by public prosecutors: for instance, they may file a motion to be examined as witnesses or an application for restoration to a prior position.[54]

As regards the injured party's right as a subsidiary prosecutor, the key difference between the current Serbian CPC and the 2001 CPC lies in the fact that under the former CPC injured parties could take over criminal prosecution not only from the beginning of the main hearing, but during the investigation as well (within eight days from the date of receiving a notification or within three months if they were not notified of the prosecutor's decision not to bring prosecution or to abandon it – Article 61 of the 2001 CPC). When the prosecutor or the court sent notifications to injured parties, they would provide them with advice about actions they were entitled to take in their capacity as subsidiary prosecutors.[55] When a public prosecutor decided to withdraw the charges, the injured party had the right to stand by the same charges or bring the new ones.[56]

Changing the rules pertaining to the possibility of taking over prosecution by injured parties, *i.e.* eliminating such a possibility during the investigation, has led to problems in Serbia with regard to practical application after the entry into force of the 2011 CPC, because it has raised the question of how the proceedings should be continued if the motion to indict was filed by the injured party while the previous CPC was in still effect. This issue has also been addressed by the Appellate Court in Belgrade whose Criminal Division in answering enquiries from lower-instance courts has taken a position that if an injured party has taken over prosecution and filed a motion for conducting an investigation which has not been decided yet, that motion shall be regarded as an injured party's objection filed with a senior public prosecutor, whereas in all the other cases, given Article 604 of the current CPC,[57] the injured party shall have the capacity as an authorised prosecutor pursuant to the provisions of the former CPC.[58]

53 Commentary to the Serbian CPC, op. cit., p. 213.

54 Ibid. See Article 92, para. 1 or Article 226, item 2 of the 2011 CPC.

55 Article 61, para. 5 of the 2001 CPC.

56 Article 61, para. 3 of the 2001 CPC.

57 Article 604 of the 2011 CPC lays down that the legality of actions undertaken prior to the entry into force of that very Code shall be assessed pursuant to the provisions of the previous CPC (the 2001 one).

58 Answers to the enquiries from lower-instance courts provided by judges with the Criminal Division of the Appellate Court in Belgrade given at their session held on 7 April 2014.

The *Montenegrin* Criminal Procedure Code provides for and regulates the injured party's right to assume prosecution both during the investigation and at the main hearing in the same manner as did the 2001 Serbian CPC; the only difference is that time limits it sets are more favourable to injured parties: 30 days to take over criminal prosecution from the moment of receiving a notification and six months if they have not received any such notification (Article 59, para. 3 and 5 of the Montenegro CPC). Subsidiary indictment is provided for in *Croatia* in an almost identical manner as it used to be regulated in Serbia before the adoption of the new CPC and as it is regulated presently in Montenegro; the only difference is made in respect of the objective time limit, so in cases of a stay of proceedings, the time limit is set at three months from the issuance of state attorney's decision (as under the 2001 Serbian CPC), whereas in cases of state attorney's dismissal of charges, the time limit is set at six months (Article 55, para. 4 of the Croatian CPC). In *Bosnia and Herzegovina,* injured parties may not act as subsidiary prosecutors in criminal proceedings under any conditions.

As for the summary proceedings, in Serbia injured parties are entitled to take over prosecution in that type of proceedings as well, under the same conditions as set out in Article 52 of the new CPC, specifically if the public prosecutor withdraws charges from the date of scheduling the main hearing or a sentencing hearing until the conclusion thereof. The *Montenegrin* CPC has kept and regulated in the same manner that same right of the injured party as it was laid down by the 2001 CPC (Article 449 of the Montenegro CPC).[59] As regards *Croatia*, injured parties could exercise that same right in summary proceedings under the former 1997 CPC – which used to exist under the former Serbian CPC and which is still in force under the current Montenegrin CPC – namely, to act as subsidiary prosecutors in cases when state attorneys failed to initiate criminal prosecution or dismiss criminal charges within a specified timeframe, given that a period of time injured parties had to wait for a prosecutor's reaction in Croatia was somewhat longer then – it was three months.[60] The new 2008 Croatian CPC has nevertheless abolished that right and presently, injured parties are forced to wait for state attorney's decision in any case.[61]

It cannot be doubted that the right to act as a subsidiary prosecutor represents both in principle and from the formal aspect of law a powerful procedur-

59 See Drago Radulović, Commentary to the Criminal Procedure Code of Montenegro, Podgorica 2009, p. 586.

60 Article 433, para. 1 of the Criminal Procedure Code (of the Republic of Croatia), Official Gazette, no. 110/97, 27/98, 58/99, 112/99, 58/02 and 143/02.

61 Also see Tomašević-Pajčić, op. cit., p. 845.

al means of the injured party's whereby he protects his interests; it is at the same time an important corrective to improper actions or a passive stance taken by public prosecutors. As a manner of challenging prosecutors' decisions not to take action which is more direct and powerful than the objection, it automatically complies with the requirement from the EU Directive 2012/29 which provides that victims of crime shall be entitled to a review of the discontinuance of proceedings not ordered by the court. However, the state is not in any way obligated to provide for such a right of injured parties and the CoE Recommendation R (85)11 expressly states that it may be replaced with the injured party's right to request a review of the decision not to initiate criminal prosecution,[62] which has been achieved by both the Serbian and BiH legislators when they provided for objection as a procedural tool. If we are to lament the abolishment of this right, it should be mentioned that the number of subsidiary indictments at the time they were allowed both during the investigation and at the main hearing was negligible in practice, while the percentage of such indictments that resulted in judgments of conviction was even lower.[63] A number of reasons could have led to such a situation: it could be that the prosecution had always made right decisions concerning dismissal or withdrawal of charges or perhaps injured parties' lack of confidence that they could be successful as subsidiary prosecutors prevailed or the fact that they were not aware of any such right (regardless of the prosecution's and court's duty to advise them thereof – which could also have been neglected in practice); other possible reasons included a lack of money or time to get involved into proceedings, even the fear that defendants might retaliate if they acted as prosecutors. The low percentage of judgments of conviction passed on subsidiary indictments could also have meant that such indictments had not been sufficiently well-founded or that injured parties were unable to conduct their investigations and further proceedings in an equally adequate manner as dedicated public prosecutors would have in their capacity as state authorities with all of their prerogatives and status, or it could have been due to some other reason. If those reasons existed before, they also exist today and even more so since injured parties as prosecutors now face even greater challenges than before given the new concept of the investigation and the burden of collecting evidence placed on prosecutors. Nevertheless, the fact that an individual right is rarely exercised should not be the primary rea-

62 See note no. 17 supra.

63 In the period 2002-2006 there were less than one percent of subsidiary indictments in Serbia. The situation is similar in other countries, for instance in Croatia. Cited according to Zoran Pavlović, op. cit., p. 626 (especially footnote 25 at that page).

son for its abolishment. We are not of the belief that the legislator was guided by previous practice to such an extent that they eliminated a not-so-often-exercised right; if that was the case, a question arises as to why they have kept the possibility of filing a subsidiary indictment at the main hearing. Rather, the impression is that the legislator had consistently adhered to the principles underlying the new Serbian CPC and entrusted the investigation exclusively to prosecutors with all the competences and powers on the one hand and the accompanying burdens and duties on the other, in spite of the examples that, as we have seen, can be found in the neighbouring countries which have kept this right of the injured party despite a more active role taken on by prosecutors and their predominantly accusatory systems.

