Issue 1
Number 4

ISSN 2671-3128

SEE LAW JOURNAL 2018

Co-funded by the
Erasmus+ Programme
of the European Union

SEELS Network
Lawyers for Europe.

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LAW JOURNAL
2018

Dear Reader;

It gives us an outmost pleasure to present you with our latest edition of the South East European Law Journal, or SEE LJ for short. This is the first issue of the SEE LJ that is published under the auspices of Erasmus + Jean Monnet Associations programme, while it comes as a fourth in the series of published SEE Law Journals. As such it is an essential part of the Strengthening the EU Law Studies in South Eastern Europe project, where 4 individual issues are planned to be published.

In the past period we have gathered sufficient information on the processes, capacities, strengths and weaknesses of our edition which gave us the incentive to undergo the process of its transformation. In this process we have analysed the unique capacity of the editions to provide a specific insight in the overall regional context within both, the EU and regional legislations, its specific capacity to unify and initiate collaboration among young academics from the region, as well as its specific format, lack of the practitioner's perspective, increasing its visibility etc.

As our previous edition introduced, we have built on an original idea which resulted in an award for our project proposal for the Erasmus + Jean Monnet Associations, whose implementation started in September 2016. As it was mentioned this production of the SEE LJ is the first one out of 4 editions that are about to be published in addition of 24 EU Law days that are planned to be organized and held in the region within the faculties members of SEELS. The project also included overall automatization of the production of the SEE LJ which was acquired through the creation and placing online of a multi-level web site and was open to the legal practitioners of the SEELS region. We are confident that this contributed to the complexity of the publication and will increase its visibility and popularity.

Editorial Policy was updated and now we have a new and we hope, improved format which will attract more contributors, researchers, authors and readers to our side. Having said that, we are glad to present you the new edition of the SEE LJ in an e-format and printed edition which is open for legal practitioners and academics alike.The e-version of this publication will be available on the newly constructed SEE Law Journal web site, while the printed copies will be distributed to the all member of SEELS faculties.

At the end of this valuable process of transformation, it only remains that we express our gratitude to all of our collaborators who made these editions possible, to all authors who had given their contribution, and finally to our readers for staying with us in the past years. Finally we hope that you will find this edition interesting and insightful to read. It is our firm belief that our efforts to improve our publication will keep our audience and be able to initiate dynamic exchanges with all interested parties in the days to come.

Gordana Lažetić
Editor in Chief

SEE LAW JOURNAL 2018

Publisher:
Centre for SEELS
Bul. Goce Delcev, 9B
1000 Skopje

Graphic design and print:
Arcuss Design

Circulation: 500 copies

ISSN 2671-311X

Co-funded by:

Co-funded by the
Erasmus+ Programme
of the European Union

CONTENT:

УДК 341.73:341.48]:341.645.2

Title:

DIPLOMATIC IMMUNITY IN THE JURISPRUDENCE OF THE ICJ

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ABSTRACT:

Diplomatic immunity derives from the sovereign equality of states and represents an indispensable cooperation mechanism between states, allowing their representatives to freely execute their duties. The research of diplomatic privileges and immunities is especially important for international relations, particularly bearing in mind the possibility of having a disparity between the norms related to immunity and those pertaining to human rights.

This paper discusses the rulings of the ICJ, in which the Court accepted a wider concept of diplomatic immunity. Specific emphasis was placed on the analysis of a judgment in Arrest warrant of 11 April 2000 case. While at the present development stage of the international community it is acceptable to acknowledge absolute personal immunity from criminal prosecution, the authors believe that functional immunity must be revoked in cases when a state representative commits serious human rights violations. Such an act cannot be considered as an official act, as the norms that prohibit genocide, war crimes, torture are treated as imperative norms of international law. These ius cogens norms take precedence over other norms because they serve to maintain international order. The authors also argue that substantive imperative norms may not collide with procedural norms such are the norms regulating immunity. Finally, regardless of this discussion, the authors conclude that in cases of acts of international crimes, the reasons for extending functional immunity cease, as it implies individual criminal responsibility, not the responsibility of the state.

Key Words: Diplomatic immunity, ICJ, *ius cogens, Arrest Warrant* case, human rights

INTRODUCTION

The issue of diplomatic immunity is a very interesting legal question that has its place in the jurisprudence of the International Court of Justice (hereinafter ICJ). The existence of diplomatic immunity is a necessary consequence of the sovereign equality of states, and is inherent in the modern international community that is based on the legal equality of states.[1] Diplomatic privileges and immunities are an indispensable mechanism for cooperation between states because they enable state representatives to execute their acknowledged functions.[2] For these reasons, the study of diplomatic privileges and immunities is of a particular importance to the relations between states, especially having in mind the growing significance of human rights, and possible dilemmas arising in cases of human rights violations regarding the supremacy of certain norms.

It is important to critically reflect on the views of the ICJ, presented in cases related to diplomatic privileges and immunities. However, it is important to underline that this paper adopts a wider notion of diplomatic immunity, as it applies to diplomatic representatives, as well as the highest state bodies representing a state abroad - the head of state, head of government and foreign minister. This guided the authors to include the cases in which the ICJ dealt with the diplomatic immunities of both diplomatic missions and the highest state representatives abroad. This paper analyses the issue of diplomatic immunity from different aspects, as they are understood in jurisprudence of the ICJ. The authors discus the legal nature of diplomatic immunity and its customary nature, later examining whether acts that constitute human rights violations can be considered official acts and thus protected by the rules of functional immunity. The particular attention was given to functional immunity, bearing in mind that it remains controversial issue and there is still disagreement about their scope of application and content.[3]

1. The scope and content of diplomatic immunity

On one hand, the rules governing diplomatic immunity fall into customary law, and on the other hand, they are woven into numerous international treaties.[4] It is a known fact that rules on the inviolability of envoys and diplomatic representatives first emerged in ancient times, when the rule not to harm the life and physical integrity of diplomatic representatives was considered to be a customary norm.[5] Over time, other diplomatic immunities also have become general customary rules of the international law, regardless of their specific acceptance. This is confirmed by the ICJ who found that "also diplomatic and consular agents, certain holders of high-ranking office in a State, such as the Head of State, Head of Government

1 Kelsen, Hans, The Principle of Sovereign Equality of States as a Basis for International Organization, *The Yale Law Journal*, 53:2, (1944), 207-220; Fox, Hazel, *The Law of State Immunity, Oxford International Law Library*, (2003) 41 – 42.

2 Cassese, Antonio, „When senior state officials may be tried for international crimes? Some comments on the Congo v. Belgium Case", *European Journal of International Law*, 13:4 (2002) 862.

3 See Mazzeschi, Riccardo Pisillo, The functional immunity of State Officials from foreign jurisdiction: A critique of the traditional theories, Questions of International Law (2015), available at http://www.qil-qdi.org/the-functional-immunity-of-state-officials-from-foreign-jurisdiction-a-critique-of-the-traditional-theories/, 2 April 2017.

4 These are the Vienna Convention on Diplomatic Relations of 1961, the Vienna Convention on Consular Relations of 1963, the Convention on Special Missions of '1969, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents of 1973, the Convention on the Representation of the States in their Relations with International Organizations of Universal Character of the 1975, Convention on Jurisdictional Immunities of States and Their Property of 2004.

5 Geršić, Gligorije *Diplomatsko i konzularno pravo*, Klasici jugoslovenckog prava, Službeni list SRJ, Beograd, (1995) 130.

and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal."[6] In this way, the ICJ accepts a wider concept of diplomatic immunity.[7] The acknowledgement of this doctrine is believed to serve the international advancement of the concept of comity and respect among sovereign nations, which can be realized only if leaders are free to execute their duties without being exposed to arrest or detention.[8] As the ICJ stated in 1980, "there is no more fundamental prerequisite for maintaining state relations as that of the inviolability of diplomatic representatives and embassies.[9]

The ICJ held the same course in the case of *Djibouti v. France*, by stressing: "The head of state particularly enjoys full immunity from criminal jurisdiction and inviolability that protects him or her from any act of authority of another State that could prevent them from performing their function".[10] This obligation is confirmed in the practice of internal courts, as in the case of the Supreme Court of Cassation in France, which has quashed a decision of a lower court in the case of Gaddafi for taking down an aircraft in 1989.[11]

In addition to the division along the line of legal nature, diplomatic privileges can also be divided in terms of to whom they are granted. Diplomatic privileges are granted to the highest representatives of countries or international organizations,[12] on the one hand, and diplomatic representatives of states, on the other hand. The ICJ dealt with the reach of diplomatic privileges granted to internal State authorities as well as to external bodies of representation. Finally, diplomatic privileges are divided according to the right-holders, i.e. privileges granted to diplomatic missions, and those granted to diplomatic representatives.

Diplomatic immunities entail the exclusion of persons from the scope of national regulations, i.e. their inapplicability to persons who have immunity and in cases when such persons evoke immunity. When it comes to personal immunities, they are traditionally divided into criminal and civil.[13] It is considered that immunity from criminal jurisdiction is absolute in nature,[14] whereas immunity from civil and administrative jurisdiction is relative in nature.[15] The ICJ gave particular consideration to the immunity of a state representative, and introduced certain

6 Arrest Warrant of 11 April 2000 *(Democratic Republic of the Congo v. Belgium)*, Judgment of 14 February 2002, para. 51. More on this issue see Akande, Dapo, Shah, Sangeeta, Immunities of State Officials, International Crimes, and Foreign Domestic Courts, *European Journal Of International Law*, 21: 4 (2011) 815-852.

7 Today there are several reasons for granting immunity to the head of state. It is considered that pressing charges against the head of state is potentially far more damaging for diplomatic relations than pressing charges against the state itself. The head of state is not an abstraction, and as he/she visits foreign countries he/she should be granted diplomatic immunity at least. Also, it is more difficult to distinguish between official and private acts of the head of state than other minor officials. Due to the function performed, his/her trial must be much more carefully conducted than in other cases. Finally, compared to judicial powers, the executive power is a better forum for decision-making on a number of issues concerning the status and functions of the head of state. See Keller, Linda M., Partial Victory for Zimbabwe President Mugabe in U.S. Litigation Alleging Human Rights, *ASIL Insights* (2002). Available at http://www.asil.org/insights/insigh83.htm, 2 April 2018.

8 Akande, Dapo, International Law Immunities and the International Criminal Court, *The American Journal of International Law*, vol. 98 (2004), 410.

9 United States Diplomatic and Consular Staff in Tehran case 1980 *(United States of America v. Iran)*, ICJ Rep 3, para. 91.

10 Case concerning certain questions of mutual assistance in criminal matters (Djibouti v. France), Judgment of 4 June 2008, para. 170; available at http://www.icj-cij.org/docket/files/136/14550.pdf, 2 April 2017.

11 Zappalà, Salvatore, Do head of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The Ghaddafi Case Before the French Cour de Cassation, *European Journal of International Law*, 12:3, (2001) 595-596.

12 Frulli, Micaela, *Immunities of persons from jurisdiction In:* The Oxford companion to international criminal justice, Cassese, Antonio, (2009).

13 More about personal immunity, which originated from international customary and treaty law that recognize the immunity of individuals who perform certain functions see Toner, Paul J., Competing Concepts of Immunity: The (R)evolution of the Head of State Immunity Defense, *Penn State Law Review*, vol. 108 (2004) 902.

14 Initially, a ruler's personality was identified with that of the state. It was believed that the sovereign power comes from God, as expressed by the maxim: *Rex dei gratia*. Over time, this had changed into the theory of a ruler whose powers come from the people: *Rex gratia populi*. A relatively simple role of rulers in the 18th and 19th centuries logically led to the rise of the theory of absolute immunity, by which a sovereign enjoyed complete immunity from jurisdiction of a foreign state in all cases and under all circumstances. To that end, the 1891 Resolution of the Institute of International Law proposed to cover the immunity of the head of state by the immunity enjoyed by the state. See Shaw, Malcom N., *International Law*, (4th ed.), Cambridge University Press, UK (1997), 494. This very broad, absolute immunity for states was justified by equality of states, their dignity and independence. See Dunoff, Jeffrey L., Ratner, Steven R., Wippman, David, I*nternational Law: Norms, Actors, Process,* Aspen Publisher (2002) 383.

15 Exemptions from criminal, civil and administrative jurisdiction, as set out in Article 31 of the Convention on Diplomatic Relations, apply in the case of: (a) a real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission; (b) an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State; (c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.

fine nuances. ICJ finds that immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts and that "while jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. "[16] A confirmation of this view of the Court may be seen in the fact that immunity from criminal jurisdiction is emphasized in the early stages of a possible procedure which leads to the automatic suspension of further proceedings. Therefore, immediately upon establishing that fact the authorities are obliged to stop the further course of the proceedings, in case they were unaware that the person is a representative of another country. This is the reason why grounds for dismissal relate to the procedural laws and not the laws that regulate specific criminal offenses.[17]

As regards the scope of the ratione personae diplomatic immunity in terms of internal state bodies, there is a clear view of the ICJ that it indisputably includes both head of state and head of government and Minister of Foreign Affairs.[18] In case of Arrest Warrant, the ICJ concluded that the customary rule on criminal immunity of state representatives is above the obligations of states under the conventions that provide for cooperation in criminal matters related to extradition.[19] The ICJ dealt with the immunity of state officials in the case of Djibouti v. France in 2008 and concluded that to all state officials, when performing duties ex officio, full immunity from criminal jurisdiction should be recognized.[20]

Although this paper considers the issue of diplomatic immunity in a wider context, involving both diplomatic representatives and the highest state representatives when acting abroad, it does not mean that these two concepts fully coincide. They differ in terms on ratione loci, because the diplomatic immunity of the highest state representatives is recognized on the territory of all countries, and the immunity of diplomatic representatives only on the territory of the receiving state. Allowing jurisdiction over the highest state officials without revoking immunity would be unacceptable, and endeavoring to carry out such actions against the will of the person completely unacceptable. The exclusion of criminal jurisdiction covers all measures taken as part of a procedure, thus including not only the practice of judicial authorities, but also of the prosecution and the police.[21] In recent years, the issue of immunity from criminal jurisdiction of the highest representatives of state is particularly emphasized, as evidenced by a large number of such cases. In the period from 1990 to 2008, there were 65 attempts to establish national jurisdiction over the highest state representatives, of which ten attempted to establish criminal jurisdiction over former heads of state after the termination of office.[22] For this reason, it is particularly important to analyze the practice of states with regard to new trends related to the traditionally accepted absolute immunity from criminal jurisdiction of persons who hold such immunity. In addition to these cases when internal bodies have tried to act in terms of processing, in several recent cases the ICJ had to deal with the scope of immunity from criminal jurisdiction. All this has led to the International Law Commission (hereinafter ILC) investigating this matter at its 58th session under a research entitled "Immunity of State Officials from Foreign Criminal Jurisdiction". The first report was submitted in 2008[23] in which the following issues were explored: legal sources of immunity of state officials, and delimitation of the concepts of immunity and jurisdiction. Particular attention was paid to determining the scope of immunity ratione personae, i.e. which persons are entitled to absolute immunity. The second report was submitted before the Commission for International Law in 2010.[24] This report considered a new practice of national courts and

16 *Arrest Warrant case*, I.C.J. Reports (2002) 25, para. 60.
17 Such is the case with the Russian Federation, according to the data from the Preliminary report on immunity of State officials from foreign criminal jurisdiction, Kolodkin, Roman Anatolevich, Special Rapporteur, International Law Commission, Sixtieth session (2008) 32.
18 Arrest Warrant case, Op. cit., para. 39.
19 Ibid., para. 59.
20 Case concerning certain questions of mutual assistance in criminal matters (Djibouti v. France), Judgment of 4 June 2008, para. 196.
21 Milisavljević, Bojan Krivičnopravni imunitet predstavnika države, *Journal of Criminalistics and Law*, no. 1, (2015), 23.
22 Second report on immunity of State officials from foreign criminal jurisdiction, Kolodkin, Roman Anatolevich, Special Rapporteur, International Law Commission, Sixty-second session (2010), 7.
23 Preliminary report on immunity of State officials from foreign criminal jurisdiction, Kolodkin, Roman Anatolevich, Special Rapporteur, International Law Commission, Sixtieth session, 2008. Document is available at http://legal.un.org/ilc/documentation/english/a_cn4_601.pdf, 2 April 2018.
24 Second report on immunity of State officials from foreign criminal jurisdiction, Kolodkin, Roman Anatolevich Special Rapporteur, International Law Commission, Sixty-second session (2010).

international bodies regarding the commencement of proceedings for serious international crimes and violation of jus cogens norms by the highest state representatives. The ILC has a duty to shape and lay down a new practice of states, as well as the ICJ in a form of clear rules because it is evident that there are deviations from the traditional scope of absolute diplomatic immunity as established by the customary rules in force.

In practice, the issue of diplomatic immunity is relevant in both domestic and international matters. If the person is a representative of state and as such holds diplomatic immunity, then the question of evoking diplomatic immunity occurs as a preliminary issue. This was pointed out by the ICJ in its proceedings on Immunity of Special Rapporteur on Human Rights.[25] The process is completed depending on the decision on the preliminary issue, or will it continue if it is found that there is no base for evoking diplomatic immunity. This can happen in case of acts that are undertaken outside official duties. So when it comes to the functional immunity, the burden of proof on the nature of activities falls on the state of the official in question i.e. whether an act was undertaken in the context of performing official duties or not.[26]

2. Immunity for the grave human rights violations

Practice shows that the high state officials often commit universally sanctioned violations of international law as part of state policy.[27] In this situation, the question is whether priority should be given to the norms regulating the issue of immunity, thus supporting the so-called "culture of impunity" for international crimes,[28] or the protection of human rights takes primacy considering the present level of development of international legal norms?