Now that the possibility of filing a subsidiary indictment has been limited to the stage following the confirmation of an indictment, one can assume that filing such indictments will be even more rare than before if only for the fact that prosecutor's withdrawal of an indictment after its confirmation has always been an exceptionally rare occurrence in practice. In consequence, the possibility of acting as a subsidiary prosecutor and representing an already prepared indictment will in reality remain a powerful potentiality for injured parties, which will nevertheless be rarely realised. On the other hand, it should be mentioned in any case that injured parties are not deprived of the possibility to influence the investigation and assist, propose, and even "guide" prosecutors in a certain manner if they should take a passive stance or be on the wrong track since, as we shall see, injured parties are entitled to take part in the investigation to some extent, as well as to point to facts and propose evidence. Still, the following problem remains: if there were an unwilling prosecutor who opted for avoiding criminal prosecution against certain persons, an injured party would not have at their disposal any other recourse than filing an objection with the senior prosecutor – which has been discussed above. When all of the above arguments are taken into account, we are still of the opinion that the solutions from the 2001 CPC should have been kept and the possibility of filing a subsidiary indictment during the investigation should have been preserved even if it were not to be used frequently in practice or if its outcome were rarely to be in favour of injured parties.

2.3 Injured Party's Motion for Criminal Prosecution

As many other national legislations, the Serbian Criminal Code provides that certain criminal offences may be prosecuted only at a motion by an injured party. Those offences are believed to threaten someone's personal interest first

and only then to jeopardise the public interest.[64] A motion is filed with the competent public prosecutor within three months from the day on which the injured party learns about a criminal offence and a suspect (Article 53, para. 2 of the 2011 CPC). If the injured party files criminal charges (criminal complaint) or restitution claim in criminal proceedings, it shall be deemed that he has thereby also filed a motion for criminal prosecution.[65] If it should happen that the injured party pass away within the timeframe for filing a motion, his legal successors may succeed him, *i.e.* they are allowed to file the motion.[66] The injured party may also withdraw his motion, but not later than the conclusion of the main hearing.[67]

The 2001 Serbian CPC used to govern the injured party's right to file the above motion in the same manner (Art. 53 through 56 and Art. 61, para. 6 of the 2001 CPC) as it is presently governed by the *Croatian* CPC (Article 48 through 51). There is no prosecution at the motion by an injured party in *Montenegro*; instead, there is only a private indictment. Given that in Bosnia and Herzegovina all the criminal offences are prosecuted *ex officio*, no prosecution at the motion by an injured party has been provided for.

2.4 Private Indictment

Injured parties may occupy the role of a private prosecutor in criminal proceedings and consequently in an investigation - when they initiate criminal proceedings in connection with offences for which substantive criminal law lays down that they shall be prosecuted by virtue of a private indictment. Private prosecutors are entitled to file and represent a private indictment and they also have rights to which public prosecutors are entitled in criminal proceedings, except for those they exercise in their capacity as public authorities (Article 64

64 Under the Serbian Criminal Code, offences in connection with which public prosecutors may undertake prosecution only at a motion by an injured party include as follows: unauthorised disclosure of secret, less serious forms of prevention of printing and distribution of printed material and of broadcasting, prevention of public assembly, rape and sexual intercourse with a helpless person when committed against a spouse, usury, squatting, unlawful occupation of premises, etc. The fact that criminal prosecution has been made contingent on the injured party's motion, which constitutes a departure from the principle of legality, is in line with the recommendations of the Council of Europe concerning the simplification of criminal justice R(87)18 (note no. 18 supra), Chapter I and on the role of public prosecution in the criminal justice system R(2000)19 of 6 October 2000, item 3.

65 Article 53, para. 2 of the 2011 CPC.

66 Article 57 of the 2011 CPC.

67 Article 54 of the 2011 CPC. 2011 CPC

of the 2011 CPC). As any other injured party, a private prosecutor may file a motion and submit evidence in support of his restitution claim as well as propose the imposition of interim measures to secure it and hire a proxy from the ranks of attorneys; provisions on the injured party as a subsidiary prosecutor and on the injured party as a filer of the motion for criminal prosecution which pertain to the succession by legal successors and withdrawal of charges apply accordingly to private prosecutors (Article 67).

In any case, a private indictment is filed within three months from the day on which the injured party learns about a criminal offence and a suspect.[68] If the injured party has filed criminal charges (criminal complaint) or a motion for criminal prosecution, and it is established in the course of proceedings that the offence in question is prosecuted based on a private indictment, the charges or the motion are to be deemed a timely private indictment if they have been filed before the set time limit.[69] The manner in which the rights of private prosecutors are provided for by the new Serbian CPC is almost identical to the rights regulated by the previous 2001 CPC (Articles 53 through 60 of thereof) as well as by the laws of Montenegro (Articles 51 through 57 of the Montenegro CPC) and Croatia (Articles 60 through 63 of the Croatian CPC). In BiH, where all criminal offences are prosecuted only ex officio and where there is no prosecution at the motion by an injured party there is no private indictment either.

2.4 Injured Party's Rights in Instances of Departure from the Principle of Legality of Criminal Prosecution

2.4.1 Injured Parties and Prosecutorial Discretion (Principle of Opportunity)

A particularly critical moment in respect of injured party's interests may arise in instances when prosecutors are allowed to depart from the principle of legality and have the right to decide not to undertake prosecution under the conditions set out by the law. The first instance pertains to the so-called conditionally deferred prosecution (conditional prosecutorial discretion) – or deferral of criminal prosecution if a defendant undertakes to fulfil certain obligations and subsequent dismissal of criminal charges when those obligations have been fulfilled (Article 283, para. 1 and 3 of the 2011 CPC).[70] As opposed to the previ-

68 Article 65, para. 2 of the 2011 CPC.

69 Article 2011 CPC.

70 Public prosecutors may defer criminal prosecution for criminal offences punishable with a fine or a term of imprisonment of up to five years provided a suspect accepts and fulfils one or more of

ous Code, the new Serbian CPC does not require either consent or an opinion from the injured party for the prosecutor to defer criminal prosecution in any case whatsoever. Likewise, under the new CPC injured parties are not entitled to file an objection against prosecutor's final decision to dismiss criminal charges if a suspect complies with the imposed obligation within the set time limit after the prosecutor has deferred criminal prosecution.[71] If the damage sustained by an injured party has not been indemnified through the fulfilment of a condition imposed on a suspect by the prosecutor, the injured party's only recourse is to file for a restitution claim in civil proceedings.[72]

No consent is sought from injured parties nor are they entitled to file an objection in the second type of prosecutorial discretion – when prosecutors are allowed to dismiss criminal charges for reasons of purposefulness or fairness (the so-called unconditional or pure prosecutorial discretion from Article 284, para. 3 of the 2011 CPC).[73] There is not even a duty on the prosecutors' side to notify injured parties of their decision unlike in the previous type of case of the conditional prosecutorial discretion for which the Code still requires from prosecutors to inform injured parties that they have dismissed criminal charges.

The status of injured parties used to be more favourable under the previous 2001 Serbian CPC since it provided that they were allowed to participate

---

the following obligations within a time limit not exceeding one year: to rectify a detrimental consequence of a criminal offence or indemnify the damage caused; to pay a certain amount of money to the benefit of a humanitarian organisation, fund or public institution; to perform community service or humanitarian work; to fulfil maintenance (alimony) obligations that have fallen due; to submit to an alcohol or drug treatment programme; to undergo psycho-social treatment for the purpose of eliminating the cause(s) of violent behaviour; or to fulfil an obligation or observe restrictions imposed by a final court decision. If the suspect fulfils the above obligation(s) within the prescribed time limit, the public prosecutor shall dismiss criminal charges by issuing a decision. Article 283, para. 1 and 3 of the 2011 CPC.