Today, the practice of revoking immunity to the head of state is almost nonexistent,[29] even in cases of very serious acts, and current cases illustrate all the complexities of politics and law.[30] On the other hand, when the head of state, head of government or foreign minister cease to perform their office, they cease to enjoy personal immunity. From that moment on they can be arrested and tried, but only for private acts committed during the execution of duties. In other words, the immunity for official acts is extended, which refers to the so-called functional immunity (immunity ratione materiae).[31] This immunity is based on the principle of equality of states, but also on the idea that if a person is acting on behalf of the state, then he or she is not personally responsible, but the state on whose behalf he or she operates.[32]

25 Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, advisory opinion ICJ Reports (1999) para. 63.
26 Case Concerning Certain Questions of Mutual Assistance in Criminal Matters *(Djibouti v. France)*, ICJ Reports, Judgment (2008), para. 196.
27 Akande, Dapo, Shan, Sangeeta, Immunities of State Officials, International Crimes, and Foreign Domestic Courts, *European Journal of International Law*, 21:4 (2010), 818.
28 This term refers to the granting of immunity to individuals who are in high positions in one country, by which they are protected against liability for international crimes. The above mentioned phenomenon occurred with the fall of military regimes in Latin America, Asia and Africa. See Falk, Richard, Taylor, Telford, The Legacy of Nuremberg, C*olumbia Journal of Transnational Law*, vol. 37 (1999), 693, 718-719.
29 Sears, Jill M., Confronting the »Culture of Impunity«: Immunity of Heads of State from Nuremberg to *ex parte Pinochet, German Yearbook of International Law*, vol. 42 (1999), 133.
30 See, e.g., United States v. Noriega, 117 F. 3d 1206, 1990, where Noriega, who served as commander of the Panamanian Defense Forces was indicted for drug- related crimes by the Southern District of Florida. See more about this case at Carter, Barry E., Trimble, Phillip R., International Law, 3rd. ed., Aspen Publishers (1999), 657-660; Hasson, Adam I., Extraterritorial Jurisdiction and Sovereign Immunity on Trial: Noriega, Pinochet, and Milosevic - Trends in Political Accountability and Transnational Criminal Law, *Boston College International and Comparative Law Review*, vol. 25 (2002), 125-142; Lafontant v. Aristide, 844 F. Supp. 128, (Eastern Dist. N.Y.), 1994; Tachiona v. Mugabe, 169 F. Supp. 2d 259; (S.D.N.Y. 2001); *Videti Chuidian v. Philippine National Bank* , 912 F.2d 1095 (9th Cir. 1990); Chuidian v. Philippine National Bank , 912 F.2d 1095 (9th Cir. 1990); Zappala, Salvatore, Do Heads of State Enjoy Immunity from Prosecution for International Crimes? *European Journal of International Law*, vol. 12 (2001) 601-607.
31 For the distinction between *functional and personal* immunity see Cassese, Antonio, International Law, *Oxford University Press* (2001) 260.
32 Akande, Dapo, Op. cit., 414; Kelsen, Hans, Collective and Individual Responsibility for Acts of State in International Law, Jewish Yearbook of International Law (1948), 230-31; Koller, David S., Immunities of Foreign Ministers: Paragraph 61 of the Yerodia Judgment as it Pertains to the Security Council and the International Criminal Court, The American University International Law Review, vol. 20 (2004), 28.

The only international convention that explicitly describes the status of immunity after a person ceases to perform his or her function is the Vienna Convention on Diplomatic Relations of 1961. According to article 39, paragraph 2 "When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict."[33] So, as stated previously, the validity of personal immunity ceases. On the other hand, this article further provides that "with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist." This means that the immunity of a former diplomat is no longer attributed to his or her person, but to the official acts performed by during the execution of duties. The question arises as to whether the same rule applies to former heads of state, heads of government or ministers of foreign affairs, as well as whether the act that seriously violates human rights can be considered an official act? The answer to this question must be sought not only in the practice of national courts, but also in analyzing the nature of certain human rights norms, which have the status of peremptory norms of international law and the implications they produce in legal relations. The ICJ had the opportunity to comment on this issue.

2.1 Democratic Republic of the Congo v. Belgium

In the case of DR Congo v. Belgium, known as the Arrest Warrant Case of 11 April 2000, there was a dispute between Belgium and the Democratic Republic of the Congo after a Belgian court of first instance issued an international warrant for the arrest of Abdoulaye Yerodia Ndombasi, then Minister of Foreign Affairs.[34] He was charged with serious violations of the international humanitarian law and crimes against humanity that were committed during 1998,[35] therefore before he took office as a minister. His participation in fostering racial hatred and intolerance against Tutsis in Congo was particularly emphasized, which has led to hundreds of killings, arbitrary executions, unfair trials and lynching. Belgium had issued this warrant on the basis of the Law on War Crimes adopted on 16 June 1993 and amended on 10 February 1999. The said law allowed for the establishment of universal jurisdiction for offenses committed on foreign territory and against foreign nationals, even if the person is not in the territory of Belgium at the time of indictment (universal jurisdiction in absentia).

At a time when the crimes were committed, Abdoulaye Yerodia Ndombasi was the chief of cabinet of the President Laurent Kabila, while at the time warrants were issued he occupied the office of the Minister of Foreign Affairs of the Democratic Republic of the Congo.[36] Sometime after the issuance of the arrest warrant, Yerodia was transferred to the post of the Minister of Education, but lost this ministerial position in April 2001. In September 2001, the Belgian authorities have asked Interpol to issue a Red Notice, demanding from the government of the DR Congo to arrest and extradite Yerodia.

However, the Congo held that the Belgian request is contrary to the principle of sovereign equality of states, that Belgium is violating the law of this country on conducting foreign af-

33 Vienna Convention on Diplomatic Relations, 18 April 1961, United Nations, Treaty Series, vol. 500, p. 95; text available at http://legal.un.org/ilc/texts/instruments/english/conventions/9_1_1961.pdf, 2 April 2018.

34 Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), ICJ, Judgment of 14 February 2002, I.C.J. Reports 2002, 3; text available at http://www.icj-cij.org/docket/files/121/8126.pdf, 2 April 2018.

35 More on this case see Orakhelashvili, Alexander, Arrest Warrant of 11 April 2000 *(Democratic Republic of the Congo V. Belgium)*, *The American Journal of International Law*, vol. 96 (2002), 677-685; Turns, David, Arrest Warrant of 11 April 2000 *(Democratic Republic of the Congo v. Belgium)* – The ICJ's Failure to Take a Stand on Universal Jurisdiction, *Melbourne Journal of International Law*, vol. 3 (2002), 383-399; Winants, Alain, The Yerodia Ruling of the ICJ and the 1993/1999 Belgian Law on Universal Jurisdiction, *Leiden Journal of International Law*, vol. 16 (2003), 491-509; Wouters, Jan, The Judgment of the ICJ in the *Arrest Warrant* case: Some Critical Remarks, *Leiden Journal of International Law*, vol. 16 (2003).

36 The arrest warrant clearly stated that the Minister of Foreign Affairs was not exempt from trial and enforcement of judgment, unless an official visit to Belgium. See: Orakhelashvili, Alexander, State Immunity and International Public Order, *German Yearbook of International Law*, vol. 45 (2002), 231.

fairs, as well as that Belgian authorities violate the principle of the right to absolute immunity that granted to the incumbent Minister of Foreign Affairs on the basis of international law.[37] For these reasons, this state has decided to refer the dispute to the ICJ.[38] Therefore, the DR Congo advocated an absolute immunity from criminal jurisdiction for the incumbent foreign minister.[39] On the other hand, Belgium held the position that the Minister cannot be granted immunity for acts that did not occur in the performance of his official duties, especially if he is indicted for war crimes and crimes against humanity, which are considered peremptory norms of international law.[40] Furthermore, Belgium maintained that there is no longer a dispute with DR Congo, as the main facts of the case have changed, that is Yerodia was no longer the Minister of Foreign Affairs.[41] The ICJ held that a conclusion can be clearly drawn that its jurisdiction is based on facts that existed at the time the complaint was submitted to this body and announced that it has jurisdiction in this particular case.[42]

The Court deliberated on whether the issuance and circulation of the arrest warrant for the Minister of Foreign Affairs violated the rules of personal immunity.[43] The Court limited its deliberation to immunity from criminal jurisdiction and personal inviolability in the customary international law, but as states lacked practice on this issue, the majority of judges drew a conclusion on functional immunity.[44] For that reason, the judgment contains an analysis of the function of the Minister of Foreign Affairs who is performing diplomatic duties for his or her country and represents it abroad. The court concluded that in order to perform these duties without hindrance, the Minister must enjoy full immunity ratione personae from criminal jurisdiction of another state, which applies regardless of whether the Minister is in official or private visit to the country that issued the arrest warrant, regardless of whether the acts for which he is charged have occurred before or after he took office as the minister, and regardless of whether these acts are committed in private or official capacity.[45]

The next issue deliberated by the Court was whether the rule on immunity applies in the same extent to the current foreign minister, who is suspected of committing war crimes or crimes against humanity. Surprisingly, the Court relied on the customary international law, which does not specify an exception to the application of the rules on immunity in this case. The Court held that it is difficult to distinguish between acts that fall into the category of official acts and those that do not fall into this category, and for therefore it acknowledged the minister's absolute immunity.[46] Thus, the Court acknowledged the minister's immunity even for acts that constitute serious human rights violations.[47]

Furthermore, the Court considered the treaty obligations of the state and concluded that the existence of a contractual obligation on the participation of countries in the prevention and punishment of serious international crimes or punishment and extradition of perpetrators to another state is not in itself impinging on the right of immunity granted by international

37 *Arrest Warrant* case, para. 1.
38 Ibid., paras. 41-43.
39 Ibid., par. 47. DR Kongo stresses that the fact that an immunity might bar prosecution before a specific court or over a specific period does not mean that the same prosecution cannot be grought, if appropreate, before another court which is not bound by that immunity, or at another time when the immunity need no longer be taken into account.
40 Ibid., para. 56.
41 Ibid., para. 18.
42 Ibid., para. 26. More on the existence of conflict in the practice of the ICJ see Kolb, Robert, The ICJ, Hart publishing (2013), 300-319. Moreover, the Court found that this change of situation with Yerodia has not put an end to the dispute between the parties.
43 More on this see. Zuppi, Alberto L., Immunity v. Universal Jurisdiction: The *Yerodia Ndombasi* Decision of the ICJ, *Louisiana Law Review,* vol. 63 (2003), 309-339.
44 Before the 20th century, the dominant theory which explained diplomatic immunity was the representative theory, while in the last century the functional theory was developed, which observes delicate functions performed by diplomats, as well as the need to maintain peace and security. Vienna Convention on Diplomatic Relations of 1961 likewise emphasizes the functional theory, but in the Preamble it also recognizes the basics of the representative theory, stating: " Realizing that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States". More about this see Barker, J. Craig, The Theory and Practice of Diplomatic Law in the Renaissance and Classical Periods, *Diplomacy and Statecraft* (1995), 604-605.
45 *Arrest Warrant case*, paras. 53-54.
46 Ibid., paras. 53-56
47 Ibid., para. 58.

customary law.[48] However, the Court made a distinction between immunity and impunity because it pointed out that, despite the existence of immunity, in some situations the Minister of Foreign Affairs can stand trial.[49] Thus, the Court concluded that the former Minister of Foreign Affairs continues to enjoy immunity from criminal jurisdiction for acts committed while holding office. Therefore, the Court ordered Belgium to withdraw the warrant and notify all countries that are informed about it, thereby awarding moral damages to the Democratic Republic of Congo.

It is particularly interesting that only judges Al-Khasawneh and Van den Wyngaert in their dissenting opinions pointed to the existence of the peremptory norms of international law, which reflect the recognition of vital interests and values of the international community, including grave human rights violations.[50] According to them, these norms are hierarchically above the norm on immunity, and in the event of conflict, the peremptory norms should be given priority.[51] In the view of the authors this position seems to be correct, although contrary to the majority view that norms of immunity have become peremptory norms of international law that cannot be modified by treaties.[52] The aforementioned position is problematic, particularly if one takes into account that the state may lift the immunity of its Minister at any time, and can conclude a contract with another state that this immunity is reduced or abolished. It is true that states insist on immunity in order to achieve a high degree of efficacy of diplomacy, which leads to peace and cooperation between states. However, it would be difficult to agree with the statement that international law is attempting to reconcile impunity and immunity and that "the triumph of one over another" cannot be recognized.[53] By ordering Belgium to withdraw the arrest warrant, the ICJ assumed that the warrant was not valid, although at that point there were no legal obstacles to try Yerodia before domestic courts. By doing so, the Court departed from the functional approach to immunity adopted in the judgment. Otherwise, the court would have logically concluded Yerodia no longer enjoys immunity, and that therefore the original warrant can no longer be regarded as unlawful.

2.2 Republic of the Congo v. France

Encouraged by the aforementioned judgment, in 2003 the Republic of Congo filed a complaint to the ICJ against France (known as Certain Criminal Proceedings in France).[54] The case was initiated because the non-governmental organizations dealing with the human rights protection initiated on 5 December 2001 before a court in France the proceedings for crimes against humanity and torture against the President of Congo, generals, the Minister of the Interior, and the commander of the President's Guard.[55] On 23 January 2002, the public prosecutor ordered an investigation into crimes against humanity and torture, and referred the case to the competent court, where the general Dabira held residence. However, an investi-

48 Ibid., paras. 58 – 59.

49 Firstly, he can be tried in domestic courts. Secondly, the state may waive immunity of the incumbent foreign minister at any time. Also, the incumbent or former Foreign Minister may be prosecuted before an international criminal tribunal if there is jurisdiction of this body. Finally, a former Minister of Foreign Affairs may be prosecuted before the courts of other countries in relation to the acts which he or she committed before or after he or she became a minister, or in relation to the acts which he or she did in a private capacity during the performance of ministerial functions. Ibid., para. 61.

50 Judge Van den Wyngaert claims that some others courts, such as the European Court of Human Rights in *Al-Adsani case*, give more considerations to *jus cogens* norms. Dissenting Opinion by Judge Wyngaert, Ibid., para. 28; Judge Al-Khasawneh underlines that the prohibition of grave international crimes has a character of jus cogens norm. Dissenting Opinion by Judge Al-Khasawneh, Ibid., para. 7.

51 Dissenting Opinion by Judge Wyngaert, paras. 12-23; Dissenting Opinion by Judge Al-Khasawneh, Ibid., para. 7.

52 Alexander Orakhelashvili explains in details the argument that *jus cogen*s norms trumps state immunity, and underlines that the role of this norms is to prevent impunity for serious human rights violations. See Orakhelashvili, Alexander, State Immunity and Hierarchy of Norms: Why the House of Lords Got it Wrong, The European Journal of International Law, vol. 18 (2008), 964.

53 Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, para. 79.

54 Certain criminal Proceedings in France (Republic of the Congo v. France), Summary 2003/3, 17 June 2003; text available at http://www.icj-cij.org/docket/files/129/8206.pdf, 2 April 2018.

55 The complaint against these persons was filed on 5 December 2001 by several non-governmental organizations. More on the facts of this case see Mangu, Andre Mbata B., State's Revenge against People in International Law: Requiem for Universal Jurisdiction, Indian Journal of International Law, 44:2 (2004) 337-341.

gation was launched against unidentified persons. Testimony was taken from General Dabira, and on 16 September 2002 the investigating judge issued a warrant for his apprehension immediately upon his return from the Congo. During an official visit to France by the President Nguesso, the investigating judge issued an instruction to police officers to interrogate him, but no interrogation took place.

The Republic of the Congo has filed a lawsuit to the ICJ, based on the breach of its sovereignty, prohibition of a unilateral establishment of universal criminal liability, as well as unlawful appropriation of the right to prosecute a Minister of Interior of another country for official acts or those acts that serve to maintain public order in that country.[56] Also, the Republic of Congo pointed out that this behavior instituted a violation of the criminal immunity of a foreign head of state, the norm of customary international law which the Court recognized in its jurisprudence. Therefore, interim measures were requested from the Court to immediately suspend all ongoing proceedings, but the Court refused to issue interim measures. Although some scholars pointed out that the Court had a historic opportunity to change its position on such an important issue and rule that universal jurisdiction for serious human rights violations takes precedence over the rules on immunities under international law[57], in 2010 France accepted the proposal from the Republic of the Congo to suspend the process.[58] In addition, as the application was withdrawn, the ICJ was not required to define and clarify the meaning and scope of "any act of authority" of incumbent foreign ministers protected by immunities, especially does it refers only to criminal warrants, or also includes other forms of process that could hinder an official's performance due to the threat of judicial compulsion or enforcement.[59]

2.3 Belgium v. Senegal

On 19 February 2009, Belgium initiated proceedings before the ICJ against Senegal based on the fact that they are parties to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984, which provides for an obligation to *extradite or punish* (case known as the *Questions Relating to the Obligation to Prosecute or Extradite).*[60] In its official claim, Belgium stated that it is addressing the ICJ because Senegal has not initiated criminal proceedings against the former President of Chad Hissène Habré for systematic and widespread human rights violations in the form of torture, war crimes, crimes against humanity and genocide committed during his rule (1982-1990).[61] After the overthrow from power, he found a safe haven in Senegal, and new government in Chad did not file any indictment for the offenses for which he was charged. The proceedings were initiated against Senegal due to the fact that after the departure from office he lived in Senegal as a political asylee without being tried for crimes he is charged with. After four years of investigation, in 2006, the Belgian authorities are sought his extradition to stand trial, but the authorities in Senegal repeatedly gave excuses not to do so, citing the need to introduce legislative changes in order

56 See: *Republic of the Congo v. France*, Request for the indication of a provisional measure, Summary of order of 17 June 2003. The text is available at: http://www.icj-cij.org/icjwww/idocket/icof/icofsummaries/icofsummary20030617.html, 2 April 2018.
57 See: Hopkins, Kevin, The ICJ and the Question of State Immunity: Why the Yerodia case is an Unfortunate Ruling for the Development of Public International Law, *South African Yearbook of International Law*, vol. 27 (2002), 256-263; Gray, Kevin R. Case of Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), *European Journal of International Law*, vol. 13 (2002), 723; Erasmus, Gerhard, Kemp, Gerhard,The Application of International Criminal Law before Domestic courts in the Light of Recent Developments in International and Constitutional Law, *South African Yearbook of International Law*, vol. 27 (2002), 64.
58 Order of 16 November 2010, available at http://www.icj-cij.org/docket/files/129/16266.pdf, 2 April 2018. Some scholars wondered what has led to the decision by Congo to discontinue, bearing in mind that the dispute was not solved. See, e.g., Akande, Dapo, More on Congo v. France discontinued, EJIL:Talk! (2010).
59 Bekker, Pieter H. F., Prorogated and Universal Jurisdiction in the International Court: The Congo v. France, Insight, *American Society of International Law*, 8:9 (2003).
60 Questions relating to the Obligation to Prosecute or Extradite, (Belgium v. Senegal), Judgment of 20 July 2012, I.C.J. Reports (2012), 422; http://www.icj-cij.org/docket/files/144/17064.pdf, 2 April 2018.
61 Ibid., para. 14.

to implement the Convention against Torture in domestic law, and other reasons, despite the decision taken within the African Union.[62]

The ICJ took into consideration the decision of the Committee against Torture (CAT), as the supervisory body under this Convention, which concluded that Senegal had failed to incorporate acts against torture into its legislature, despite being a member of the Convention and therefore obliged to do so.[63] It was not until 2007 that Senegal changed the law on criminal procedure in accordance with the recommendation of the Committee. Nevertheless, the ICJ ruled that Senegal has not taken any measures against Habré, while under the Convention was required to do so.[64] The second part of the Court's consideration referred to the legitimacy of Belgium filing a complaint against Senegal. The Court stressed that "The States parties to the Convention have a common interest to ensure, in view of their shared values, that acts of torture are prevented and that, if they occur, their authors do not enjoy impunity."[65] The first time in its history, the ICJ concluded that Belgium is authorized to it because these are obligations *erga omnes,* and each member has an interest to act in order to prevent torture and other acts envisaged by the Convention.[66]

In this way, in its judgment, the ICJ accepted that the prohibition of torture and other forms of ill-treatment norms are *jus cogens* in nature.[67] Following the ruling of 2012, the question arises – if the case on the issue of immunity was before the court now, would the ICJ conclude that these norms which are peremptory in nature prevail over the norms on immunity?

62 The AU Assembly of Heads of State and Government issued a decision instructing Senegal to prosecute Habre. See Decision 127 (VII) in 2006. However, Senegal claimed that it lacked financial resources, and referred to separate decision by the Economic Community of West African States, which concluded that his human rights could be violated by a failure to abide by the principle of non-retroactivity. See Buys, Cindy Galway, Belgium v. Senegal: The ICJ Affirms the Obligation to Prosecute or Extradite Hissène Habré Under the Convention Against Torture, *ASIL Insights*, 16:29 (2012).
63 Questions relating to the Obligation to Prosecute or Extradite, para. 26.
64 Ibid., para. 121.
65 Ibid., para. 68.
66 Ibid. Before this case, the Permanent Court of International Justice (PCIJ) had only once to pronounce on this question in the *Wimbledon case*. In this case, the PCIJ found that all the States parties "have a legal interest" in the protection of the rights involved, and that these obligations may be defined as "obligations erga omnes partes" in the sense that each State party has an interest in compliance with them in any given case. See *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, para. 33.
67 Ibid., para. 97.

CONCLUSION

Although the ICJ had on several occasions the opportunity to express its opinion on issues of immunity, the judgment in the case of *DR Congo v. Belgium* caused the greatest interest and also the greatest disappointment. The impression remains that the *Arrest Warrant* case reflects the lack of courage, both in terms of the development of law and the manner in which the arguments were presented.[68] In this judgment, the judges did not take into account that some international agreements expressly or implicitly hold the official capacity irrelevant for certain violations (genocide, torture, war crimes).[69] These are widely accepted treaties, which points to the fact that the states that have ratified them were aware of the conflict between these two groups of norms, but they did not give primacy to immunity in case of conflict.[70] The court refused to make a distinction between official acts and those committed to satisfy the personal benefit of high officials, and this judgment was surprisingly conservative.[71] On the other hand, it supports the progressive trend of rejection of immunity in the event that there are serious violations of human rights and humanitarian law. While acknowledging the immunity of the Minister of Foreign Affairs, the Court ordered a limited area in which a person may invoke immunity. Another positive aspect is that the Court had ruled that even the incumbent minister can be tried before an international court, which has jurisdiction for this matter.[72]

The development of international criminal law brought the definition of international crimes that are so grave in nature that any exemption from prosecution would be unjustified. The practice of the possibility of holding the highest representatives of states responsible for the most serious crimes, which establishes an exception to the absolute immunity from criminal jurisdiction in relation to the highest representatives of the state, should be valid *mutatis mutandis* for diplomatic representatives. Already after the First World War, in the case of Wilhelm II, it became clear that the position of the head of state should not to protect his or her persona from accountability before a properly set up tribunal.[73] This policy was confirmed by the Statute of the Tribunal at Nuremberg [74] and the Statute of the Tribunal in Tokyo.[75] The ILC subsequently adopted the Principles of the Nuremberg Tribunal as the general principles of international law, as confirmed by the United Nations General Assembly.[76] The third principle clearly states that "the fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law."[77] Later this rule was confirmed by the Statute of the *ad hoc* International Criminal Tribunal for the former Yugoslavia (ICTY),[78] as well as in the Statute of the Rwanda Tribunal.[79] The practice also confirms this rule. Thus, in the ruling in *Blaškić* case, the *ad hoc* ICTY concluded that "the highest state representatives are

68 Kolb, Robert, *Op.cit*., 1158.
69 For example, the Convention on the Prevention and Punishment of the Crime of Genocide in Article 4 prescribes that "Persons committing genocide or any of the other acts enumerated in Article 3 shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals."
70 Orakhelashvili, Alexander, State Immunity and International Public Order, *German Yearbook of International Law*, vol. 45, (2002), 253.
71 The same opinion is shared by Koivu, Virpi, Head-of-State Immunity v. Individual Criminal Responsibility under International Law, *Finnish Yearbook of International Law*, vol. 12 (2001), 315.
72 Arrest Warrant Case, para. 61.
73 Report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, Presented to the Preliminary Peace Conference, 29 April 1919, *The American Journal of International Law*, vol. 14, (1920), 116-117. However, Emperor Hirohito was not tried after World War II, although many of his decisions have led to war crimes; it was assumed that he was a symbolic figure who had no influence on the decision making process in Japan. See O'Neill, Kerry C., A New Customary Law of Head of State Immunity?: Hirohito and Pinochet, *Stanford Journal of International Law*, vol. 38 (2002), 301.
74 Article 7 of the Nuremberg Tribunal Statute.
75 Article 6 of the Tokyo Tribunal Statute.
76 Principles of the Nuremberg Tribunal, 1950, available at http://deoxy.org/wc/wc-nurem.htm, 2 April 2018.
77 Principle III of the Principles of International Law Recognized in the Charter of the Nuremberg Tribunal, in the Judgment of the Tribunal, adopted by the International Law Commission of the United Nations in 1950 and approved by the UN General Assembly.
78 Article 7. para. 2 of the ICTY Statute.
79 Article 6. para. 2. of the ICTY Statute.

responsible for war crimes, crimes against humanity and genocide and that they cannot invoke immunity from national or international jurisdiction even if they committed these crimes while acting in an official capacity."[80] Finally, article 27 of the Rome Statute emphasizes even more clearly that this instrument is applied equally on all persons without making a distinction as to whether they are occupying a public office or not. It states in the paragraph 2 that "Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person."[81]

Since these are serious criminal acts, and both the doctrine and practice have clear views on this, the exclusion from criminal immunity of the incumbent representative is fully justified. This attitude was supported by the ICJ.[82] It is clear that giving such jurisdictions to national courts must be avoided, since it would render other persons who are beneficiaries of diplomatic immunity in a broader sense incapable of performing their duties.[83] In other words, discrepancies may occur, as the ICJ pointed out, only if the state waives immunity, or if the head of state is on trial before international criminal tribunals that are competent to try for war crimes, genocide or crimes against humanity.[84]

Today, a much more complicated question arises from the recognition of functional immunity for serious violations of human rights. The question is whether serious violations of human rights should be regarded as official acts and therefore covered by the immunity? The answer to this question must be negative because even if these acts committed in connection with official functions, they must be strictly considered as private acts.[85] In the case of *Pinochet,* even the Lord Browne Wilkinson asks: How can an act be considered as an official act for the actions that international law prohibits and demands their criminalization?[86] Each official is obliged to act within a certain framework, and by exceeding these limits performed acts are becoming private in their nature. The only logical conclusion to be reached is that serious human rights violations cannot meet the criteria of official acts, i.e. a person cannot plead that such acts were carried out to achieve the interests of the state.[87]

On the other hand, in cases of serious human rights violations, it is less likely that the former head of state will be granted immunity. Today, there must be transparency and accountability of government officials toward individuals, and to what extent this will be achieved depends on the balancing of public and private interests. Immunity of civil servants serves the same purpose as state immunity, and that is to preserve the integrity of sovereign powers and functions of the state.[88] It is, therefore, logical that an official enjoys immunity only while performing his or her duties and only for official acts performed in the exercise of these duties. This rule derives from the functional justification of immunity, meaning the ability of certain public officials to perform their functions.

No norm of the international law is isolated, which means that it interacts with other norms of international law. Therefore, their reach and applicability depends on the way they affect each other's scope. Peremptory norms prevail over other norms of international law, and

80 *Prosecutor v. Blaškić*, Case No. IT-95-5/18, Trial Chamber, Decision of 16 May 1995, para 41.
81 Article 98. para 1. of the Rome Statute partially limits this right because it prescribes that: "The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender."
82 Case concerning certain questions of mutual assistance in criminal matters *(Djibouti v. France)*, Judgment of 4 June 2008, available at http://www.icj-cij.org/docket/files/136/14550.pdf, 2 April 2018.
83 Many scholars accept this position. For example, Dapo Akande and Sangeeta Shan argue that personal immunity (*immunity ratione personae*) continues to apply even where prosecution is sought for international crimes. They reject both arguments, based on the *jus cogens* status of norms prohibiting international crimes, and argument that human rights violations may not be considered to be official acts. See Akande, Dapo, Shan, Sangeeta, Op. cit., 825-838.
84 Arrest Warrant case, para. 61.
85 See Yitiha Simbeye, *Immunity and International Criminal Law*, Ashgate, USA (2004), 127.
86 The case of *Pinochet* (no. 3), Lord Browne-Wilkinson, p. 114.
87 See, for example, *Prosecutor v. Kambanda*, IT-97-23-S, 2000. The ruling is available at http://69.94.11.53/default.htm, 2 April 2018; Zegveld, Liesbeth, *The Bouterse case, Netherlands Yearbook of International Law,* vol. 32, (2001) para. 113.
88 More on state immunity see Dixon, Martin, *Textbook of International Law*, Oxford University Press, 6th ed. (2007) 174- 185.

therefore render the opposing international agreements and other rules of international law invalid. The function of these rules is to preserve the legal relations established by certain norms in that they make opposing norms and acts that threaten the preservation of the integrity of legal relationship invalid.[89] If we consider the norms on immunity as having an ordinary character, and norms which prohibit the international crimes as *jus cogens*, it is clear that the former will be limited or abolished if they are opposed to the latter. Peremptory norms have that character both in terms of the international treaty law and the customary international law.[90] In addition, state practice shows that the effect of the peremptory norms extends not only to the contract law, but also to areas such as extradition, unilateral acts, responsibilities of states and amnesty.[91] Although there are authors who believe that procedural rules, including the norms on immunity cannot come in conflict with the substantive peremptory norms,[92] this attitude seems to be wrong because the substantive peremptory norms are hierarchically above all other standards, regardless of their character. However, notwithstanding the debate over the division between substantive and procedural norms that cannot be in conflict with each other, it must be recognized that in case of international crimes the reasons for granting functional immunity cease and that entails individual criminal liability, not the liability of the state.

89 Mosler, Herman, International Society as a Legal Community, *Red Cross*, vol. 250, (1994), 285.
90 See ICJ, *Bosnia and Herzegovina v. Yugoslavia*, Order of 13 September 1993, Separate Opinion of Judge Lauterpacht, ICJ reports, 1993, para. 440.
91 Orakhelashvili, Alexander (2002), Op. cit., 256.
92 Fox, Hazel, Op.cit., 525; Zimmermann, Andreas, Sovereign Immunity & Violations of International *Jus Cogens* – Some Critical Remarks, *Michigan Journal of International Law*, vol. 16 (2003), 433; Parlett, Kate, Immunity in Civil Proceedings for Torture: The Emerging Exception, *European Human Rights Law Review,* no. 1 (2006) 51; Douglas, Zachary, State Immunity for the Acts of State Officials, *The British Yearbook of International Law*, Vol. 29 (2012), 283; Sévrine Knuchel, State Immunity and the Promise of Jus Cogens, *Northwestern Journal of International Human Rights*, 9: 2, (2011) 160.

Bibliography

Books

Carter, Barry E., Trimble, Phillip R., *International Law*, 3rd. ed., Aspen Publishers (1999).

Dixon, Martin, *Textbook of International Law*, Oxford University Press, 6th ed. (2007).

Dunoff, Jeffrey L., Ratner, Steven R., Wippman, David, *International Law: Norms, Actors, Process*, Aspen Publisher (2002).

Fox, Hazel, *The Law of State Immunity*, Oxford International Law Library, (2003).

Kolb, Robert, *The ICJ*, Hart publishing (2013).

Shaw, Malcom N., *International Law*, (4th ed.), Cambridge University Press, UK (1997).

Yitiha Simbeye, *Immunity and International Criminal Law*, Ashgate, USA (2004).

Geršić, Gligorije *Diplomatsko i konzularno pravo*, Klasici jugoslovenckog prava, Službeni list SRJ, Beograd, (1995).

Articles

Akande, Dapo, International Law Immunities and the International Criminal Court, *The American Journal of International Law,* vol. 98 (2004).

Akande, Dapo, Shah, Sangeeta, Immunities of State Officials, International Crimes, and Foreign Domestic Courts, *European Journal Of International Law*, 21: 4 (2011).

Akande, Dapo, Shan, Sangeeta, Immunities of State Officials, International Crimes, and Foreign Domestic Courts, *European Journal of International Law,* 21:4 (2010).

Barker, J. Craig, The Theory and Practice of Diplomatic Law in the Renaissance and Classical Periods, *Diplomacy and Statecraft* (1995).

Bekker, Pieter H. F., Prorogated and Universal Jurisdiction in the International Court: The *Congo v. France*, Insight, *American Society of International Law*, 8:9 (2003).

Buys, Cindy Galway, Belgium v. Senegal: The ICJ Affirms the Obligation to Prosecute or Extradite Hissène Habré Under the Convention Against Torture, *ASIL Insights*, 16:29 (2012).

Cassese, Antonio, „When senior state officials may be tried for international crimes? Some comments on the *Congo v. Belgium* Case", *European Journal of International Law*, 13:4 (2002).

Douglas, Zachary, State Immunity for the Acts of State Officials, *The British Yearbook of International Law*, Vol. 29 (2012).

Erasmus, Gerhard, Kemp, Gerhard,The Application of International Criminal Law before Domestic courts in the Light of Recent Developments in International and Constitutional Law, *South African Yearbook of International Law*, vol. 27 (2002).

Falk, Richard, Taylor, Telford, The Legacy of Nuremberg, *Columbia Journal of Transnational Law*, vol. 37 (1999),
Frulli, Micaela, *Immunities of persons from jurisdiction* In: The Oxford companion to international criminal justice, Cassese, Antonio, (2009).

Gray, Kevin R. Case of Concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), European Journal of International Law*, vol. 13 (2002).

Hasson, Adam I., Extraterritorial Jurisdiction and Sovereign Immunity on Trial: Noriega, Pinochet, and Milosevic - Trends in Political Accountability and Transnational Criminal Law, *Boston College International and Comparative Law Review*, vol. 25 (2002).

Hopkins, Kevin, The ICJ and the Question of State Immunity: Why the *Yerodia* case is an Unfortunate Ruling for the Development of Public International Law, *South African Yearbook of International Law,* vol. 27 (2002).