71 Article 283, para. 3 of the 2011 CPC.

72 Commentary to the Serbian CPC, op. cit., p. 653.

73 Certain statutory prerequisites need to be met in this instance as well, but no conditions are imposed on defendants. This type of prosecutorial discretion may be exercised only if several conditions have been met cumulatively: 1) the offence is punishable with a fine or a term of imprisonment of up to three years, 2) a suspect has, as a result of genuine remorse, prevented the occurrence of damage or he has already indemnified the damage in full, and 3) the public prosecutor has found that the imposition of a criminal sanction would not be fair given the circumstances of the case. Article 284, para. 3 of the 2011 CPC. According to some authors, this type of unconditional prosecutorial discretion is the only one that is in the true sense of that word based on the principle of opportunity (prosecutorial discretion) as opposed to the principle of legality (mandatory prosecution) and they subsume the previous type or the so-called conditionally deferred prosecution under the typical case of deferred prosecution which exists in modern legislations. Stanko Bejatović, Drago Radulović, Zakonik o kivičnom postupku SR Jugoslavije, Beograd, 2002, s. 160.

in the decision-making process on the application of conditionally deferred prosecution. More precisely, consent from an injured party was sought in cases of two out of six measures that constituted potential requirements for abandonment of criminal prosecution under the 2001 CPC (these two were the payment of a certain amount of money to a humanitarian organisation, foundation, or a public institution and the performance of community service or humanitarian work); only in those two situations did injured parties lose their right to act as subsidiary prosecutors (Article 236, para. 4 and 6 of the 2001 CPC). Nevertheless, an injured party could not arbitrarily refuse to give consent because if the prosecutor found that he was denying consent for unjustified reasons even though he had been fully indemnified for the damage sustained, the prosecutor would apply to the panel to issue a ruling allowing the fulfilment of an obligation related to conditionally deferred prosecution.[74] The 2001 CPC also provided that prosecutors had a possibility but not a duty to question both the injured party and the suspect when examining possibilities for deferring criminal prosecution prior to the filing of a motion to indict or a motion for conducting an investigation.[75]

The new *Montenegrin CPC* has also kept the same solution as the 2001 Serbian CPC, which existed in the previous Montenegrin CPC as well, according to which consent from injured parties was sought in cases of conditionally deferred prosecution in connection with the imposition of measures of paying a sum of money for humanitarian purposes and of performing humanitarian work (Article 272, para. 4 of the Montenegro CPC), with an additional provision that prosecutors should advise the injured party that he would lose his right to act as a subsidiary prosecutor if a suspect fulfilled his obligations. However, in contrast to the above-mentioned solution from the former 2001 Serbian CPC, the Montenegrin CPC does not provide that prosecutors has a possibility to apply to the judicial panel for an approval that a suspect could fulfil his obligation if an injured party refused to give their consent for unjustifiable reasons. The Montenegrin CPC provides for a possibility which does not exist in any of the other three national jurisdictions; specifically, prior to issuing a decision whereby some of suspect's obligations are established, the state prosecutor may con-

74 Article 236, para. 5 of the 2001 CPC.

75 Article 236, para. 9 of the 2001 CPC. Likewise, the Instructions A no. 246/8 of 28 August 2008 issued by the Republic Prosecutor provided that public prosecutors had a duty to consider exercising either conditional or unconditional discretion after receiving a criminal complaint and to request, among other things, an opinion from injured parties for the purpose of reaching a decision in that regard. Cited according to Goran Ilić, Jasmina Kiurski, "Prosecutorial Discretion and Experiences in its Application so Far" in Ivan Jovanović, Miroljub Stanisavljević (eds.), op. cit., p. 253.

duct a mediation (victim-witness reconciliation) procedure between the injured party and the suspect.[76] Such a course of action available to prosecutors is in line with the Recommendation R(99)19 of the Council of Europe concerning mediation in criminal matters, which provides, *inter alia*, for laying down of statutory norms which would form a basis for mediation between the defendant and injured party.[77] As regards unconditional discretion – dismissal of criminal charges on grounds of fairness (to which conditions identical to those found in the current Serbian CPC apply and no duty to notify the injured party is mentioned therein) – injured parties in Montenegro cannot in any manner challenge such a decision nor has any possibility been made available to them to proceed as subsidiary prosecutors (Article 273 of the MN CPC).

The *Croatian CPC* is once again the code that has given the widest range of rights to injured parties, *i.e.* victims in respect of prosecutorial discretion as well. In Croatia, as opposed to other countries, it is required that state attorneys obtain prior consent from victims or injured parties so that they could resort to conditionally deferred prosecution.[78] Unlike the new Serbian CPC, which, as mentioned above, only requires that the injured party shall be notified by a decision that criminal charges have been dismissed when a suspect has fulfilled his obligation within a prescribed time limit, both in Croatia and in Montenegro, prosecutors deliver a decision whereby criminal prosecution is abandoned or deferred to injured parties as well, the only difference being that the Croatian law provides that advice on restitution claim to be filed in civil proceedings shall be delivered together with to the said decision.[79] The 2013 amendments to the Croatian CPC have broadened even more the scope of rights enjoyed by victims and injured parties in the process of exercise of prosecutorial discretion. As opposed to the situation in Serbia and in Montenegro, injured parties are presently granted a right to file an objection (*pritužba* in Croatian, which can also translate as a *complaint*) within eight days from the date of receiving a deci-

76 Article 272, para. 4 of the MN CPC.

77 CoE Recommendation No. R (99) 19 concerning mediation in penal matters adopted on 15 September 1999, para. III

78 Article 522, para. 1 or Article 206d, para. 1 of the Croatian CPC following amendments thereto made in 2013. Injured party's role has remained the same even after the amendments, the only difference being that the lawmaker has laid down by the amendments of December 2013 that within the scope of conditionally deferred prosecution prosecutors are allowed to initially defer prosecution and not only dismiss criminal charges or abandon prosecution, which used to be the case before the amendments. Article 522, para. 3 or Article 206d, para. 3 of the Croatian CPC after the amendments.

79 Article 522, para. 3 or Article 206d, para. 3 of the Croatian CPC after the amendments.

sion in cases of the so-called unconditional prosecutorial discretion[80] – or in other words, after the prosecutor's decision to dismiss criminal charges or abandon prosecution unconditionally when there are statutory grounds therefor, which are somewhat broader than in Serbia.[81] An immediately superior prosecutor shall decide on the complaint within 30 days and if he should accept it, he shall order the lower-ranking prosecutor to continue working on the case and shall also notify the injured party thereof (on the other hand, if he should uphold the lower-ranking prosecutor's decision, he shall notify the injured party and advise him that he may bring a civil action for the purpose of realising his restitution claim).[82] In Croatia, as well as in Serbia (both under the new and former CPCs) and in Montenegro, injured parties lose their right to undertake prosecution as subsidiary prosecutors if suspects comply with their obligations within the prescribed time limit and the prosecutor dismisses criminal charges or abandons prosecution.

As regards *Bosnia and Herzegovina*, the criminal procedure codes which are in force in that country have not legislated the principle of prosecutorial discretion, except for in cases against juveniles in which unconditional discretion may be exercised. Only in such cases are prosecutors allowed to decide not to initiate criminal proceedings for the reason of purposefulness or fairness and injured parties are only entitled to be informed by prosecutors about their decision for which the prosecutor must provide a statement of reasons.[83]

80 Article 206c, para. 2 of the Croatian CPC. Prior to the amendments, injured parties were only sent such a decision, with the usual advice on the possibility of civil action, against which no appeal was allowed (Article 521, para 2 of the Croatian CPC before the amendments).