Kelsen, Hans, Collective and Individual Responsibility for Acts of State in International Law, *Jewish Yearbook of International Law* (1948).

Kelsen, Hans, The Principle of Sovereign Equality of States as a Basis for International Organization, *The Yale Law Journal*, 53:2, (1944).

Koivu, Virpi, Head-of-State Immunity v. Individual Criminal Responsibility under International Law, *Finnish Yearbook of International Law,* vol. 12 (2001).

Koller, David S., Immunities of Foreign Ministers: Paragraph 61 of the Yerodia Judgment as it Pertains to the Security Council and the International Criminal Court, *The American University International Law Review,* vol. 20 (2004).

Mangu, Andre Mbata B., State's Revenge against People in International Law: Requiem for Universal Jurisdiction, *Indian Journal of International Law*, 44:2 (2004).

Mazzeschi, Riccardo Pisillo, The functional immunity of State Officials from foreign jurisdiction: A critique of the traditional theories, *Questions of International Law* (2015).

Milisavljević, Bojan Krivičnopravni imunitet predstavnika države, *Journal of Criminalistics and Law*, no. 1, (2015).
Mosler, Herman, International Society as a Legal Community, *Red Cross*, vol. 250, (1994).

O'Neill, Kerry C., A New Customary Law of Head of State Immunity?: Hirohito and Pinochet**,** *Stanford Journal of International Law*, vol. 38 (2002).

Orakhelashvili, Alexander, *Arrest Warrant* of 11 April 2000 *(Democratic Republic of the Congo V. Belgium), The American Journal of International Law*, vol. 96 (2002).

Orakhelashvili, Alexander, State Immunity and Hierarchy of Norms: Why the House of Lords Got it Wrong, *The European Journal of International Law*, vol. 18 (2008).

Orakhelashvili, Alexander, State Immunity and International Public Order, *German Yearbook of International Law*, vol. 45 (2002).

Orakhelashvili, Alexander, State Immunity and International Public Order, *German Yearbook of International Law,* vol. 45, (2002).

Parlett, Kate, Immunity in Civil Proceedings for Torture: The Emerging Exception, *European Human Rights Law Review,* no. 1 (2006).

Sears, Jill M., Confronting the »Culture of Impunity«: *Immunity of Heads of State from Nuremberg to ex parte Pinochet, German Yearbook of International Law*, vol. 42 (1999).

Sévrine Knuchel, State Immunity and the Promise of *Jus Cogens, Northwestern Journal of International Human Rights*, 9: 2, (2011).

Toner, Paul J., Competing Concepts of Immunity: The (R)evolution of the Head of State Immunity Defense, *Penn State Law Review*, vol. 108 (2004).

Turns, David, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* – The ICJ's Failure to Take a Stand on Universal Jurisdiction, *Melbourne Journal of International Law*, vol. 3 (2002).

Winants, Alain, The Yerodia Ruling of the ICJ and the 1993/1999 Belgian Law on Universal Jurisdiction, *Leiden Journal of International Law*, vol. 16 (2003).

Wouters, Jan, The Judgment of the ICJ in the *Arrest Warrant* case: Some Critical Remarks, *Leiden Journal of International Law*, vol. 16 (2003).

Zappalà, Salvatore, Do head of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The Ghaddafi Case Before the French Cour de Cassation, *European Journal of International Law*, 12:3, (2001).

Zappala, Salvatore, Do Heads of State Enjoy Immunity from Prosecution for International Crimes? *European Journal of International Law***,** vol. 12 (2001).

Zegveld, Liesbeth, The *Bouterse case, Netherlands Yearbook of International Law*, vol. 32, (2001).

Zimmermann, Andreas, Sovereign Immunity & Violations of International *Jus Cogens* – Some Critical Remarks, *Michigan Journal of International Law***,** vol. 16 (2003).

Zuppi, Alberto L., Immunity v. Universal Jurisdiction: The *Yerodia Ndombasi* Decision of the ICJ, *Louisiana Law Review*, vol. 63 (2003).

Cases

Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970.

Case Concerning Certain Questions of Mutual Assistance in Criminal Matters *(Djibouti v. France),* ICJ Reports, Judgment (2008).

Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), ICJ, Judgment of 14 February 2002, I.C.J. Reports 2002.

Case concerning certain questions of mutual assistance in criminal matters *(Djibouti v. France),* Judgment of 4 June 2008.

Certain criminal Proceedings in France (Republic of the Congo v. France), Summary 2003/3, 17 June 2003.

Chuidian v. Philippine National Bank, 912 F.2d 1095 (9th Cir. 1990).

Lafontant v. Aristide, 844 F. Supp. 128, (Eastern Dist. N.Y.), 1994.

Prosecutor v. Blaškić, Case No. IT-95-5/18, Trial Chamber, Decision of 16 May 1995.

Prosecutor v. Kambanda, IT-97-23-S, 2000.

Questions relating to the Obligation to Prosecute or Extradite, (Belgium v. Senegal), Judgment of 20 July 2012, I.C.J. Reports (2012).

Republic of the Congo v. France, Request for the indication of a provisional measure, Summary of order of 17 June 2003.

Tachiona v. Mugabe, 169 F. Supp. 2d 259; (S.D.N.Y. 2001).

United States v. Noriega, 117 F. 3d 1206, 1990.

Other

Akande, Dapo, More on Congo v. France discontinued, *EJIL:Talk!* (2010).

Keller, Linda M., Partial Victory for Zimbabwe President Mugabe in U.S. Litigation Alleging Human Rights, *ASIL Insights* (2002).

Kolodkin, Roman Anatolevich, Special Rapporteur, International Law Commission, Sixtieth session (2008).

Kolodkin, Roman Anatolevich, Special Rapporteur, International Law Commission, Sixty-second session (2010).

Report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, Presented to the Preliminary Peace Conference, 29 April 1919, *The American Journal of International Law,* vol. 14, (1920).

УДК 346.546(496.5:4-672ЕУ)
339.137.2:340.13(496.5:4-672ЕУ)

Title:

The impact of Europeanization of Normative and Institution Building in Albania: The Case of Competition Law

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ABSTRACT

The prospect of EU membership given in 1999 for the Western Balkan countries and the confirmation in Thessaloniki in 2003 tailored with the fulfilment of the accession criteria, laid down the opportunity of these countries to adjust their domestic legal system in compliance with the EU ***acquis***. The perspective of membership has been considered as the most effective tool to induce domestic changes in the Western Balkan countries as a result of conditionality to take on the obligations of the membership including adherence to the aims of political, economic and monetary union. This paper aims to analyse how and to what extent Albanian competition law has been adjusted with EU ***acquis*** in this field as a result of EU conditionality policy induced in pre-accession stage. In order to assess the impact of Europeanization on Albanian competition law, the paper focuses in understanding the theoretical approach as what does it mean "Europeanization" and how this obliges Albania to adjust its domestic legislation in compliance with EU ***acquis***. Moreover, the paper analyses the evolution of Albanian competition law and as well institution adaption in the competition policy as a result of conditionality induced by EU in different periods of time. In the end the paper argues that Albanian legal and institutional framework in the competition policy has been generally adjusted with EU competition law.

Key Words: Europeanization; EU acquis; competition law; approximation; Competition Authority

INTRODUCTION

After the fall of communistic regime, Albania, gradually shifted its market policy from a state centralised economy towards a market economy. The challenges were enormous due to the absence of a clear legal framework and the lack of institutional building capacities. Several International and Regional Organization started to provide financial and technical assistance in reviving the legal framework in compliance with the international standards. The prospect of a membership given in 1999 for the Western Balkan countries and the confirmation of the same in Thessaloniki in 2003 laid down an opportunity for EU membership. Consequently, it laid down an obligation to adjust their domestic legal system in compliance with EU *acquis*.

The accession criteria - commonly referred as Copenhagen criteria - were introduced in the European Council in June 1993. In this summit, European Council stipulated that "accession will take place as soon as an associated country is able to assume the obligations of membership by satisfying the economic and political conditions required".[1] Therefore, for a country to be able to accede to the EU, it has to demonstrate that it has "stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union".[2]

Since 2003, fulfilment of the so-called EU accession criteria has been so difficult. The tangible results in carrying out the key reforms requested by Brussels, opened the green light for signing process of the Stabilisation and association Agreement (SAA). The SAA entered into force on 1st April 2009 after ratification by the Albanian Parliament (June 2006) and EU member states. Bringing domestic legislation in compliance with EU acquis was among core requirement of the SAA. According to article 70 (1) of the SAA, "The Parties recognise the importance of the approximation of Albania's existing legislation to that of the Community and of its effective implementation".[3] Furthermore, the SAA stipulated the legal obligation of Albania to approximate "its existing laws and future legislation shall be gradually made compatible with the Community acquis" and to "ensure that existing and future legislation shall be properly implemented and enforced".[4] Pursuant to article 70 (3) and article 6 of the SAA, approximation process is divided in two stages; each to 5 years. In the first stage starting from the time of entry into force of the SAA, approximation process shall be focused on fundamental elements of the internal market acquis. The second stage will be focused on the remaining part of the EU acquis.

Since the time for the first stage has elapsed, it presupposes that fundamental elements of the internal market EU acquis foreseen in Article 70 of the SAA have been transposed into Albanian legal system. Following this legal obligation, this paper aims to analyse how and to what extent Albanian competition law has been adjusted with EU competition *acquis* as a result of EU conditionality policy induced during pre-accession stage. It follows a "top – down" approach through which EU political, social and economic dynamics became an increasingly important part of domestic arrangements. Accordingly, it follows that Albanian national legal system has changed due to EU pressure induced through conditionality.

Methodology used in this paper is the doctrinal research. Doctrinal research has been defined as a "research which provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and,

1 European Council, "Conclusion of the Presidency" (SN 180 / 1 / 93 Rev 1, 21 – 22 June 1993), part 7A (iii).
2 Ibid pt 7A (iii).
3 Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Albania, of the other part – Protocols – Declaration [2009] OJ L 107/166, article 70 (1).
4 IIbid, art 70 (1)

perhaps, predicts future development".[5] In other word, doctrinal research focuses on reading and analysing of legislation, case law, secondary sources, textbooks, and periodicals. Legal gap analyses technique has been adopted to assess to what extent Albanian competition law has been approximated.

The paper is structured as follows: The second section provides a conceptual and theoretical analysis on the definition of Europeanization and mechanism and instruments induced by the EU to bring domestic changes in Albanian legal system with specific reference to Albanian competition law. The third and forth sections focus on changes that occurred in Albanian legal and institutional competition law as a result of EU pressure. Finally, the concluding section summarizes the findings.

1. Unpacking Europeanization: EU Conditionality and instruments of Europeanization

Since 1990s, the interest of the researchers dealing with EU studies has shifted from political integration to the impact that EU has on the domestic polity, politics and policy of member states, candidate countries and countries without an explicit membership perspective.[6] This impact is known as Europeanization and represent a distinct research area in the EU studies.

Europeanization is an essentially contested concept among academics due to its use in different policies and changes brought either in member states or third countries.[7] In general, literature published on Europeanization may be treated either as a dependent variable or an independent variable and can be categorized in three groups as a: bottom – up approach; top – down approach and two way process. Firstly, Europeanization has been defined as a process of European integration and institution building at EU level. Accordingly, it is a bottom-up process through which national political, social and economic forces create new European institutions and governance structures.[8] Secondly, Europeanization means the impact of the EU on the domestic policy, politics and polity structures.[9] It is a top-down process through which EU political, social and economic dynamics becomes an increasingly important part of domestic arrangements. Thirdly, Europeanization is a two-way process: member states are not only passive recipients of pressure from the EU, but they also try to project national policy preferences upward to EU level.[10]

5 Terry Hutchinson, Researching and Writing in Law. Lawbook Co, 2006. 7.
6 Ulrich Sedelmeier, "Europeanization" in The Oxford Handbook of the European Union, edited by Erik Jones, Anand Menon and Stephen Weatherill, 825 – 840. Oxford: OUP, 2014. 825.
7 Johan P Olsen, "The Many Faces of Europeanization." Journal of Common Market Studies 40 (2002), 921–952; Tanja A Börzel and Thomas Risse, "Conceptualizing the Domestic Impact of Europe" in The Politics of Europeanization, edited by Kevin Featherstone and Claudio M Radaelli, 57–80. Oxford: OUP, 2003; Claudio M Radaelli, "The Europeanization of Public Policy" in The Politics of Europeanization, edited by Kevin Featherstone and Claudio M Radaelli, 27–56. Oxford: OUP, 2003. 30; Andrea Lenschow, "Europeanisation of public policy", in European Union: power and policy-making, edited by Jeremy Richardson, 55-71. 3rd edn, Oxford: Routledge 2006.
8 Thomas Risse, et al, "Europeanization and Domestic Change: Introduction" in Transforming Europe: Europeanization and Domestic Change, edited by Maria Green Cowles, James A Caporaso and Thomas Risse, 1 -20. Cornell University Press, 2001.
9 Robert Ladrecht, "Europeanization of Domestic Politics and Institutions: The Case of France" Journal of Common Market Studies 32 (1994): 69-88; Adrienne Héritier, et al, Differential Europe: New Opportunities and Restrictions for Member-State Policies. Rowman & Littlefield 2001; Claudio M Radaelli, "The Europeanization of Public Policy"
in The Politics of Europeanization, edited by Kevin Featherstone and Claudio M Radaelli, 27–56. Oxford: OUP, 2003.
10 Simon Bulmer and Martin Burch, "The Europeanization of Central Government: the UK and Germany in historical Institutionalist Perspective" in The Rules of Integration: Institutional Approaches to the Study of Europe, edited by Gerald Schneider and Mark Aspinwall, 73 -98. Policy Research Unit Series, Manchester University Press, 2001.

Considering the three approaches, the Europeanization can be understood as a top – down process (independent variables) through which EU rules, procedures and policy diffuse in the domestic polity, policy and/or politics of member states or candidate countries. Accordingly, Albanian national legal system changes as a result of EU pressure induced through the mechanism of conditionality. After Thessaloniki Summit in 2003, when EU's leaders promised that Western Balkans countries "will become an integral part of the EU, once they meet the established criteria"[11], conditionality became a fashionable word denoting changes in the Western Balkan countries. Kubicek defines EU conditionality as "the linking of perceived benefits (e.g. political support, economic aid, membership in an organisation) to the fulfilment of a certain programme, in this case the advancement of democratic principles and institutions in a "target" state)" [12] and aims to enhance democratic reforms, market economy, good governance and legal approximation, with the final aim of reaching EU standards and being admitted into EU.

In order for the Europeanization to happen, EU should have in its disposal various instruments that cause changes on domestic level. Among mechanism identified and studied by the academics,[13] the most notable are those developed by Heather Grabbe. In her book, Grabbe identifies five instrument that EU had in it disposal to exert its influence on CEECs. Instruments identified are as follows: a) models – provision of legislative and institutional template; b) money – aid and technical assistance; c) benchmarking and monitoring; d) advice and twining and e) gate-keeping.[14] Drawing on Grabbes' instruments, this paper will be limited only on the role of the first instrument models provision of legislative and institutional template. Through this instrument, the Central and East European countries were obliged to take on all the EU's existing laws and norms, being subject of the same Europeanisation pressures as member-states in the policies and institutional templates.[15] Therefore, legal transposition of the EU *acquis* into domestic legal system is essential for a country to become member of the Union.

The provisions of legislative and institutional template have been transferred mainly through the contractual binding agreement – the SAA. Pursuant to article 217 TFEU, the SAA are agreements concluded by the Union with third countries "establishing an association involving reciprocal rights and obligations, common action and special procedure"[16] and cover wide range of areas from political dialogue to regional cooperation to freedom of movement to areas of cooperation in home and justice affairs.[17] The SAA constitutes a cornerstone of the Stabilisation and Association Process introduced to deal with post conflict countries of the Western Balkan and to bring these more closer to EU with the final aim of their membership.[18] Such kind of agreement, once have been ratified by all member states and third countries in accordance with their constitutional requirement, necessitates from the third countries to take necessary measures to approximate their existing and future legal systems in compliance with EU acquis and to ensure their proper implementation.

11 Council of the European Union, Thessaloniki European Council 19 and 20 June 2003 Presidency Conclusions. Brussels, 1 October 2003.
12 Paul J Kubicek, "International Norms, the European Union, and Democratization: Tentative Theory and Evidence" in The European Union and Democratization, edited by Paul J Kubicek, 1-29. London: Routledge, 2003, 7.
13 Christoph Knill and Dirk Lehmkuhl, "How Europe Matters. Different Mechanism of Europeanization," last January 2, 2018 http://eiop.or.at/eiop/pdf/1999-007.pdf.; Alfio Cerami, "Europeanization and Social Policy in Central and Eastern Europe" in Européanisation. D'Ouest en Est. Coll. Logiques Politiques, edited by François Bafoil and Timm Beichelt, 137-168. L'Harmattan, 2008.
14 Grabbe Heather, The EU's Transformative Power: Europeanization through Conditionality in Central and Eastern Europe. Palgrave Macmillian, 2006, 75 -76.
15 ibid, 76
16 Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2010] OJ C83/53, article 217.
17 Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Albania, of the other part – Protocols – Declaration [2009] OJ L 107/166, art 1.
18 Commission of the European Communities, 'Communication from the Commission to the Council and the European Parliament on the Stabilization and Association process for Countries of South – Eastern Europe' COM (1999) 235 final.

Articles 70 and 71 of the SAA stipulate the effects of Europeanization on Albanian competition policy because provides the legal base of approximation and establishing an independent authority entrusted with appropriate powers to ensure full application of competition rules. According to article 70 of the SAA, Albanian is obliged to approximate its existing laws and future legislation in compliance with the EU acquis and ensure its proper implementation.[19] Article 71 of the SAA laid down competition and other economic provisions and is structured in 8 paragraphs. The first paragraph considers as incompatible with the SAA: a) all agreements between undertakings, decisions of Associations and concerted practice which restrict or distort competition; b) abuse of dominant position and c) any state aid which distort competition. According to second paragraph, any practice contrary to article 71 of the SAA, have to be assessed on the basis of criteria arising from the EU rules, more particularly, article 81, 82, 86 and 87 TEC (respectively article 101, 102, 106 and 107 TFEU). Moreover, paragraphs 3-4 foreseen the establishment of operationally independent body to implement objectives of EU competitions rules. Through these 2 articles, EU exerts its influence to Europeanize Albanian competition law and policy. In other words, ability to take on the obligation to approximate existing and future competition laws and establishing an independent authority entrusted with appropriate powers to ensure implementation constitutes a leverage by the EU in the pre accession period to exert its influence in Albania. The following parts analyse the changes that occurred in Albanian domestic legal and institutional framework with specific reference to competition law.

2. Convergence of Albanian competition law with EU Competition acquis

The convergence of Albanian competition law in compliance with EU competition acquis can be divided in three periods. The first period 1990 – 2003 reflect the shift from the planned economy towards market economy. Until 1995, competition issues were subject of different laws as a result of the transition measures and reforms that started in that period. For the first time, the competition law was introduced in 1995 and was modeled based on the German experience. It should be noted that during this time Albania did not have any binding obligation to approximate its domestic legislation. The second period 2003 – 2009 starts with repealing of the Law 1995 and enactment of the law 2003 until the moment that SAA entered into force (April 2009). This period coincides with starting negotiations of SAA and the Law 2003 was drafted in compliance with the best European practices in competition area and in the same time reflects the willingness of Albania to approximate its legislation despite the fact that the country had no legal obligation to do so. The third period 2009 – 2014 echoes the obligation steaming from the SAA to approximate competition law within the five years from the moment of its entering into force.

19 Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Albania, of the other part – Protocols – Declaration [2009] OJ L 107/166, art 70.

2.1 From the Planned Economy towards open Market: The Need for a Competition law

Until 1990s, Albanian economy, due to communist ideology, was centrally planned economy, characterized by "a high degree of economic concentration, a state of collective ownership, absence of an effective price mechanism, lack of administrative autonomy for economic entities, and an insufficient framework setting up transparent and common rules".[20] In this situation, in order to address abovementioned problems, in 1995, Albania enacted the first competition law which paved the institutionalization of competition policy.[21] Until that time, competition issues were subject of different laws as a result of the transition measures and reforms that started in that period, "consisting in privatization; deregulation of economic activities; price liberalization and also exchange rates liberalization; trade liberalization; land and real estate market liberalization; banking and financial system reforming".[22]

The law 8044/1995 was entirely an innovation because it came in an environment where business competed with each other without legally justifying their action.[23] Modelled in accordance with German Law "On the Protection of Competition" [24], the Law 8044/1995 was based on "the need to create a market" [25] by adopting a "step-by-step approach", which aimed to introduce basic rules with a low level of sanctions at the initial phase of transition and which presented a high risk of non-implementation".[26] The law 8044/1995 addressed issues regarding: monopolies; prohibition of dominant positions in the market; criminal acts against consumers; a list of exemptions from the articles related to contracts and agreement which disturb the competitions; responsible institution for the protection of competition (the Economic Competition Department); the inspection of business offices and the sequestration of documents by preliminary court order; the investigation process; "hearing process" as a part of the procedure for taking a decision; courts authorised to deal competition issues and fines for companies or individuals that infringe the provisions on competition. Henceforth, the Law 8044/1995 paved the road toward institutionalization of the market economy because it "created a basis for a competition policy in Albania".[27]

From 1995 until 2003, the Law 8044/1995 was amended only once by the Law 8403/1998 (hereafter the Law 8044/1995 as amended).[28] The amendment consisted only in asserting one paragraph in article 37 related to the price of the newspapers and magazines to not be lower than their production cost. Despite the existence of legal framework, in practice the Law 8044/1995 as amended remained unenforced due to several factors such as: (i) lack of an appropriate legal framework; (ii) lack of an independent institution; (iii) lack of sufficient and qualified staff; (iv) lack of financial resources in conducting surveys for market data collection. [29] The lack of an independent authority was recognised as well by the EC progress report. In 2002, the EU Stabilisation and Association Report for Albania concluded that "the development of competition policy in Albania remains at an early stage despite the existence of basic legislation since 1995. Implementation is weak, due in particular to the clearly insufficient resources devoted to this area. [Although the law provides for establishment of an independent

20 Ahmet Mancellari, "Competition Policy in Albania" in Competition Policy in Western Balkan Countries, edited by Slavica Penev and Andreja Marusic, 45 – 73. Westminster Foundation for Democracy, 2013, 45.
21 Law No. 8044, date 7.12.1995, 'For Competition' [1995] OJ Special Edition.
22 Ahmet Mancellari, "Competition Policy in Albania" in Competition Policy in Western Balkan Countries, edited by Slavica Penev and Andreja Marusic, 45 – 73. Westminster Foundation for Democracy, 2013, 48.
23 Eriona Katro and Kestrin Katro, "Analysis on the recent Amendments of the Albanian Law on Competition protection in Albania" International Journal of Management Cases (2012): 83 - 89.
24 Ahmet Mancellari, "Competition Policy in Albania" in Competition Policy in Western Balkan Countries, edited by Slavica Penev and Andreja Marusic, 45 – 73. Westminster Foundation for Democracy, 2013, 48.
25 Eriona Katro and Kestrin Katro, "Analysis on the recent Amendments of the Albanian Law on Competition protection in Albania" International Journal of Management Cases (2012): 83-89, 83.
26 Pranvera Këllezi, "Competition Law in Albania" Horizons | Concurrences 2 (2009): 1-6, 1.
27 Pranvera Këllezi, "Competition Law in Albania" Horizons | Concurrences 2 (2009): 1-6, 1; Ahmet Mancellari, "Competition Policy in Albania" in Competition Policy in Western Balkan Countries, edited by Slavica Penev and Andreja Marusic, 45 – 73. Westminster Foundation for Democracy, 2013, 50.
28 Law no 8403, 'Amendment to Law no. 8044/1995 *On Competition*' [1998] OJ 23, 897.
29 Irena Dajkovic, "Competing to Reform: An Analyses of the New Competition Law in Albania" (Comment) [2004] ECLR 12 (2004): 735-736, 734.

Competition Office, this structure does not yet exist and competition issues are dealt by the Department of Economic Competition within the Albanian Ministry of Economy. This department remains poorly staffed and, as a result, enforcement of the law is extremely limited".[30] Whereas, Pranvera Këllezi in her paper argues that ineffectiveness of the competition law was *inter alia*, as a result of "low incentive to break up monopolies before privatizations process".[31] The lack of enforcement mechanisms created favourable conditions to increase the awareness for importance of competition rules. Such situation coincided with the prospective of EU membership given for Western Balkan countries in 2003.

2.2 Europeanization of Albanian Competition law without a legal obligation

Once the prospective of membership was reassured in Thessaloniki summit (2003), a new law was drafted in compliance with essential elements of EU competition rules. The Law 9121/2003 'On Competition Protection'[32] repealed previous Law 8044/1995 as amended. The initiative taken by the Albanian Competition Department was supported by the *Deutsche Gesellschaft fur technische Zusammenarbeit* (GTZ). Pursuant to obligation laid down in the accession criteria (Copenhagen criteria) and draft model of SAA introduced for negotiation, the Law 9121/2003 aimed to improve the legal and institutional framework for competition in Albania and ensure proper implementation of competition policy. Compared to Law 8044/1995 as amended several novelties were introduced with regard to the scope of prohibited agreement, abuse of dominant position, concentration and establishment of a new independent competition authority with appropriate enforcement powers.[33]

The Law 9121/2003 is structured in 7 parts. The first part entitled 'General Provisions' deals with the scope of the law, its applicability and definitions of most important terms. The second part deals with prohibited agreements; the abuse with market dominance and control of concentrations. The third part entitled 'Competition Authority and Administrative Procedures' laid down the organization and functioning of competition authority; general administrative procedures; procedures on agreements and abuse of dominant position; procedures on concentration. Part four, five, six and seven arrange respectively, the following issues: civil procedures; cooperation with other institutions; administrative violations and sanctions and transitionary provisions.

Generally, the Law 9121/2003 was drafted in compliance with Articles 101-102 TFEU and with most important secondary legislation and Commissions' guidelines. Article 4 of the Law 9121/2003 mirrors with article 101 TFEU prohibiting agreements which have as their objective prevention, restriction or distortion of competition rules. Moreover, Albanian competition law foresaw the possibility of exemptions under certain economic grounds (article 5;6;7). Article 102 TFEU was transposed in article 8 and 9 of the Law 9121/2003. Article 8 presents the criteria for the appraisal of dominant position whereas article 9 introduced cases were abuse with dominant position shall be prohibited. Beside transposition of primary sources (article 101 and 102 TFEU), the Law 9121/2003 was modelled as well with 3 important EU regulations, 4 Commissions' notices and 1 Commission guideline. In the table 1 is shown EU competition rules (primary, secondary and soft sources) transposed in the Law 9121/2003 where the level of approximation is full.

30 EU Commission's Stabilisation and Association Report of April 4, 2002, COM (2002) 163, 24.
31 Pranvera Këllezi, "Competition Law in Albania" Horizons | Concurrences 2 (2009): 1-6, 1.
32 Law no 9121, 'For Competition Protection' [2003] OJ 71 amended with Law no. 9499, 'For some changes on the law no 9121 date 28. 07. 2003 'For Competition Protection' [2006] OJ 37; Law no 9584, 'For Wages, Remuneration and Structure of Independent Constitutional Institutions and other Independent Institutions, established by Law' [2006] OJ 84 and Law no 10 317, 'For some additions and changes in the law no 9121 date 28. 07. 2003 'For Competition Protection' [2010] OJ 135.
33 For more legal analyze see: Eriona Katro and Kestrin Katro, "Analysis on the recent Amendments of the Albanian Law on Competition protection in Albania" International Journal of Management Cases (2012): 83-89; Irena Dajkovic, "Competing to Reform: An Analyses of the New Competition Law in Albania" (Comment) [2004] ECLR 12 (2004): 735-736; Ahmet Mancellari, "Competition Policy in Albania" in Competition Policy in Western Balkan Countries, edited by Slavica Penev and Andreja Marusic, 45 – 73. Westminster Foundation for Democracy, 2013.

In 2006, the Law 9121/2003 'On Competition Protection' was amended. Such amendment did not come as a result of EU conditionality. The amendments occurred are merely related with the minor changes with regards to the criteria to be elected as member of Competition Commission (article 20/c) and irreconcilability and release of members of Competition Commission (article 22/3/c).

2.3 The Europeanization of Albanian Competition law after the enter to force of SAA

With the entry into force of SAA in 2009, the adjustment of domestic legal system (article 70 SAA) and establishing an independent authority entrusted with appropriate powers to ensure full application of competition rules (article 71 SAA) became an obligation for Albanian government. Considering such obligations and their effects in Albanian legal system pursuant to articles 122 and 123 of Albanian Constitution as last amended (2016), a new Law 10317/2010 was enacted by amending Law 9121/2003 'On Competition Protection' (hereafter Law 9121/2003 as amended).

The 2010 amendment have further adjusted Albanian competition law by increasing the effectiveness of competition policy reflecting the recent development in EU level. Amendments improved the definitions of both agreements [art 3 (4)] and dominant position [art 3 (5)] and enhanced more clarity of these concepts. Generally, the amendments are particularly related to: (i) exclusive and special rights given by the state for public companies and other companies operating in the fields of economic services [art 2 (c and ç)]; (ii) prohibition of agreements restricting competition by providing bloc exemptions and specifying the cases of 'de minims' agreements (art 5-7; 49-50); (iii) dominant position by removing the third paragraph that justified dominant position for 'objective reasons' (art 9); (iv) concentration (art 10), a significant reduction of the thresholds for notifying concentration and an increase of the deadline of notification – from one week to 30 days (art 12); (v) revising the extent of petty and heavy fines (art 73-74) and (vii) investigative procedures by approximating them almost completely with the relevant EU regulations and Commission soft laws (art 41 – 43).

Furthermore, several "guidelines" and "notices" have been enacted by Albanian Competition Authority to guarantee further alignment of Albanian competition law with EU secondary legislation or Commissions' soft law. Through 2010 amendment and transposition of Commission' soft law, the Albanian competition law is generally in line with EU competition law and reflects what Eriona and Kestrin Katro have pointed out in their paper that the primary purpose of such evolution relates to the development of Albanian internal market and then integration in the European market.[34]

34 Eriona Katro and Kestrin Katro, "Analysis on the recent Amendments of the Albanian Law on Competition protection in Albania" International Journal of Management Cases (2012): 83-89, 87 – 88.

3. Europeanization of Institutional framework in the Competition Policy

Besides the impact on the normative aspects, the Europeanization process has induced changes as well within the institutional framework responsible for enforcing competition. The impact of Europeanization on the institutional framework can be manifested in three aspects: a) independence of competition authority; b) the role of competition authority in the market by identification and detecting measure with purpose to restore competition and c) the role of competition authority in furthering the approximation process.

Firstly, Europeanization process has increased independency of competition authority. Law 8044/1995 foresaw the establishment of the Department of Economic Competition responsible for the implementation of the law. The Department of Economic Competition was part of the Ministry of Economy. According to the Law 9121/2003 as amended, the Competition Authority is public entity and independent in the performance of its tasks, which aims the protecting fair and effective competition in the market place [art 18(1)]. The Competition Authority is composed by the Commission which is a decision taking body and the Secretariat as the administrative and investigating body.

The Competition Commission is a collegial body, whose member are appointed by the Parliament in accordance with criteria laid down in article 20 and 22 of the Law 9121/2003 as amended. The duties and competences of the Commission are outlined in the article 24 of the Law 9121/2003 as amended. Accordingly, The Commission is vested with the following powers: a) outlining the national competition policy responsible and issuing issue regulation and guidelines necessary for the protection of competition; b) supervising the work of the Secretariat in the application of the provisions of this Law and submitting an annual report of the Authority to the Parliament within the first three months of the consequent year; c) giving opinions upon Parliament's Commission request on issues related to the competition and the legislation regarding this field and giving evaluations and recommendations to central and local administration and other public institutions and private entities; d) taking decisions on the basis of the Law; e) representing the Authority, within and abroad the country, in relationships with other and homologue institutions. Whereas, the Secretariat of the Competition Authority is the administrative body whose officials detain the status of the civil servants and are entrusted by law to the administrative investigations according the Code of Administrative Procedures (art 27 Law 9121/2003 as amended). According to article 28 Law 9121/2003 as amended, the Secretariat shall have the following responsibilities: a) to monitor and analyse the conditions on the market to the extent necessary for the development of free and effective competition; b) to conduct investigations in compliance with the procedures of Code of Administrative procedures, this Law and other legislation in force; c) to compile and submit investigation reports to the Commission for decision-taking d) to ensure publishing the decisions taken, by-laws issued according to this Law, and also the annual report of the Authority; e) to follow and supervise the implementation of the decisions taken by the Commission.

Secondly, since its establishment, the Competition Commission has made significant progress in terms of performance of law enforcement decisions. Pursuant to article 24 (d), the Competition Commission takes decision as been stipulated in the law. As can be seen from the table 2, the role of Competition Commission as regulatory institutions in a competitive market has been increased by interventions in many sectors of economy where anti-competitive practices have been identified and detected. Furthermore, the Competition Commission has encouraged discussions and made recommendations to the public institutions with regard to issues of competition policy.

Finally, the increasing role of Competition Authority with appropriate competences has increased further adjustment of Albanian competition law with EU standards. The Competition Authority has continued the process of the approximation of legislation with the EU competition *acquis*, aiming to achieve full transposition. Pursuant to article 24 (dh), the Competition Commission is entitled with the issue regulation and guidelines in order to enforce the provisions of the law. Granting such power to the Competition Commission has enabled the transposition of EU secondary competition rules into domestic system through guidelines or notices that have binding effects. From the inception, the Competition Commission has been very actively involved in the approximation process. Accordingly, from 2004, 11 regulations have been issued by the Competition Commission corresponding with most important EU regulations. Moreover, a huge number of "guidelines" and "notices" issued by the Commission are transposed in the Albanian legal system. The table 3 and 4 shows the EU acquis transposed into domestic competition law.

CONCLUSION

After the fall of communist regime, transition for Albania towards the market economy has been associated with several shortfalls in the competition policy. The challenges were enormous due lack of competition culture, informal market and absence of a clear legal and institutional framework. In the beginning of transition, Albanian government was concerned more with opening the market; privatising process and maintaining the macroeconomic stability rather then with developing a competition policy. In 1995, the Law 8044/1995 was adopted by introducing basic rules with a low level of sanctions. However, the lack of enforcement mechanism associated with problems from privatisation processes required a new law on competition issues.