81 Unconditional prosecutorial discretion is exercised in Croatia in cases of offences punishable with a fine or imprisonment of up to five years, namely if: "1) it is likely, taking into account the circumstances, that the defendant shall be acquitted in the criminal proceedings; 2) the execution of the punishment or safety measure against the defendant in underway, and the institution of criminal proceedings for another offence has no purpose given the severity and nature of the offence, its motive and the effect of penal sanction or other measure on the perpetrator not to commit any offence in future; 3) the defendant has been extradited or delivered to a foreign country or to the international criminal court so that proceedings for another criminal offence could be conducted; 4) the defendant has been reported for several offences which constitute elements of two or more offences but it is purposeful to sentence him only for one offence, because instituting criminal proceedings for other offences would not have any significant influence on rendering the punishment or other sanctions against the perpetrator." Article 521, para. 1 of the 2008 Croatian CPC or Article 206c, para. 1 following the 2013 amendments.

82 Article 206c, para. 2 of the Croatian CPC.

83 The principle of prosecutorial discretion may be applied in BiH in proceedings against minors for the reason of purposefulness or fairness in cases of criminal offences that carry the statutory penalty of imprisonment of up to three years or a fine. BiH CPC, Article 352, para. 4. The Code does not specify any kind of time limit before which prosecutors are bound to deliver such notification to injured parties, but considering the principle of urgency adhered to in cases against juveniles, as well as corresponding provisions governing the non-conduct of investigation, it can be concluded that the time limit is three days. H. Sijerčić-čolić, M.Hadžiomeragić, M. Jurčević, D. Kaurinović, M. Simović, Commentary to the Criminal Procedure Code of Bosnia and Herzegovina, Sarajevo 2005 (hereinafter – Commentary to the BiH CPC) p. 880.

Serbian lawmakers took as their starting point a belief that the public prosecution service as a state body competent, *inter alia*, for looking after the rights of injured parties would adequately safeguard their interests and that there was no reason why public prosecutors should not be allowed to decide on the issues of prosecutorial discretion freely.[84] On the other hand, there are those who are of the opinion that prosecutors' decisions to exercise prosecutorial discretion ought to be controlled and that precisely injured parties are those who should keep them under control by means of their objections filed with superior prosecutors in connection with such decisions, as provided for in the majority of national legislations.[85] Certain information about the practical application of the principle of prosecutorial discretion in Serbia under the 2001 Code has shown that in the majority of cases, injured parties did not refuse consent when it was sought from them under the above-mentioned provision of the Code for the two out of eight measures which could be imposed on defendants as a condition for deferral and subsequent abandonment of criminal prosecution.[86] Similarly, according to some analyses of Serbian practice, the fact that prosecutors could seek an opinion from injured parties – allowed under the 2001 CPC – and that the latter's opinions were taken into account had increased the frequency with which prosecutorial discretion was exercised prior to the entry into force of the new Code.[87]

At present, there are no international standards that would require states which are not EU members to allow injured parties to participate in or influence this type of conditional discretion exercised by prosecutors. The Council of Europe only recommends (Recommendation R(87)28) that "whenever possible" a complainant should be notified of the authority's decision when some institutions of simplified procedure are applied,[88] and prosecutorial discretion is certainly one of them. Countries are thereby allowed freedom when regulating this issue in their national laws; still, the Recommendation clearly suggests that in

84 Commentary to the Serbian CPC, op. cit., p. 652.

85 Goran Ilić, Jasmina Kiurski, op. cit., p. 253.

86 A study conducted in eleven basic and high prosecutor's offices in Serbia by the Serbian Association of Public Prosecutors and Deputy Prosecutors for the period 1 January 2008 – 30 September 2011 has revealed that injured parties gave consent for deferral of criminal prosecution in 82.17 percent of cases and withheld it in 4.45 percent of cases, whereas information about the existence or absence of injured party's consent for applying that legal institution was not available for 13.36 percent of cases. Published in Stanko Bejatović et al., Primena načela oportuniteta u praksi – izazovi i preporuke, Serbian Association of Public Prosecutors and Deputy Prosecutors, Beograd, 2012, pp. 6 and 117.

87 Goran Ilić, Jasmina Kiurski, op.cit., p. 262.

88 CoE Recommendation R(87)18 (see footnote no. 18 supra), para. 10.

the law-making process, countries should be guided by the minimum requirement that injured parties should be notified of prosecutors' decisions (which is, when it comes to Serbia, required only in cases of conditionally deferred prosecution and not in cases of unconditional prosecutorial discretion), except if there are justified reasons for withholding such a notification. As regards EU regulation, the Directive 2012/29 provides that on the one hand victims shall be notified upon their own request of any decision not to undertake or to abandon criminal prosecution.[89] As we have seen, that is not the case either in Serbia or in Montenegro when prosecutors apply the principle of unconditional discretion. On the other hand, the Directive requires that victims are ensured the right to challenge prosecutors' decisions not to prosecute, but at the same time it makes an exception when it comes to out-of-court settlements with defendants, provided the settlements impose an obligation or a warning.[90] This is exactly the situation with conditionally deferred prosecution (when a defendant has to fulfil an obligation). However, the fact that there is no agreement with a defendant or an obligation on his part in cases when unconditional prosecutorial discretion is exercised would imply that the above rule laid down by the Directive required that injured parties should have the right to a review of prosecutors' decisions in case of unconditional discretion. As we have seen, this requirement has been complied with in Croatia – an EU member state, through the possibility of filing a complaint, but not in Serbia, Montenegro, or BiH; consequently, those three countries ought to harmonise their codes with the Directive in respect of this issue in the processes of their accession to the EU in the near future.

Aside from the reason of harmonisation with the law of the EU, we believe that it would be favourable from the perspective of criminal procedure policy to implement more than the minimum requirements set out in international recommendations or in the *acquis communautaire* and not to avoid assigning at least some kind of a role to injured parties when the prosecution exercises their discretionary powers. Finally, prosecutorial discretion – both the conditional and the unconditional one – exists not only for the purpose of a more efficient resolution of criminal matters, but also for the reason of justice and fairness; a question therefore arises as to why injured parties, whose interests certainly constitute an element of the totality of justice and fairness attained through criminal proceedings, should not at least be allowed to voice their opinions so that prosecutors would have an opportunity to hear their side and, as a result of that, maybe reach a more correct decision. In view of the above, the

89 EU Directive, Article 6, para. 1.

90 Ibidem, para. 45 of the Preamble and Art. 11, para. 5

legislator at least ought to provide that public prosecutors shall have a duty to obtain injured party's opinion before making a decision to defer criminal prosecution or dismiss criminal charges. The 2012 draft version of the amendments to the new Serbian CPC prepared by the then working group of Serbian Ministry of Justice proposed that such a solution should be adopted both in cases of conditional and unconditional prosecutorial discretion.[91] If the opinions of injured parties were obtained, even though there were not binding, their interests would be taken into account and they would be helpful to prosecutors in reaching correct decisions; at the same time, prosecutors would remain the masters of the decision whether or not to prosecute. In addition, a timeframe of eight days or less could be set within which injured parties would have to provide their opinions upon prosecutor's request in order not to risk a delay of the proceedings.