The prospect of EU membership tailored with conditionality induced voluntary changes in the Albanian legal system by obligating Albania to take approximate domestic legislation in compliance with EU *acquis* and establish an independent institutions to enforce competition rules. The law enacted in 2003, reflected the best practices of EU standards in competition law. EU primary provisions (article 101 and 102 TFEU); secondary legislations (regulations) and other soft laws were included in this law. Such adjustment was voluntary showing the willingness of the country to obtain the EU membership since at that time Albania did not have a legal binding agreement. The entry into force of the SAA in 2009, legally obliged Albania to advance in adjusting further the domestic legal system and empowering the Competition Authority.

In conclusion, the paper argues that Albanian institutional and legal framework in competition law is in compliance with EU competition law. The "Europeanization" impact on Albanian competition law is manifested in: a) adjustment of legislation in line with EU *acquis*; b) establishing an institutional authority with appropriate powers to ensure enforcement of competition rules and c) completion of Albanian competition law with secondary sources. In near future, as Albania is waiting to open the negotiations for several chapters of the EU *acquis*, a special attention has to be placed on the enforcement process and promotion of competition culture.

Bibliography

ACA, Annual Report 2016. Tirana: ACA, 2016.

Agreement between the European Economic Community and the Republic of Albania, on trade and Commercial and Economic Cooperation [1992] OJ L 343/0002.

Börzel, A Tanja and Risse, Thomas. "Conceptualizing the Domestic Impact of Europe" in The Politics of Europeanization, edited by Kevin Featherstone and Claudio M Radaelli, 57–80. Oxford: OUP, 2003.

Bulmer, Simon. and Burch, Martin. "The Europeanization of Central Government: the UK and Germany in historical Institutionalist Perspective" in The Rules of Integration: Institutional Approaches to the Study of Europe, edited by Gerald Schneider and Mark Aspinwall, 73 -98. Policy Research Unit Series, Manchester University Press, 2001.

Cerami, Alfio. "Europeanization and Social Policy in Central and Eastern Europe" in Européanisation. D'Ouest en Est. Coll. Logiques Politiques, edited by François Bafoil and Timm Beichelt, 137-168. L'Harmattan, 2008.

Commission, 'Communication from the Commission to the Council and the European Parliament on the Stabilization and Association process for Countries of South – Eastern Europe' COM (1999) 235 final.

Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2010] OJ C83/53.

Council of the European Union, Thessaloniki European Council 19 and 20 June 2003 Presidency Conclusions. Brussels, 1 October 2003.

Dajkovic, Irena. "Competing to Reform: An Analyses of the New Competition Law in Albania" (Comment) [2004] ECLR 12 (2004): 735-736.

EU Commission's Stabilisation and Association Report of April 4, 2002, COM (2002) 163

European Council, "Conclusion of the Presidency." SN 180 / 1 / 93 Rev 1, 21 – 22 June 1993.

Grabbe Heather, The EU's Transformative Power: Europeanization through Conditionality in Central and Eastern Europe. Palgrave Macmillian, 2006.

Héritier, Adrienne. ***et al,*** Differential Europe: New Opportunities and Restrictions for Member-State Policies. Rowman & Littlefield 2001.

Hutchinson, Terry. Researching and Writing in Law. Lawbook Co, 2006.

Katro, Eriona. and Katro, Kestrin. "Analysis on the recent Amendments of the Albanian Law on Competition protection in Albania" International Journal of Management Cases (2012): 83-89.

Këllezi, Pranvera. "Competition Law in Albania" Horizons | Concurrences 2 (2009): 1-6.

Knill, Christoph and Lehmkuhl, Dirk. "How Europe Matters. Different Mechanism of Europeanization," last January 2, 2018 http://eiop.or.at/eiop/pdf/1999-007.pdf.

Kubicek, J Paul. "International Norms, the European Union, and Democratization: Tentative Theory and Evidence" in The European Union and Democratization, edited by Paul J Kubicek, 1-29. London: Routledge, 2003.

Ladrecht, Robert. "Europeanization of Domestic Politics and Institutions: The Case of France" Journal of Common Market Studies 32 (1994): 69-88.

Law No. 8044, date 7.12.1995, 'For Competition' [1995] OJ Special Edition.

Law No 9121, 'For Competition Protection' [2003] OJ 71 amended with Law no. 9499, 'For some changes on the law no 9121 date 28. 07. 2003 'For Competition Protection' [2006] OJ 37.

Law No 10 317, 'For some additions and changes in the law no 9121 date 28. 07. 2003 'For Competition Protection' [2010] OJ 135.

Lenschow, Andrea. "Europeanisation of public policy", in European Union: power and policy-making, edited by Jeremy Richardson, 55-71. Oxford: Routledge 2006.

Mancellari, Ahmet. "Competition Policy in Albania" in Competition Policy in Western Balkan Countries, edited by Slavica Penev and Andreja Marusic, 45 – 73. Westminster Foundation for Democracy, 2013.

Olsen, P Johan. "The Many Faces of Europeanization." Journal of Common Market Studies 40 (2002), 921–952.

Radaelli, M Claudio. "The Europeanization of Public Policy" in The Politics of Europeanization, edited by Kevin Featherstone and Claudio M Radaelli, 27–56. Oxford: OUP, 2003.

Risse, Thomas. ***et al***, "Europeanization and Domestic Change: Introduction" in Transforming Europe: Europeanization and Domestic Change, edited by Maria Green Cowles, James A Caporaso and Thomas Risse, 1 -20. Cornell University Press, 2001.

Sedelmeier, Ulrich. "Europeanization" in The Oxford Handbook of the European Union, edited by Erik Jones, Anand Menon and Stephen Weatherill, 825 – 840. Oxford: OUP, 2014.

Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Albania, of the other part – Protocols – Declaration [2009] OJ L 107/166.

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Table 1:
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3	Regulation (EC) No 773/2004
4	Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty
5	Commission Notice on the definition of relevant market for the purposes of Community competition law
6	Commission Notice on Immunity from fines and reduction of fines in cartel
7	Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003
8	Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de minimis)
9	Regulation (EC) No 139/2004

Source: Authors' own calculation based on ACA website.

Table 2:
Statistical Data on Competition Commission Decision for the period 2004 -2016

Year	04	05	06	07	08	09	10	11	12	13	14	15	16
Concentrations	2		4	9	11	8	6	10	9	13	8	11	12
Abuse of Dominant position				1	1	1	3	2	2		3	3	5
Prohibited Agreement				3		2	2	2	2	1	7	6	7
Exempted Agreement					1	1			1	1	1	1	4
Regulations and Guidelines	6	2		4	4	2	7	6	5	3	2	3	5
Recommendations to public institutions	1	3	1	2	5	10	5	5	5	1	4	11	12
Fines		1	1	5		2	2	1	7	2	2	0	0
Interim Measure										1	0	1	0
Conditions and Obligations											1	2	1
other decisions	4	12	9	6	7	12	11	18	24	22	14	15	6

Source: ACA, 'Annual Report' (ACA 2016) 70.

Table 3:
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No	EU *Acquis*	Albanian legislation
1	Regulation (EC) Nr. 139/2004	Regulation "On the concentration procedures"
2	Regulation (EC) No139/2004	Regulation "On implementation of the procedures of concentrations between undertakings"
3	Regulation (EC) No 1/2003	Regulation "On investigative procedures of the Albanian Competition Authority"
4	Regulation (EC) No 772/2004	Regulation "On categories of technology transfer agreements"
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6	Regulation (EU) No 1218/2010	Regulation "On exemptions of the categories of specialisation agreements"
7	Regulation (EU) No 330/2010	Regulation "On the categories of vertical agreements and concerted practices"
8	Regulation (EU) No 461/2010	Regulation "On categories of agreements in the motor vehicle sector"
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10	Regulation (EC) No 487/2009	Regulation "On categories of agreements and concerted practices in the air transport sector"
11	Regulation (EC) No 622/2008	Regulation "On settlement procedures"

Source: Authors' own calculation based on ACA website.

Table 4:
Compliance of Law 9121/2003 as amended in with the EU soft law issued by Commission for competition Law (2009 – 2016)

No	EU *Acquis*	Albanian legislation
1	Commission Notice on Immunity from fines and reduction of fines in cartel cases	Regulation "On fines and leniency"
2	Guideline on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003	
3	Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings;	Guideline "On the assessment of horizontal mergers between undertakings"
4	Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings;	Guideline "On the assessment of non-horizontal mergers and conglomerate mergers between undertakings"
5	Commission notice - Guidelines on Vertical Restraints	Guideline "On the assessment of vertical restraints agreements"
6	Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de minimis)	Regulation "On agreements of minor importance, de minimis"
7	Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings" (2008/C 95/01);	Guideline "On control of concentrations"
8	Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements	Guideline "On the assessment of horizontal agreements"
9	Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings	Guideline "On the enforcement of articles 8 and 9 of Law 9121, dated 28.07.2003, "On Competition Protection
10	Commission notice - Guidelines on Vertical Restraints	Guideline "On the assessment of vertical restrains"
11	Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004	Guideline regarding remedies
12	ECN Leniency programe	Leniency programe
13	Commission Notice on simplified procedure for treatment of certain concentrations under Regulation 139/2004	Guideline "On the simplified procedure in cases of concentrations"

Source: Authors' own calculation based on ACA website.

УДК 327.5:342.228(497.7:495)]:
341.171.071.51(4-672ЕУ:497.7)
327.5:342.228(497.7:495)]:
327.51.071.51(100-622НАТО:497.7)
347.95:341.645.2"2011"(497.7)

Title:

Republic of Macedonia's membership in EU and NATO in the light of the ICJ Judgment of 5 December 2011

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ABSTRACT

The paper makes an assessment of the Republic of Macedonia's efforts to become a member of the European Union and NATO in the context of the name issue with the neighbouring Greece. The European Union's involvement in tackling the name issue between one of its member states – Greece and the Republic of Macedonia has been highly ineffective. Although, the EU has gained numerous mechanisms for conflict prevention and conflict resolution within its Common Foreign and Security Policy and within the Enlargement Policy, the Union has been unsuccessful in the process of solving this dispute and consequently in the process of bringing the fragile Balkan country closer to its membership. Moreover, NATO's membership for R. Macedonia has been burdened with an additional criterion in 2008 – resolving the name issue, due to the opposition from one of its member states. The authors argue that in the case when the dispute involves one of the international organisations' member states, due to the lack of unity among its members, it is extremely difficult to find a fair settlement that properly weights the interest of both parties. This obstacle has been continuously present both in EU and in NATO, even after the ICJ delivered its judgment on the breach of the Interim Accord of 1995, finding the Greek opposition to the Macedonian membership in international organisations unlawful.

Key Words: European Union, NATO, Name issue, Greece, R. Macedonia, International Court of Justice, Interim Accord.

INTRODUCTION

One of the disputes that the European Union is facing since the beginning of the 1990s is the name issue between one of its member states – Greece and Republic of Macedonia **-** a country which emerged from the dissolution of the former Socialist Federal Republic of Yugoslavia (SFRY) (hereinafter: R. Macedonia). It is a dispute that the EU tried to tackle through several mechanisms within its enlargement policy and Common Foreign and Security Policy (CFSP), but it still hasn't led to a successful resolution. This is mainly due to the fact that one of the parties to this dispute is a Union member state, which makes the decision making process and the coordination process within the enlargement policy and the CFSP much more difficult. It has been shown on numerous occasions, that the lack of unity among member states contributes greatly towards paralysis of the EU institutions to tackle the disputes and conflicts on their borders. This has been the case in the conflicts when the Yugoslav federation was violently dissolving during the 1990s and the EU was just starting to build its new mechanisms within the CFSP. The lack of unity among the member states contributes towards the inability of the Union to tackle this particular dispute on the Balkans.

The paper covers the period from 1991 onwards, when the dissolution of the former SFRY started. It presents a short historical background to the name issue, in order to focus afterwards on how the Stabilization and Association Process (SAP) which was launched in 1999 influenced the dispute. Using its conditionality policy and the 'proverbial carrot' of the candidate status, the Union was instrumental in brokering the Ohrid Framework Agreement that ended the conflict in the Republic of Macedonia in 2001; the Belgrade Agreement in 2002 that prevented the Federal Republic of Yugoslavia from violently falling apart and having a knock-on effect on the weak balance in Kosovo; the Arbitration Agreement in 2009 providing for a mechanism for resolving of the border issues between Croatia and Slovenia and allowing Croatia to finish its accession negotiations and, finally, the landmark Brussels Agreement on normalizing the relations between Serbia and Kosovo of 2013. The latter agreement closed one of the most complicated chapters in the collapse of Yugoslavia. The prospect of concluding a Stabilization and Association Agreement, or eventual EU membership was used as a strong leverage in persuading the parties to engage in negotiations and make difficult compromises. The authors argue that due to the fact that one EU member state is engaged in the name issue, the Union proves to be extremely ineffective in using the mechanisms of its enlargement policy in dispute resolution.

The paper presents the role of the NATO as well in the name issue between R. Macedonia and Greece as one of its member states. Since its independence, R. Macedonia had NATO membership as one of its foreign policy priorities. However, what was seen as a move forward – the possibility to receive an invitation for NATO membership in 2008, soon became just a greater obstacle for R. Macedonia's membership. The Greek lobbying and strong opposition to the R. Macedonia's membership in NATO lead to the change of the circumstances and change in the membership criteria. This resulted in the need for the country not only to make progress on reforms, but to find a mutually acceptable solution with Greece to the issue over its name before it would be invited to join NATO.

Finally, the arguments of the International Court of Justice (ICJ) in the name issue are presented and the paper focuses on the outcome in terms of how the judgment can be used by both EU and NATO to reassess their enlargement strategies. When it comes to the EU, the Lisbon Treaty has provided that the Union is obliged towards the "strict observance and the development of international law, including respect for the principles of the United Nations Charter"[3]. In that context, the use of the Interim Accord after the ICJ judgment was delivered in the case of the Macedonian accession process will be assessed.

3 Article 3, Consolidated version of the Treaty on European Union.

1. Setting the Scene: The Name Issue

After the Yugoslav Federation disintegrated violently in the 1990 ties, alongside other changes on the political map of the region, conditions emerged for the Republic of Macedonia to become independent state, as one of the six constituent members of the above said Federation. R. Macedonia declared independence on the referendum held on September 8, 1991. The referendum and the enactment of the new constitution in November 1991 formally completed the process of establishment of the newly-independent country, but it was only the beginning of the long and painful process of building an internationally recognized and secured state. After the enactment of the new constitution, R. Macedonia was faced with the challenge of the international recognition of its independence. It was undoubtedly exposed to a longest and burdensome procedure of international recognition from all the new countries in the Central and Eastern Europe. One of the main obstacles in that process was the fact that its neighbour Greece would not accept the existence of an independent Macedonian state on its border. Especially problematic for Greece was the fact that a distinct Macedonian national identity would start to exist in an independent state, instead as a Federation's member state. Greece believed that the name "Macedonia" was part of its own historic heritage, and that it possessed exclusive rights on it, and therefore it could not be used for the identification of another nation, although it acknowledged that the Region of Macedonia was spread in other countries too, including R. Macedonia. With the R. Macedonia's independence, the Macedonian national identity, based on the separate Macedonian (Slavic) language and culture, would continue to exist and develop in an independent Macedonian state, and not any more as part of the Yugoslav Federation. Such environment for existence of the Macedonian identity was looked upon as a threat to Greek national security.

Back in 1991, EC attempted to handle the process of breaking up of the Yugoslav Federation by conveying a Peace Conference on Yugoslavia,[4] which represented an opportunity to test the new emerging Common Foreign and Security Policy. The Peace Conference enabled Greece to articulate its security concerns against R. Macedonia's independence in a very early stage, practically in the dawn of the process of obtaining of international recognition of R. Macedonia's independence. It was achieved through the EC Council of Foreign Ministers, were the Declaration on Yugoslavia and the Declaration on the Guidelines on the Recognition of New States in Eastern Europe and Soviet Union (hereinafter: The Guidelines) were adopted on 17 December 1991. It was upon insistence of the then Greek Foreign Minister - Antonis Samaras, that the three additional conditions for recognition were added to the Declaration for Yugoslavia[5]. The first one referred to the need of the Yugoslav Republics "prior to recognition to adopt constitutional and political guarantees ensuring that it has no territorial claims towards a neighbouring Community State". Afterwards, it was requested that: "they would conduct no hostile propaganda activity versus a neighbouring Community State". The third condition was not to use "a denomination which implies territorial claims". According to Kofos, "the wording confirms that the Greek position was focused specifically on security concerns, in particular that their northern neighbour should not constitute a base for interests hostile to Greece; that any possibility of stirring up and promoting irredentist demands and visions should be nipped in the bud; and that specific commitment should be given not to engage in 'hostile propaganda'."[6] All of the Greek demands were transposed in the Declaration for Yugoslavia.

4 The Peace Conference brought together the Federal Presidency and the Federal Government of Yugoslavia, the presidents of the six Yugoslav republics, the President of the EC Council, and representatives of EC Commission and EC Member States.
5 See P. Pazartzis, *La reconnaissance d'un république yougoslave:la question de l'ancienne République yougoslave de Macédoine (ARYM), 41 Annuaire français de droit international, 1995, pp.281-297*; M. Wood, Participation of Former Yugoslav States in the United Nations and in Multilateral Treaties, 1 Max Planck Yearbook of United Nations Law, 1997, pp.231-257.
6 E. Kofos, 'The Unresolved 'Difference over the Name', A Greek Perspective', in E. Kofos and V. Vlasidis (eds.), *Athens – Skopje: An Uneasy Symbiosis* (1995-2002), ELIAMEP, Athens, 2005, pp.125-223.