2.4.2. Injured Party and Agreements between Prosecutor and Defendant

In addition to prosecutorial discretion, agreements between public prosecutors and defendants are yet another important procedural tool (a relatively novel one) whereby not only the principle of legality, but also the accusatory principle is departed from. In the first place, this refers to plea agreements. Let us recall that a plea agreement, for which there are no limitations in respect of offences to which it can be applied under the new CPC, may be concluded from the issuance of an order to conduct an investigation (the same as agreements on testifying by defendant) until a defendant pleads to an indictment at the main hearing (whereas agreements on testifying by defendant may be concluded before the conclusion of the main hearing). Given the fact that a criminal matter is resolved on the merits by means of a plea agreement – as opposed to other procedural situations analysed herein – the injured party's interest does not lie in how he can react and possibly achieve the reversal of prosecutor's decision not to undertake prosecution or to discontinue it or to continue prosecution by himself. In such cases, a prosecutor has successfully brought criminal prosecution to its end, namely a judgment rendered by the court, whereas a dilemma arises about the extent in which injured parties should be allowed to influence

91 Amended Article 283 and proposed new Article 284a of the Draft Version of Amendments to the Criminal Procedure Code of 16 November 2012 (available in the archive of the website of the Republic of Serbia's Ministry of Justice and Public Administration at http://arhiva.mpravde.gov.rs/cr/articles/zakonodavna-aktivnost/). Ultimately, this draft version had not been adopted as amendments to the Code; however, some other future working group with the Ministry of Justice might accept the above-mentioned solution and propose its adoption while continuing to work on some potential amendments to the 2011 CPC.

the final result of such prosecution. For those reasons, such a procedural situation will also be included in the analysis of injured party's position during the investigation.

In contrast to the previous Serbian CPC, injured parties certainly may not propose plea agreements or participate in plea bargaining and their role in the plea bargaining process is limited; however, the lawmaker has taken care that their interests are safeguarded, at least from the perspective of substantive law. As a result, a person entitled to file a restitution claim may do so and if they have not previously filed such a claim, the public prosecutor has a duty to invite them to file it prior to the conclusion of an agreement (Article 313, para. 6 of the 2011 CPC). One of mandatory elements not only of a plea agreement, but also of an agreement on testifying by defendant, is an agreement between a public prosecutor and a defendant on a restitution claim provided it has been filed by the injured party.[92] A restitution claim is therefore a subject of plea bargain negotiations in connection with the offence with which a defendant is charged and a position taken by the injured party on a submitted restitution claim has an impact on what will be the final prosecutor's and defendant's position on the text of the agreement.[93] If such an agreement was not signed, the injured party who has put forward a restitution claim could seek its realisation by taking civil action.

Except for the above-mentioned influence on negotiations on a restitution claim as an element of the plea agreement, which is not considered a decisive one, injured parties may not in any other manner influence, let alone prevent, the conclusion of an agreement between a prosecutor and a defendant.[94] An injured party is not summoned to a hearing on plea agreement: the law lays down that the only persons to be summoned are the public prosecutor, a defendant and his defence attorney; there is no duty to inform the injured party thereof. Even if the injured party somehow learned about the hearing, he could not attend it despite his interest therein, nor could the public, given that the Code requires that such hearings are held in a closed session (Article 315, para. 3 of the 2011 CPC). A ruling on the plea agreement is not delivered to the injured party, but only to the parties and the defence counsel, which is the most restrictive solution among herein analysed codes.[95] The ruling on a plea agreement may not be appealed.

92 Article 314, para. 1, item 4, or Article 321, para. 1, item 4 of the 2011 CPC.

93 Handbook on Application of Criminal Procedure Code, op. cit., pp. 278-279.

94 Certainly, we do not refer here to any potential influences coming outside the realm of law, through the media or by putting the prosecution under direct pressure – which are not excluded from occurring in real life even though they belong to the domain of speculations – through which certain injured parties with such options available to them could possibly achieve a somehow different and, in their opinion, more fair agreement.

95 Article 319, para. 1 of the 2011 CPC.

The previous 2001 Serbian CPC placed injured parties in a considerably more favourable position in the process in which agreements on the admission of guilt were concluded (as this procedural tool introduced by the 2009 amendments to the 2001 CPC used to be termed). At that time, the court was obligated to establish, *inter alia*, that an agreement on the admission of guilt did not violate any of the injured party's rights in order to be able to grant it (Article 282v, para. 8, item 5 of the 2001 CPC). Both the injured party and his proxy had the right to attend a hearing on plea agreement and the court had to inform them thereof, while the court ruling was served on the injured party and his proxy.[96] If the court granted the agreement, they could file an appeal to the ruling within eight days, which represents an important right enjoyed by the injured party.[97] Judgments were served on injured parties even if they were prevented from attending the main hearing for justifiable reasons so as to be able to seek restoration to a prior position.[98]

Much greater importance has been given to the role of an injured party and his rights with regard to the application of plea agreements in *Montenegro* than in the new Serbian CPC. In an identical manner as the 2001 Serbian CPC, the Montenegrin Code recognises the injured party's restitution claim as an element of the agreement reached between a state prosecutor and a defendant and it sets forth that injured parties shall have the right to attend hearings on plea agreement; that the court shall have a duty to make certain that an agreement does not violate the injured party's rights; and finally that the injured party shall be entitled to appeal if the court accepts a plea agreement.[99] Besides, this Code is the only one among the four codes analysed in this paper which, just as the 2001 Serbian CPC did, limits the application of plea agreements specifically to offences punishable with a term of imprisonment of up to ten years.

At first, when the 2008 CPC was adopted, the new *Croatian* criminal procedure system did not provide for any greater extent of participation or protection of injured parties in the procedure for conclusion of plea agreements and agreements on sentences; in that respect, it was similar to the BiH CPC and surpassed the new Serbian CPC to a certain degree. It provided that a restitution claim, *i.e.* defendant's statement thereon, should form a part of plea agreements and that the state attorney should inform the victim and injured party that a statement was signed whereby an agreement between the prosecutor and the defen-

96 Article 282v, para. 5 or para. 11 of the 2001 CPC.

97 Article 282 g, para. 1 and 2 of the 2001 CPC.

98 Article 282d, para. 3 of the 2001 CPC.

99 Article 301, para. 1 and 2, Article 302, para. 5, para. 8, item 4 and para. 10, item 10 of the Montenegro CPC.

dant was concluded; this has not been provided for by the new Serbian CPC.[100] Judgments passed based on concluded agreements could not be contested by an appeal on grounds of decision on the restitution claim.[101] However, a quantum leap has been made in giving rights to injured parties and victims by amendments to the Croatian CPC adopted in December 2013. A rule has thus been added to the Croatian Code under which state attorneys must obtain prior consent from victims for concluding agreements in cases of criminal offences against life and limb or against sexual freedom punishable with a term of imprisonment of more than five years (Article 360, para. 6 after the amendments made to the Croatian CPC).[102] In the event a victim has passed away or is unable to give any such consent, the prosecutor must obtain it from some other person who otherwise has the right to continue proceedings after the injured party has deceased.[103] Such a rule is also unique in that it provides victims with a possibility to impose a "veto" against agreements between prosecutors and defendants in cases of certain criminal offences, namely the most serious ones.

As regards *Bosnia and Herzegovina*, the role of injured parties in the process of plea bargaining and concluding plea agreements has been limited to making a statement before the prosecutor about a restitution claim, which is verified by the court, and then receiving a notification from the court of the final result of the plea bargaining.[104] As in the case of Croatia, this is somewhat more than offered by the new Serbian CPC. Some authors cite that examples have been recorded, admittedly in BiH practice, in which injured parties were included in the process of plea agreement conclusion owing to the duty on the prosecutor's part to collect information about the restitution claim and the court granted such agreements.[105] Such an example from BiH is an indicator of how practice can sometimes lead to the involvement of injured parties in the conclusion of agreements, or at least some segments of that process.

100 Article 360 para. 4, item 5 and para. 5 of the Croatian CPC.

101 Article 364, para.1 of the Croatian CPC.

102 Introduced by Article 178 of the Law on Amendments to the Criminal Procedure Code, 4 December 2013.

103 If a victim has passed away, consent is sought from a spouse or common law partner, from children, parents, adopted children, adoptive parents, or siblings (Article 360, para. 6 in conjunction with Article 55, para. 6 of the Croatian CPC)

104 Article 231, para. 6(e) and 9 of the BiH CPC. According to interpretations by certain authors, an injured party could file an appeal against a decision on a restitution claim and costs of proceedings since that right, which he is otherwise allowed to exercise in regular proceedings, has not been denied by the BiH CPC provisions on either the appeal or plea bargaining. Veljko Ikanović, "Plea Bargaining after Ten Years of Application in Bosnia and Herzegovina" in Ivan Jovanović, Miroljub Stanisavljević (eds.), op.cit., p. 201.

105 Ibidem.

Strong criticism has been levelled for the absence of injured party's influence and cooperation in the conclusion of such agreements from the new Serbian CPC.[106] The following has been criticised in particular: the fact that it has not provided that injured parties shall be summoned to the hearing on plea agreement, that they are not allowed to file an appeal against a ruling granting the agreement as well as that judges do not have a duty to verify if such an agreement violated the rights of an injured party.[107] On the other hand, there are those who are of the opinion that injured parties should not have any kind of role in the plea bargaining process considering that their restitution interest has been protected and prosecutors are those who safeguard both the public and private interest to punish perpetrators of criminal offences.[108] There are no international standards concerning the conclusion of such agreements that would require a certain degree of victim's involvement or his right to challenge them.[109]

We are of the opinion that the status of injured parties in the process of conclusion of agreements between prosecutors and defendants as governed under the new Serbian CPC should be improved. That Code is the most restrictive one among the four Codes from the region, not only in respect of the notification of injured parties of plea agreements, but also when it comes to the possibilities for influencing the agreements, not to mention that it reduces the role of an injured party only to his restitution claim. The ways of improving it would include providing at least for the injured party's right to be informed of the hearing on plea agreement as well as that injured parties have an opportunity to make a statement on the agreement, and then for the right to be notified that an agreement has been concluded. The 2012 draft version of the amendments to the new Serbian CPC proposed that injured parties and their proxies should be notified of the hearing on plea agreement.[110] Another step in the right direction would be if the court examined while making a decision on a plea agreement if it violated the rights enjoyed by an injured party, as used to be provided by the 2001 CPC. Such provisions would not decelerate in any considerable measure

106 Momčilo Grubač, "Procesnopravni položaj oštećenog prema novom Zakoniku o krivičnom postupku Srbije", Temida, no. 2, Year 15, June 2012, p. 115.

107 Milan Škulić, Goran Ilić, Reforma u stilu "jedan korak napred, dva koraka nazad", Belgrade, 2012, p. 100.

108 Drago Radulović, „Aktuelna pitanja krivičnoprocesnog zakonodavstva Crne Gore – da li nam je potrebna nova reforma", in Nova rešenja u kaznenom zakonodavstvu Srbije i njihova praktična primena, Zlatibor 2013, p. 273.

109 Since cases are resolved by a judgment on the merits based on such agreements, the victim's right to seek a review of a decision on abandonment of criminal prosecution referred to in the EU Directive 2012/29 is not applicable here.

110 Amended Article 315, para. 2 of Draft Amendments to the Serbian CPC (see note 91 supra).

the process of plea bargaining and it is quite certain that an injured partycould not prevent the conclusion of such agreements (except when the court deems that the rights of the injured party have been substantially violated). On the other hand, a greater degree of protection would be afforded to the interests of injured parties, which is one of the aims of proceedings, and their role would be somewhat of a corrective mechanism ensuring that the application of this procedural tool – which should be used even more often – would not be distorted into prosecutors' mere chasing after statistics on the number of concluded agreements.

2.5. Other Rights of Injured Party in Investigation

2.5.1. Presence During and Participation in Evidentiary Actions

Injured parties are entitled to point out to facts and propose evidence relevant to the subject matter of evidentiary actions; they also have the right to inspect files and examine objects used as evidence, with the exception that they may be denied that right before they are questioned as witnesses (Article 50, para. 1 and 2 of the 2011 CPC). Those same rights are enjoyed by injured parties in *Montenegro*, along with the above-mentioned restriction which is in effect before they are questioned as witnesses (Articles 58 and 281 of the MN CPC). Injured parties in Serbia have the right to attend a crime scene investigation and the questioning of witnesses and expert witnesses in the course of an investigation (Article 300, para 1 and 3 of the 2011 CPC). A public prosecutor has a duty to inform the injured party about the time and venue of the questioning of a witness or an expert witness, but those actions may be undertaken even if the said party fails to appear thereat.[111] The Code does not require that public prosecutors must notify injured parties of a crime scene investigation.

Injured parties are only informed that a witness or an expert witness will be questioned, whereas a "summons" to attend such actions must be sent to suspects and their defence lawyers. That represents a higher degree of procedural formality and obligation that the authority conducting the proceedings has towards defendants as opposed to injured parties, given that providing timely information to defendants and their involvement in procedural actions are one of the cornerstones of the equality of arms and fairness of proceedings in general. The European Convention on Human Rights does not require that same level of duty towards injured parties. However, prosecutors do not face any consequences if they do not notify the injured party and so it can happen in practice that injured parties are not invited to attend evidentiary actions.

111 Article 300, para. 3 of the 2011 CPC.

Just as defendants and their defence lawyers, injured parties have the right to propose to a public prosecutor that certain questions are put forward to a suspect, witness, or expert witness for the purpose of clarifying an issue. They are also allowed to directly ask such questions, with an approval from the public prosecutor. Injured parties are allowed to propose that individual pieces of evidence are obtained. Likewise, they are entitled to request that their objections to undertaking certain actions are entered in a record.[112] Such rights are also granted to injured parties under the Montenegrin CPC (Article 282 thereof), in which the position of an injured party in the process of undertaking evidentiary actions has been put on an equal footing with other participants therein. They may propose that certain evidentiary actions are undertaken; unlike the Serbian Code, the Montenegrin Code also provides that injured parties may be present during a reconstruction and a search of residence conducted as evidentiary actions in the course of an investigation.[113] Injured parties in *Croatia* have the following rights: to point out the facts and propose evidence; be present at the evidentiary hearing and inspect the case file, whereas state attorneys and the court have a particular duty to advise an injured party of the fact that he has the above rights (Article 47, para. 1 of the Croatian CPC following the 2013 amendments). The rights of injured parties to attend and participate in evidentiary actions, which are regulated in the above manner in Serbia, Montenegro, and Croatia, comply with what has been set by the European Court of Human Rights as standards for the participation of injured parties (murder victims' next of kin) in the investigation, including the asking of questions, as well as to the requirements of the EU Directive 2012/29, specifically that member states are required to ensure that victims may be heard and may offer and submit evidence in criminal proceedings.[114] As regards *Bosnia and Herzegovina*, injured parties however do not enjoy almost any rights from the above-cited catalogue which would allow them to participate in an investigation. There are many authors and practitioners who have been continuously putting forward that BiH statutory provisions should be amended in such a manner as to ensure that injured parties may, among other

112 Article 300, para. 8 of the 2011 CPC.

113 Articles 281 and 282 of the Montenegro CPC. Both the 2011 Serbian CPC and its predecessor from 2001 provide that injured parties shall be notified and have the right to attend reconstructions when they are undertaken not only during the main hearing, but also away from it (Article 404 of the 2011 CPC and Article 334 of the 2001 CPC).