Within the Peace Conference an Arbitration Commission was established, that was expected to enhance the rule of law in the settlement of differences relating to the Yugoslav crisis.[7] The Arbitration Commission was consisted of the presidents of the Constitutional courts of Belgium, France, Germany, Italy, and Spain. It was presided by the President of the French Constitutional Court, Mr. Robert Badidnter. In the period from 1991 -1993 the Commission adopted 15 legal opinions including opinions regarding the recognition of the Yugoslav Republics.

When the Arbitration Commission decided that R. Macedonia and Slovenia are the only two republics that fulfil the criteria for independence, it was a triumph of law. One would have expected Greece not to have issues with the Badinter Arbitration Commission's opinion after the transposition of all Greek demands in the Declaration for Yugoslavia.[8] In the Opinion No.6 of 14 January 1992[9], the Arbitration Commission determined that R. Macedonia had fulfilled all the conditions for recognition as determined by the EC, emphasizing explicitly that "the use of the name 'Macedonia' cannot imply any territorial claim against another State".[10] Greece resolutely refused to accept it and directly caused the EC member states to decline to grant recognition to R. Macedonia. The two amendments to the Constitution of the R. Macedonia which were adopted on 6th January 1992[11] explicitly provided that R. Macedonia had no territorial claims against neighbouring countries, confirmed the inviolability of the state borders and declared that R. Macedonia would not interfere in the sovereign rights of other states or their internal affairs. Although, these amendments were evaluated by the Commission as sufficient and positive development according to the Greek demands, they were insufficient for Greece. From the Greek reaction to the Arbitration Commission's Opinion, it can be concluded that the Greek concerns of that time were not connected to the issues of security and stability of the region, but rather at preserving the geopolitical balance. The EC member states showed solidarity with Greece, by adopting a position that they would be ready to recognize R. Macedonia "under a name which does not include term Macedonia".[12] In that way, Greece achieved its goal and managed to block EC to recognize R. Macedonia, although it could not completely prevent the recognition of the newly independent state by the other states of the world.

At the time when the war raged in former Yugoslavia, and the EC was incapable to give reassurance to the newly formed state, during in 1993, three of the EC member states that were at that time also members to the UN Security Council – United Kingdom, France and Spain, took the lead in preparing a package that would enable R. Macedonia to become an UN member. After lengthy negotiations, with strong opposition from Greece,[13] the Security Council adopted Resolution 817 (1993) on 7th April 1993, which recommended the UN General Assembly to admit the state to the UN membership. Unlike any Security Council Resolution so far, the Resolution 817 did not contain the name of the state, but it identified it as "the state whose application is contained in document S/25147" or simply "the State". It recommended that admission should be granted to "this State being provisionally referred to for all purposes within the United Nations as 'the former Yugoslav Republic of Macedonia' pending settlement of the difference that has arisen over the name of the State." The General Assembly Resolution 225 adopted on 8th April 1993 was completely in line with the Security Council's recommendation and used the same language as the Security Council.[14]

7 European Community, Declaration on Yugoslavia adopted at the EPC Extraordinary Ministerial Meeting, The Hague, 27 August 1991 (EC Press Release P.82/91).
8 More in: T. Deskoski, 'Macedonian-Greek Relations and the ICJ Judgment of 5 December 2011', in R. Wolfrum, M. Seršić and T.M. Šošić (eds.), *Contemporary Developments in International Law, Essays in Honour of Budislav Vukas*, Brill Nijhoff, Netherlands, 2015, pp.26-46.
9 Arbitration Commission of the Conference on Yugoslavia, *Opinion No.6 on the Recognition of the Socialist Republic of Macedonia by the European Community and its Member States* (14 January 1992) annexed at Annex III to the letter dated 26th May 1993 from the United Nations Secretary – General to the President of the Security Council, UN Doc. S/25855 (28 May 1993).
10 Arbitration Commission Opinion No.6 of 14 January 1992, paragraph 5.
11 Amendments I and II to the Constitution of the Republic of Macedonia, *Official Gazette of the Republic of Macedonia,* No.1/1992.
12 See: "European Council Declaration on Former Yugoslavia" of 26-27 June 1992 – available at: http://www.europarl.europa.eu/summits/lisbon/default_en.htm?textMode=on. [Accessed 10 April 2017].
13 See: Case concerning the Application of Article 11, Paragraph 1, of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece), Memorial, Vol. I, p. 26.
14 More in T. Deskoski, 'Macedonian-Greek Relations and the ICJ Judgement of 5 December 2011', in R. Wolfrum, M. Seršić and T.M. Šošić (eds.), *Contemporary Developments in International Law, Essays in Honour of Budislav Vukas*, Brill Nijhoff, Netherlands, 2015, pp.26-46.

The admission of Republic of Macedonia to the UN membership, led to a number of recognitions from other states around the world, as well as from the EC member states, such as the recognition that came from UK and Spain in 1993. This was done despite the Lisbon declaration of 1992 that obliged the EC member states not to recognize the newly-formed country under a name that includes the term 'Macedonia' in it. In any case, it did not lead to normalization of the relations with Greece. Instead, Greece imposed an economic embargo on 16th February 1994 and continuously undermined R. Macedonia's effort to integrate in the international community, especially concerning its membership in OSCE and Council of Europe.

In those turbulent times for the countries emerging from the former Yugoslav federation, thanks to the US shuttle diplomacy, the agreement[15] that will end the dispute between the two countries was presented by the US Assistant Secretary of State – Richard Holbrooke. As a result of the pragmatic effort to avoid the obstacle posed by the name issue, the parties of the Interim Accord are referred as 'the Party of the First Part' – Greece and 'the Party of the Second Part' – R. Macedonia. This manner of naming the parties of the Accord gave the impression of equality between the parties, something that was more than necessary at this stage. The Interim Accord of 1995 settled many bilateral issues, while permitting the postponement of any final resolution to the name dispute, since the positions of the parties were irreconcilable. Greece adopted an intransigent position, insisting on renaming of the R. Macedonia in a manner that would exclude the term 'Macedonia'.[16] On the other hand, R. Macedonia proposed the so called "double formula", which means having one name for the country that would be used by Greece and the constitutional name that will be used by R. Macedonia in its communication with the rest of the world – in the international organisations, multilateral forums as well as in bilateral relations.

Greece agreed in Article 8 of the Interim Accord to put an end to the painful economic embargo and in Article 11, para.1 committed itself not to hinder R. Macedonia's efforts to obtain membership in international organisations and institutions. From her side, R. Macedonia agreed in Article 7, para.2 to change its national flag and abandon the use of the 'Sixteen Rayed Sun', making numerous clarifications and interpretations to the provisions of its constitution which were deemed satisfactory for the Greek side according to Article 6 of the Accord. Both parties agreed to continue the negotiations over the name difference under the auspices of the Secretary General of the United Nations (Article 5, para.1).

After the Interim Accord was signed, it seemed that the sensitive name issue was gradually drifting towards the political margins, especially in Greece.[17] Up until the start of the EU Stabilization and Association Process, in which R. Macedonia was included, there were no major developments when it comes to the name issue. The SAP gave new perspectives to R. Macedonia, but once again put the name issue in the forefront. It also emphasized the internal differences of the EU member states. It took additional nine years since the start of the SAP for the R. Macedonia's membership to be placed on the NATO agenda and to have the NATO member states deal with the name issue.

15 The Interim Accord was formulated and presented in the first week of September 1995.
16 The compromise proposed by the then Greek Prime Minister Kostantinos Mitsotakis was the name "Slavomakedonija" – see http://www.ekathimerini.com/135814/article/ekathimerini/news/nimetz-regrets-lost-opportunities-for-agreement, [Accessed 25 April 2017].
17 According to A. Tziampiris, *The Name Dispute in the Former Yugoslav Republic of Macedonia after the Signing of the Interim Accord*, in E.Kofos and V.Vlasidis (eds.), 'Athens – Skopje: An Uneasy Symbiosis (1995-2002)', ELIAMEP,2005, pp.225 – 252.

2. The EU and NATO Mechanisms in Dealing with the Name Issue

Since the Western Balkans region is characterized by legacies of war and a political climate that enabled flourishing of organized crime, corruption and illegal migration, the EU first had to stabilize the region after the dissolution of SFRY and then associate the newly emerged countries. The Stabilization and Association Process was launched in 1999 and provided the countries from the Western Balkans with the status of potential candidate countries. Furthermore, the Thessaloniki Agenda promoted the political dialogue and cooperation in the area of the CFSP, the strengthening of parliamentary cooperation and institution building.[18] After the SAP process started in 1999, Republic of Macedonia was the first country to conclude Stabilization and Association Agreement in 2001 and the third republic of the former SFRY to achieve candidate status.[19] The Union used its conditionality policy in brokering the Ohrid Framework Agreement that ended the conflict in the Republic of Macedonia in 2001. Afterwards, the 'proverbial carrot' of granting the candidate status to the country in 2005 was seen as recognition of an important progress, particularly regarding the inter-ethnic situation. In October 2009 the Commission has recommended opening of accession negotiations, but the negotiations still have not commenced nor was a time framework created. The major reason why the negotiations have not started is the name issue with neighbouring Greece, which has been put as an additional condition for the start of the negotiations with the Union. Therefore, due to the fact that one of its members is party of the name dispute, the Union could not use the prospect of EU membership as a strong leverage in persuading the parties to engage in negotiations.

In the meanwhile, the number of countries that have recognized the country under the constitutional name "Republic of Macedonia" was growing and included the recognition by the US in 2004[20]. By the end of January 2011, the number of countries that recognized R. Macedonia under the constitutional name reached 131.

As a consequence of these developments, and especially after the US recognition of R. Macedonia under its constitutional name, the Greek foreign policy made a sharp shift in its policy towards the name issue.[21] The Greek shift went in two directions. First, already in 2005, Greece made a brave step forward in the negotiations on the name issue, by departing from its initial position that it insisted that the name of its northern neighbour does not include name "Macedonia". Being aware that such a position is without any support from anyone in the EU and facing the recognition of the country's name for bilateral relations by the US in November 2004, Greece proposed a solution that would be based on "a composite name that includes the geographical designation of Macedonia but attaches an adjective to it to distinguish it from the Greek province with the same name."[22] In other words, the new international name of the country that would be acceptable to Greece would be "Republic Northern Macedonia" or "Republic Upper Macedonia". According to the Greek side, the purpose of adding of such an adjective would be to distinguish R. Macedonia from the northern Greek

18 Council of the European Union (2003) 'Thessaloniki Agenda for the Western Balkans: moving towards European integration', Thessaloniki, General Affairs and External Relations Council (GAERC) Conclusions, 16 June.
19 Slovenia was first and became a member state in 2004. Croatia was second and became a member state in 2013.
20 The United States formally recognized R. Macedonia in 1994, and the countries established full diplomatic relations in 1995. In November 2004, the United States recognized the country under its constitutional name: the Republic of Macedonia, lasting until a mutually acceptable solution is reached with Greece.
21 See more in Diplomatic cable of the US Embassy in Athens to the State Department of 08/08/2007, available at: https://wikileaks.org/plusd/cables/07ATHENS1594_a.html [Accessed 25 April 2017].
22 Dora Bakoyannis, "The view from Athens", *International Herald Tribune* (31 March 2008), available at: http://www.nytimes.com/2008/03/31/opinion/31iht-edbakoy.1.11552267.html, [Accessed 25 April 2017].

province "Macedonia", in a sensible, reasonable and fair to both sides manner.[23] The second line of direction of the Greek diplomacy was to depart from its commitment of Article 11 para 1 of the 1995 Interim Accord, and to start objecting to R. Macedonia's membership in international organisations, as leverage in the negotiations on the name issue. It was manifested at the NATO Bucharest Summit in 2008, where a decision on enlargement was to be made. NATO enlargement with Albania, Croatia and R. Macedonia was strongly supported by the US and was placed very high on the President Bush's agenda. In that direction, one day before the summit US President Bush announced that a "historic decision for the NATO enlargement with three new countries – R. Macedonia, Albania and Croatia - will be adopted at the NATO Summit in Bucharest".[24] At the Bucharest summit, the members of NATO acknowledged the hard work and the commitment demonstrated by R. Macedonia to values and operations of the Alliance. However, NATO member countries emphasized that "an invitation to the former Yugoslav Republic of Macedonia will be extended as soon as a mutually acceptable solution to the name issue has been reached."[25]

Greek officials left no space for any doubt that the failure to extend an invitation to R. Macedonia was a direct result of a firm Greek opposition at the Summit. For example, Greek Prime Minister Mr Kostas Karamanlis made an explicit statement on 3 April 2008 that: "Due to Greece's veto, FYROM is not joining NATO."[26] A great number of statements made after the Bucharest Summit confirmed that the Greece did object to the R. Macedonia's membership of NATO at the Bucharest Summit. Greece also asserted that it would object to the R. Macedonia's application to join another regional institution, namely the European Union. Greek breach of its commitments was not made without knowledge and support of the NATO Allies. Greek diplomacy gained support by persuading the Allies that its own proposal for resolution of the name issue was fair for both sides. However, this violation of the 1995 Interim Accord completely disrupted the balance of power in the negotiations on the name issue and boosted the mistrust between the parties. It did not by any case lead to a speedy settlement of the name issue. Macedonian side rejected the proposal of renaming the country into "Republic Northern Macedonia" or "Republic Upper Macedonia", because that move would severely damage the identity of the Macedonian nation, and it could further lead to a disintegration of the state. As previously pointed out in this article, the main pillar of the Macedonian nation is the name Macedonia. For that reason, however fair and reasonable these proposals might seem to third parties, they are regarded as hostile from the Macedonian side and undermine the credibility of a third party that intends to facilitate acceptance of such a proposal by R. Macedonia. It is worth to mention that Greece has always declared its position that it considers the Macedonian nation as an artificial one and cultivated by the former Yugoslav leader Tito,[27] and therefore it is not even trying to hide that the main purpose of its opposition to the name of the neighbouring country is to prevent the existence of a non-Greek Macedonian identity.

23 Ibid.
24 http://www.balkaninsight.com/en/article/us-president-nato-expansion-historic. [Accessed 14 October 2016].
25 NATO Bucharest Summit Declaration [online]. Available from: http://www.nato.int/cps/en/natolive/official_texts_8443.htm. [Accessed 14 October 2016].
26 Message of Prime Minister Mr. Kostas Karamanlis, available at the web site: http://www.mfa.gr/www.mfa.gr/GoToPrintable.aspx?UICulture=en-US&GUID={AE7CCBFE-5D97-4F2B-974F-B38897A50D83}. [Accessed 10 October 2008].
27 See: "Macedonian naming dispute" on the web page of the Greek Foreign Ministry - http://www.mfa.gr/en/. [Accessed 7 June 2017].

3. The ICJ Judgment: Is there a Potential for Dispute Resolution?

As an aftermath of the decision taken on the 2008 NATO summit, on 17th November 2008, R. Macedonia unilaterally took to the Court the case concerning the violation of the 1995 Interim Accord.[28] R. Macedonia's Application narrowed the case brought before the ICJ to the breach of Article 11, para. 1 of the Interim Accord, which was in violation of the *pacta sunt servanda* principle.[29]

The Macedonian side submitted two main claims to the ICJ. Primary, it requested the Court to adjudge that Greece has violated Article 11, paragraph 1, of the 1995 Interim Accord. [30] In its second request, R. Macedonia, asked the Court to order to Greece to take all necessary steps to immediately comply with its obligations under the Interim Accord. Furthermore, the request referred to the need for the Court to order Greece to cease and abstain from further objections to R. Macedonia's membership of the NATO or any other international organisation where Greece is member. This request was made for all circumstances where R. Macedonia was to be referred by the designation provided in the UNSC resolution 817.[31] During the procedure in front of the Court, both sides agreed that the obligation not to object to the Macedonian application for membership in international organisations does not require Greece to support actively Macedonian membership to international organisations. The requirement not to object is not an obligation of a result, but an obligation of a conduct, as confirmed by the Court.[32]

According to the International Court of Justice, through the formal diplomatic correspondence and statements of the officials, Greece made it clear to the NATO member states that the "decisive criterion" for the Macedonian admission to NATO is the resolution of the difference over the name. This was done before, during and after the Bucharest Summit. Moreover, the Court did not accept the Greek position that all the statements presented above were not objections to the admission, but rather observations that were aimed to the attention of the NATO member states. According to the Court, Greece went beyond such observations and clearly opposed Macedonian admission to NATO.