114 ECtHR, Ayhan v. Turkey, Hugh Jordan v. UK, Ogur v. Turkey, Edwards v. United Kingdom (see note 23 supra) and the EU Directive, Article 10.

things, have the right to inspect files, propose certain investigative actions and evidence, question defendants, witnesses, and expert witnesses.[115]

It would be suitable to mention here some other rights that do not have such a bearing on the procedural status of injured parties, but which are more relevant to treatment and support they may receive in the course of an investigation and in connection therewith. In *Croatia*, injured parties or victims of an offence against sexual freedom have the right to be interviewed by a person of the same sex from the police or a prosecutor's office,[116] which partly exceeds the requirements of the EU Directive 2012/29.[117] Likewise, even though there is a provision in *Montenegro* granting a right to a female injured party to be interviewed and to have proceedings conducted by a judge of the same sex in cases of the said offences if so allowed by the structure of court staff, some convincing arguments have been put forward by commentators on the Montenegrin Code that a broad interpretation of this provision could be applied in the context of a prosecutorial model of investigation, so that it could entail that such investigations are led by state prosecutors of the same sex.[118]

2.5.2. Filing of Restitution Claim

In all the four countries in the region injured parties have the right to file a motion for a restitution claim and evidence in support of it as well as to propose that interim measures are taken with the aim of securing such a claim; the only difference is that the 2013 *Croatian* amendments have instituted that both the prosecution and the court shall examine if there is a possibility that a defendant indemnifies the damage caused to the injured party by the commission of a crime.[119] Whenever there is a possibility that material gain may be seized, state attorneys in Croatia are obligated to contact an injured party in order to allow them to put forward a restitution claim.[120] The 2008 amendments to the CPC in

115 Dautbegović and Pivić, op. cit., p. 16, Tadija Bubalović, "Novele Zakona o kaznenom postupku Bosne i Hercegovine od 17.06.2008", Hrvatski ljetopis za kazneno pravo i praksu (Zagreb), vol. 15, 2/2008, p. 1155, Božidarka Dodik, "Prosecutorial Investigation – the Experiences of Bosnia and Herzegovina" in Ana Petrović, Ivan Jovanović (eds.), op. cit, pp.35-36.

116 Article 45, para. 1, items 1 and 2 of the Croatian CPC.

117 Such a possibility is not requested for victims if their statements are taken by a prosecutor or a judge. EU Directive 2012/29, Art. 23, para. 2(d).

118 Article 58, para. 4 of the Montenegrin CPC. Radulović, Commentary to the Montenegrin CPC, op. cit., p. 106.

119 Article 50, para. 1, item 1 of the 2011 CPC, Article 58 of the Montenegrin CPC, and Article 47, para. 1, item 2 and para. 2 of the Croatian CPC after the 2013 amendments, Articles 194 and 195 of the BiH CPC.

120 Article 540, para. 4 of the Croatian CPC.

Bosnia and Herzegovina have charged prosecutors since the beginning of the investigation with a duty to start collecting evidence which is according to their assessment relevant to making a decision on the injured party's restitution claim.[121] Even though such a provision is seemingly beneficial to injured parties because a state authority is thereby bound to look after restitution claims when private persons are concerned, there are accounts that such a solution has proven not so good in BiH practice due to the fact that overburdened prosecutors focused on the collection of evidence about offences and their perpetrators have often omitted to discharge the above duty towards injured parties.[122]

2.5.3. Representation of Injured Party by Proxy

While the *BiH CPC* does not even mention the injured party's proxy, injured parties in Serbia, Montenegro, and Croatia have the right under the current laws to hire a proxy to represent them and in all the three countries they must come from the ranks of attorneys-at-law (a legal intern may act as a substitute for an attorney-at-law before municipal courts in *Croatia*).[123] Such a restriction used not to exist under the 2001 Serbian CPC. It is certain that the legislator's intention was to ensure that injured parties can have as competent as possible legal representation, even though injured parties do not have the same procedural rights and roles in the above-mentioned three countries, which is understandable and justifiable for the most part. Still, injured parties should have been allowed a possibility of choosing a proxy who would not be an attorney-at-law by profession as in a number of other countries. Most often the role of an injured party entails the above-described interventions into proceedings and in many cases injured parties will turn to non-governmental organisations, especially to those specialised in human rights or to humanitarian organisations as they used to do when the 2001 CPC was in effect. Such organisations were able to provide free assistance to them by lending their representatives, who were lawyers and often experts in the field of human rights law, but not necessarily attorneys-at-law, to act as injured parties' proxies, whereas now, the fact that they must hire attorneys-at-law will render such assistance more expensive and thus less available to injured parties.

Admittedly, there is a corrective mechanism that can lighten the burden of hiring an attorney-at-law in all of the observed countries with the exception

121 Article 197 of the BiH CPC. Commentary to the BiH CPC, op. cit., p. 556.

122 Božidarka Dodik, op. cit., p. 36.

123 Articles 50 and 59 of the 2011 CPC, Article 64, para. 3 of the MN CPC, Article 54 of the Croatian CPC.

of BiH; that mechanism is the injured party's right of an indigent person: in certain situations, a proxy is assigned to an injured party and his services are covered by the state budget if it is in the interest of proceedings or fairness and if the said party cannot cover the costs of proceedings due to their financial situation. The EU Directive 2012/29 requires that it is ensured that victims who participate in proceedings can have access to legal aid, whereas countries are left to provide in their respective laws for conditions and procedural rules under which that right can be exercised; the Directive also lays down that victims shall have the right to reimbursement of expenses incurred as a result of their participation in criminal proceedings in accordance with relevant national regulations.[124] That is possible both in Serbia and Croatia if an injured party acts as a subsidiary prosecutor (which would mean only at the main hearing in the case of Serbia) in proceedings conducted in connection with an offence punishable with imprisonment of more than five years (Article 59 of the 2011 Serbian CPC, Article 59 of the Croatian CPC). The same conditions applied under the 2001 Serbian CPC[125] with one exception – the injured party was able to acquire the capacity of a subsidiary prosecutor during an investigation, which was why that rule used to apply to that stage in the proceedings as well. In Serbia, a professional consultant can be appointed *ex officio* under the same conditions (Article 125 of the 2011 CPC). The scope of the right to a proxy free of charge has been widened in *Croatia* in such a manner that it is always recognised to children victims of crime and to victims of sex crimes.[126] In Croatia, if a victim of crime has suffered a serious mental or physical injury or more serious consequences of a criminal offence, he or she is recognised a right to free professional assistance from an advisor, while a victim of a criminal offence against sexual freedom shall have the right to an interview with a counsellor prior to being questioned.[127] A following distinction is made in Montenegro: a proxy may be appointed to an injured party even if he is not a subsidiary prosecutor for reasons of fairness and if it is in the interest of criminal proceedings provided they are conducted in connection with an offence that carries a punishment of more than three years in prison, or, if an injured party acts as a prosecutor, in connection with an offence punishable by more than five years of imprisonment.[128]

124 EU Directive 2012/29, Articles 13 and 14.

125 Article 66, para. 2 of the 2001 CPC.

126 Articles 44 and 45 of the Croatian CPC after the 2013 amendments.

127 Article 16, para. 3 and 45, para. 1 of the Croatian CPC after the 2013 amendments.

128 Article 64, para. 3 of the Montenegrin CPC.

Concluding Remarks

The position of injured parties in the investigation is regulated in various manners in Serbia, Bosnia and Herzegovina, Montenegro, and Croatia and there is a substantial discrepancy between some of their rights and possibilities for exercising those rights in the investigation. Such variances should not be regarded as a flaw in itself and they are commonly found in comparative law governing this field and also allowed to EU member states under the EU regulations. The greatest number of similar or identical solutions in the reformed codes of criminal procedure of the countries in the region has been kept in respect of the filing of a restitution claim by an injured party as well as – but to a lesser extent and with the exception of BiH – in relation to the injured party's participation in evidentiary action, representation by a proxy, and filing of a private indictment. That is indicative not only of lawmakers' different approaches and aims, but in the first place of different schools of thought existing among theorists and practitioners, the foreign ones included, who had decisive influence on the creation of the draft codes in the region. Among the observed countries, it is evident that injured parties are given the greatest range of possibilities by the recently amended CPC of Croatia, which has also introduced the concept of a victim into its procedural code, then by the Montenegrin Code, substantially less by the new Serbian CPC, whereas the most limited range of possibilities is provided in Bosnia and Herzegovina.[129] In BiH, which was the first country to adopt the prosecutorial model of investigation, injured parties are solely secondary participants in criminal proceedings (among other things, owing to the fact that all offences are prosecuted *ex officio*) and they are only entitled to file an objection against the prosecution's decision not to conduct an investigation; their procedural position has been virtually reduced to putting forward and realising restitution claims and as such, it has been met with criticism in BiH, including proposals that injured parties should be granted more rights.[130]

129 Even a mere linguistic analysis and summary of the number of times the words "injured party", or "injured party" and "victim", are used in the four national criminal procedure codes could lead to the same conclusion and "ranking" of the countries. As a result, those words are most frequently used in the Croatian CPC (the word injured party appears 227 times and the word victim 47 times), then comes the Montenegrin CPC (injured party – 250 times), followed by the Serbian one (203 references to the injured party in the new 2001 CPC and 233 in the previous one), and finally by the BiH CPC (76 times).

130 It is emphasised that in respect of regulations governing the position of injured parties BiH is ranked among the countries such as the United Kingdom, which have consistently excluded victims from criminal proceedings or relegated them to a marginal status (see Dautbegović and Pivić, op. cit., p. 12).

As regards Serbia, the new 2011 CPC has deprived injured parties of a number of rights and possibilities they used to have under the previous 2001 CPC (which had been otherwise exposed, during its application, to criticism for not giving victims an adequate and sufficiently active role). It could therefore be said that the procedural position of injured parties has been made even more secondary and worse in that regard by the current CPC when compared to the previous one. In Serbia, the capacity of a subsidiary prosecutor may now be acquired only after the confirmation of an indictment; injured parties cannot participate in a decision-making process on the application of conditionally deferred prosecution nor are they even notified in cases of the exercise of unconditional prosecutorial discretion; their position in the process of plea bargaining has been provided for in the most restrictive manner in the region, and proxies who represent injured parties must be attorneys-at-law – to mention some of the most important restrictions of rights that have been singled out in this paper. What has been new in the Serbian system is the introduction of an objection by the injured party similar to the one in BiH as a replacement for the subsidiary indictment during the investigation; it is the only procedural recourse before the confirmation of an indictment whereby injured parties may defend their interest that criminal prosecution is undertaken. Aside from objecting to individual solutions concerning the rights of injured parties, general criticism has been levelled over the fact that the interests and rights of injured parties have been even more relegated to a marginal status by the new Serbian CPC.[131] On the other hand, some authors hold that injured parties have been given a more prominent role in criminal proceedings in Serbia.[132] There are also those who are of the opinion that the rights of injured parties have been restricted in comparison to the previous CPC as a logical result of implementing a new model of investigation that is no longer controlled by the court and may not depend on "private justice".[133] A partial justification for such rights and role of the injured party may indeed be found in the new conception of prosecutorial investigation and increased burden and level of responsibility on the part of the prosecution, but it is nevertheless obvious from the examples of Montenegro and Croatia that the concept of pros-

131 Tatjana Lukić, „Uticaj međunarodnih pravnih standarda na oblikovanje pripremnog stadijuma krivičnog postupka", Annals of the Belgrade Faculty of Law, Year LIX, 2/2011, p. 161, Goran Ilić, "Position of the Public Prosecutor According to the New Serbian Criminal Procedure Code" op. cit., pp. 65-66, Ivana Simović-Hiber, op. cit., pp. 235-253.

132 Goran P. Ilić, „O položaju oštećenog u krivičnom postupku", op. cit., pp. 153-154.

133 They maintain that if injured parties had a more active role in such proceedings, the law would be at risk of being transformed from the corrective mechanism into the retaliatory one. Commentary to the Serbian CPC, op. cit., p. 201.

ecutorial investigation can be implemented while keeping or even extending the scope of certain rights enjoyed by injured parties. Still, it ought to be said that those who object to the position of injured parties under the new Serbian CPC do underline that they still have a better procedural position than injured parties in many countries in which they can be nothing more than witnesses and have no active role in the proceedings.[134]

The rights of injured parties to attend and participate in evidentiary actions are regulated in Serbia, Montenegro, and Croatia in accordance with the jurisprudence of the European Court of Human Rights, Council of Europe recommendations and EU regulations and the same can be said about the duty imposed on the authority that conducts the proceedings to notify the injured party of their course and decisions made. The ECtHR, the recommendations as well as the EU Directive insist in particular on adequate and timely notification of injured parties which is why the discharge of that duty by prosecutors, for whose neglect there are no procedural sanctions under the national law, will be among key parameters for assessing the exercise of rights of injured parties in light of the international standards.

There are a number of international recommendations which advise that injured parties should have the right to a review of decisions to abandon criminal prosecution, although, for the time being, there are no binding international rules in that respect other than those that will be awaiting the countries in the region on their way to the EU. In concrete terms, that would specifically refer to the injured party's right to put forward some kind of an objection against prosecutor's decision not to resort to criminal prosecution on grounds of unconditional discretion, in keeping with the EU Directive 2012/29 – which has been laid down in an adequate manner only by Croatia, an EU member state, whereas the other countries have yet to complete that task.

The majority of other de lege ferenda suggestions aimed at improving the position of injured parties in the investigation - especially under the Serbian CPC - would be based on the reasons of criminal and criminal procedure policies. The interest of injured parties should be taken into account more, but it certainly should not be the ultima ratio of providing for their position in criminal proceedings; personal - and certainly legitimate - restorative and retributive interests of an injured party in respect of a specific criminal event should be considered against the public interest (which includes, among other things, the efficiency of proceedings, special and general prevention, society's restorative policy) which need not be taken into account by the injured party, as well as in the

134 Momčilo Grubač, op. cit., p. 117.

light of a need for preserving the position of the prosecutor as the person in charge of the investigation. On the other hand, the public prosecutor as a state authority should not be the only one vested with the duty of taking care of the interests of injured parties which would then discharge it only to the extent in which an injured party can be of help to him in his investigation; instead, the voice of the injured party should be heard and its relevance ought to be ensured, which would contribute to a desirable increase in the restorative level of criminal proceedings. Therefore, making some amendments to the new Serbian CPC concerning the injured party should be taken into consideration. They would include as follows: bringing back the possibility of filing a subsidiary indictment during the investigation; public prosecutor's duty to obtain an opinion from the injured party in cases of exercise of prosecutorial discretion; injured party's right to be informed of the hearing on a plea agreement, to declare his opinion about the plea agreement, and to be informed of its conclusion, as well as that the court while deliberating on the plea agreement shall have a duty to examine whether or not the agreement violates any of the injured party's rights. Finally, injured parties should also be allowed a possibility to choose a proxy who is not an attorney-at-law by profession if they wish so.