According to the Greek side, it is the alleged general principle of the international law - *exceptio non adimpleti contractus* that allows it "to withhold the execution of its own obligations which are reciprocal to those not performed by the FYROM"[33]. The *exceptio,* according to Greece, applied in the case of NATO because the Macedonian side breached the obligations provided within Articles 5, 6, 7 and 11 of the Interim Accord. Therefore, since Greek obligation not to object to Macedonian membership in international organisations is connected closely with the obligations R. Macedonia has under the Interim Accord, the breaches of those obligations preclude the wrongfulness of any non-performance by Greece of its obligation not to

28 Under Article 36, para. 1 of the Statute of the Court.
29 See the Application instituting proceedings filed in the Registry of the Court on 17 November 2008, paragraph 23. Available from: http://www.icj-cij.org/docket/files/142/14879.pdf. [Assessed 15 November 2016].
30 Article 11 paragraph 1 of the Interim Accord provides the following: "Upon entry into force of this Interim Accord, the Party of the First Part agrees not to object to the application by or the membership of the Party of the Second Part in international, multilateral and regional organisations and institutions of which the Party of the First Part is a member; however, the Party of the First Part reserves the right to object to any membership referred to above if and to the extent the Party of the Second Part is to be referred to in such organisation or institution differently than in paragraph 2 of United Nations Security Council resolution 817 (1993)." United Nations Treaty Series (UNTS), Vol. 1891, p. 7, available from http://treaties.un.org/doc/Publication/UNTS/Volume%201891/v1891.pdf. [Accessed on 23 October 2016].
31 Application instituting proceedings filed in the Registry of the Court on 17 November 2008, available from: http://www.icj-cij.org/docket/files/142/14879.pdf. [Assessed 15 November 2016].
32 ICJ Judgment, Application of the Interim Accord of 13 September 1995, The Former Yugoslav Republic of Macedonia v. Greece, 05.12.2011 available from: http://www.icj-cij.org/docket/files/142/16827.pdf. [Assessed 15 November 2016].
33 Rejoinder of Greece, 27.10.2010, available from http://www.icj-cij.org/docket/files/142/16360.pdf. [Accessed on 22 November 2016].

object.[34] The Court found all of these Greek claims of R. Macedonia's breaches of the Interim Accord to be unmeritorious, and it did not enter into deliberation whether *exceptio non adimpleti contractus* is a general principle of the international law, and whether Greece could rely on it at all. In other words, Greek case failed on the facts, and there wasn't even a need for the Court to evaluate on its legal grounds.

Furthermore, the ICJ elaborated in details whether the Greek objection felt within the exception contained in the second clause of Article 11, paragraph 1 of the Interim Accord.[35] After concluding that the resolution 817 recommends that R. Macedonia should be admitted to membership in the United Nations, being "provisionally referred to for all purposes within the United Nations as 'the former Yugoslav Republic of Macedonia' pending settlement of the difference that has arisen over the name of the State"[36], the Court further elaborated the situation in regard to the Macedonian application for NATO membership. The practice of the R. Macedonia becoming member to international organisations in the period between the conclusion of the Interim Accord and the Bucharest Summit was examined by the Court. The conclusion reached is that it joined at least 15 international organisations[37] of which Greece was member as well. And in each case, R. Macedonia was referred in the international organisation with the prescribed designation while R. Macedonia was referring to itself by its constitutional name when dealing with those international organisations. The Court found such practice as consistent with art. 11 para 2 of the Interim Accord. This act did not provoke any objections from the Greek side when R. Macedonia was becoming a member to the international organisations. In the case of the Council of Europe (CoE), Greece raised its concerns in 2004, nine years after R. Macedonia became member of the CoE. The issue of the Macedonian identity and language was raised in the CoE Parliamentary Assembly once again in 2007.

According to the Court, both parties agreed that Greece may object Macedonian membership at international organisations only in one circumstance – if R. Macedonia is admitted to an international organisation and referred to by the other member states and the organisation itself other than by the provisional designation. However, the Court also found that the said provision of the Interim Accord did not include an obligation for the R. Macedonia to refer to itself within the organisation under the provisional designation "the former Yugoslav Republic of Macedonia". [38] In other words, when admitted into membership of an international organisation under the provisional designation, the second clause of article 11, paragraph 1 of the Interim Accord provides that in such organisation the country would be referred to by the other member states and the organisation itself as "the former Yugoslav Republic of Macedonia", while the country will use its constitutional name.[39] The Court clarified that Greece erroneously claimed that "the former Yugoslav Republic of Macedonia" is a provisional international name of the country under the UN Security Council Resolution 817/1992, and in that way it removed an important obstacle for the resolution of the name dispute. Furthermore, when reviewing the practice of the Macedonian relations with NATO (as well with the international organisations that R. Macedonia joined after entering into the Interim Accord), the Court found that for several years prior to the Bucharest Summit, R. Macedonia constantly used its constitutional name. This was done while participating in the NATO Partnership for Peace and the NATO Membership Action Plan. Despite this kind of practice, Greece did not expressed concerns about it. Furthermore, it did not indicate that it would object to the R. Macedonia's admission to NATO based on the past or future use of its constitutional name.[40]

34 Ibid.

35 Within the second clause of Article 11, paragraph 1, the Parties agree that Greece "reserves the right to object to any membership" in international, multilateral or regional organisation or institution of which Greece is member "if and to the extent the Second Part is to be referred to in such organisation or institution differently than in paragraph 2 of United Nations Security Council resolution 817 (1993)". United Nations Treaty Series (UNTS), Vol. 1891, p. 7, available from http://treaties.un.org/doc/Publication/UNTS/Volume%201891/v1891.pdf. [Accessed on 23 October 2016].

36 UN Security Council Resolution 817/93.

37 OSCE, Council of Europe, World Trade Organisation, and International Labour Organisations can be used as most noticeable examples.

38 ICJ Judgment, Application of the Interim Accord of 13 September 1995, The Former Yugoslav Republic of Macedonia v. Greece, 05.12.2011 available from: http://www.icj-cij.org/docket/files/142/16827.pdf. [Assessed 15 November 2016].

39 It is strange that Greece still maintains on its own interpretation of the second clause of article 11 paragraph 1 of the Interim Accord, although the ICJ's Judgment clearly rejected such interpretation. See: "Macedonia naming dispute", on the web site of the Greek Foreign Ministry - http://www.mfa.gr/en/. [Accessed 7 June 2017].

40 ICJ Judgment, Application of the Interim Accord of 13 September 1995, The Former Yugoslav Republic of Macedonia v. Greece, 05.12.2011 available from: http://www.icj-cij.org/docket/files/142/16827.pdf. [Assessed 15 November 2016].

Finally, the Court emphasized the duty to negotiate in good faith provided with the 1995 Interim Accord and to the need to reach the agreement on the difference described in the UNSC resolutions under the auspices of the Secretary-General of the United Nations.

The Court concluded that according to the evidence submitted to it, it is clear that Greece objected Macedonian admission to NATO because of the failure to reach a final agreement of the difference over the name. Furthermore, the conclusion of the Court is that Greece failed to comply with its obligation under the Article 11, paragraph 1 of the Interim Accord. According to the ICJ, the view that Republic of Macedonia will use its constitutional name in NATO, did not make the Greek objection lawful under the exception contained in the second clause of Article 11, paragraph 1.[41]

However, the Court rejected Macedonian requests to issue declaration that Greece has acted illegally, and to order it to refrain from any future action that will violate its obligations under Article 11, paragraph 1, of the Interim Accord. This was done because: "its finding that [Greece] has violated its obligation to the [Republic of Macedonia] under Article 11, paragraph 1, of the Interim Accord, constitutes appropriate satisfaction."[42] Moreover, the Court referred to its previous case law and stated that "[a]s a general rule, there is no reason to suppose that a State whose act or conduct has been declared wrongful by the Court will repeat that act or conduct in the future, since its good faith must be presumed".[43]

The ICJ Judgment was delivered on 5th December 2011. Although, the ICJ's rulings are final and there is no higher instance to appeal the judgment, the Court does not have an instrument to force the countries to comply. Besides the Court findings that Greece has violated its obligations under Article 11, paragraph 1, of the Interim Accord of 1995, it did not find it necessary to order it to refrain from any future action.

4. The Aftermath

Even though the ICJ Judgment was seen by the Macedonian side as a turning point in the resolution of the name issue and a stimulus for the EU and NATO integration process of the country, it was not perceived in the same manner by these organisations. In the evening of the 5th December 2011, the Council of EU reached a decision to postpone the accession negotiations with R. Macedonia, until a mutually acceptable solution to the name issue is reached. Both the Union and its member states representatives continued to appeal for the name issue resolution in order to start the negotiations in the future.[44] NATO Secretary General also made a statement that the ruling does not affect the decision taken by NATO Allies at the Bucharest summit in 2008 and an invitation would be extended to the R. Macedonia as soon as a mutually acceptable solution to the name issue has been reached.[45]

It is understandable that both organisations where Greece is already a member will give their support to their ally rather than to the country that is outside their alliance. According

41 Ibid, para.113.
42 Ibid, para. 169.
43 Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2009, p. 267, para. 150.
44 See for example the statement of the German Chancellor, Ms. Merkel given on 14.02.2012 in Berlin http://www.time.mk/read/4ad1772a64/b5f9850c2b/index.html, [Accessed on 1 March 2016].
45 NATO Secretary General statement on the ICJ Judgment of 5th December 2011, available from http://www.nato.int/cps/en/natolive/news_81678.htm [Accessed on 15 October 2016].

to Maleski "[t]he lesson that we should have learned by now is that alliances, including NATO and the EU, are created to defend the interests of their own members and not to distribute justice".[46] But the fact that the process of the EU and NATO integration of R. Macedonia has been stalled for the past years has contributed towards deepening the crisis of democratic deficit in the country.

So far, in the dispute over the international name of the Republic of Macedonia, both NATO and EU member states have taken solidary stance with Greece. This is mainly due to the fact they consider that Greece has offered a reasonable and fair compromise to rename R. Macedonia, a composite name that includes the geographical designation of Macedonia but attaches an adjective to distinguish it from the Greek province with the same name - "Republic Northern Macedonia" or "Republic of Upper Macedonia". However, in that way, NATO and EU member states have harmed negotiations process because of two reasons. Primarily, renaming Republic of Macedonia into "Republic of Northern Macedonia" or "Republic of Upper Macedonia" tackles directly the Macedonian national identity, since it concerns the primary factor of such identity – the name, and with that it endangers the stability and integrity of R. Macedonia and the region. The second reason lies in the fact that Greek actions are jeopardizing of the good neighbourly relations with R. Macedonia, and the support given to Greece is a support to Greek breach of the Interim Accord and to the false Greek allegations that R. Macedonia is continuously in breach of the Interim Accord. The Judgment of the ICJ clearly revealed that Greece is the party which has breached the Interim Accord and disrupted the balance in the negotiations over the name issue, while in the same time Greece is also the country that falsely alleges that R. Macedonia is in continuously in breach of its obligations under the Interim Accord. In our view, it is an obvious indication for absence of good faith in the negotiations on the Greek side

Greece's bad faith in the negotiations on the name issue is manifested in one more way. Namely, Greece declares that its main goal in the negotiations is to achieve a distinction between R. Macedonia and the Greek part of the Region of Macedonia. If such distinction was the primary goal of the negotiations, Greece would have no problem to accept the proposals that would enable such goal. The first one is the clear commitment by R. Macedonia not to use solely the term "Macedonia" for its designation in international relations, but always its full constitutional name "Republic of Macedonia" or abbreviation "R. Macedonia". The second one is the mediator's Niemetz proposal of 2008 "Republic of Macedonia (Skopje)". It is worth to mention that this proposal was previously suggested by the Macedonian side back in 1992 to Robin O'Neill, acting as European Community Envoy.[47] Also, Greece cannot be unaware that the Badinter commission in 1992 found that that "the use of the name 'Macedonia' cannot imply any territorial claim against another State". However, Greece maintains its intransigent position, that the only solution it would accept is the renaming of its northern neighbour into Republic of Northern Macedonia or Republic of Upper Macedonia, although it is aware of the disastrous consequences if such renaming is accepted. One has to reach a conclusion that Greece is obviously not acting in a good faith in the negotiations on the name issue, and that it is pursuing a hidden agenda by opposing to the R. Macedonia's accession in the NATO and the EU. Both EU and NATO member states should use the major contributions that the ICJ's judgment gives towards normalization of relations between the two countries – and those are the Court's findings that the Interim Accord should be kept alive and that the alleged Macedonian breaches of the Interim Accord are simply unmeritorious.

46 Denko Maleski, *Law, Politics and History in International Relations: Macedonia and Greece, New Balkan Politics, 2010,* available from http://www.newbalkanpolitics.org.mk/documents/pdf/NBP,%20MaleskiD.pdf [Accessed on 15 October 2016].
47 Robin O'Neill, *Relations between the European Community and its Member States – and the former Yugoslav Republic of Macedonia, Report to the President of the Council of Ministers*, 01.12.1992.

CONCLUSIONS

The lack of unity among member states on how to define a strategy to tackle and resolve the name issue between R. Macedonia and Greece has been hunting the R. Macedonia's membership in EU and NATO from the very beginnings of the country's independent existence on the international stage. It is very hard to have a united strategy for dispute resolution when the EU and NATO member states are divided. When the organisations' member states have vested interest on a certain issue, like in the case of Greece, those organisations can achieve little. The lack of unity among member states contributes towards paralysis of the organisations' institutions to tackle the name issue within its enlargement policy.

This paralysis of the EU and NATO enlargement strategies towards R. Macedonia, together with the Greek blockade that continues even despite the ICJ ruling in 2011, have opened the way for the authoritarianism in R. Macedonia and contributed towards building the phenomenon of captured state[48]. The best way to move forward in order to facilitate the settlement of the name issue for the EU and NATO members would be to return support for the full implementation of the 1995 Interim Accord, since it provides sustainable framework for long lasting good neighbourly relations between Greece and R. Macedonia, notwithstanding whether the name dispute has been settled or not. Restoring of the balance of negotiations on the name issue, as established by the Interim Accord and preventing the endangering of the good neighbourly relations by Greece, by breaching of the Interim Accord may bring R. Macedonia closer to EU and NATO membership. The membership in those organisations is essential for R. Macedonia, since it gives a boost to the new government's efforts to stabilize the country's democratic institutions. Moreover, the EU and NATO membership is seen as a way of preserving the country's security.

The history of the name issue shows that the only points of progress have been made when the EU and NATO member states have abandoned the Greek unreasonable positions. This has been done back in the 1990s, when the war was raging through the territory of the former SFRY republics. This needs to be done again in order to preserve the regions' stability.

48 A description of the country in a Progress Report by the European Commission, meant to designate a state where there had been a long-lasting bifurcation of state and the party

Bibliography:

Arbitration Commission of the Conference on Yugoslavia, *Opinion No.6 on the Recognition of the Socialist Republic of Macedonia by the European Community and its Member States* (14 January 1992) annexed at Annex III to the letter dated 26th May 1993 from the United Nations Secretary – General to the President of the Security Council, UN Doc. S/25855 (28 May 1993).

Application instituting proceedings filed in the Registry of the Court on 17 November 2008. Available from: http://www.icj-cij.org/docket/files/142/14879.pdf.

Basheska E., *Good Neighbourliness Principle in International and EU Law,* in D. Kochenov and E. Basheska (eds.), 'Good Neighbourliness in the European Legal Context', Brill Nijhoff, 2015.

Constitution of the Republic of Macedonia, *Official Gazette of the Republic of Macedonia,* No.1/1992.

Council of the European Union (2003) 'Thessaloniki Agenda for the Western Balkans: moving towards European integration', Thessaloniki, General Affairs and External Relations Council (GAERC) Conclusions, 16 June.

Deskoski T., 'Macedonian-Greek Relations and the ICJ Judgement of 5 December 2011', in R. Wolfrum, M. Seršić and T.M. Šošić (eds.), *Contemporary Developments in International Law, Essays in Honour of Budislav Vukas,* Brill Nijhoff, Netherlands, 2015, pp.26-46.

European Commission, Press Release, MEMO 12/187, Skopje, 15 March 2012.

European Community, Declaration on Yugoslavia adopted at the EPC Extraordinary Ministerial Meeting, The Hague, 27 August 1991 (EC Press Release P.82/91).

EU, Macedonia Launch New Dialogue, Balkan Insight, 16.03.2012, available from: http://www.balkaninsight.com/en/article/eu-macedonia-launch-new-dialogue.

ICJ Judgment, Application of the Interim Accord of 13 September 1995, The Former Yugoslav Republic of Macedonia v. Greece, 05.12.2011 available from: http://www.icj-cij.org/docket/files/142/16827.pdf.

Interim Accord, United Nations Treaty Series (UNTS), Vol. 1891, p. 7, available from http://treaties.un.org/doc/Publication/UNTS/Volume%201891/v1891.pdf.

Kochenov D. and Basheska E. (eds.), 'Good Neighbourliness in the European Legal Context', Brill Nijhoff, 2015.

Kofos E., 'The Unresolved 'Difference over the Name', A Greek Perspective', in E. Kofos and V. Vlasidis (eds.), *Athens – Skopje: An Uneasy Symbiosis (1995-2002),* ELIAMEP, Athens, 2005, pp.125-223.

Maleski D., *Law, Politics and History in International Relations: Macedonia and Greece,* New Balkan Politics, 2010, available from http://www.newbalkanpolitics.org.mk/documents/pdf/NBP,%20MaleskiD.pdf.

NATO Bucharest Summit Declaration [online]. Available from: http://www.nato.int/cps/en/natolive/official_texts_8443.htm.

Pazartzis P., *La reconnaissance d'un république yougoslave:la question de l'ancienne République yougoslave de Macédoine (ARYM),* 41 Annuaire français de droit international, 1995, pp.281-297.

Tziampiris A., *The Name Dispute in the Former Yugoslav Republic of Macedonia after the Signing of the Interim Accord,* in E.Kofos and V.Vlasidis (eds.), 'Athens – Skopje: An Uneasy Symbiosis (1995-2002)', ELIAMEP,2005, pp.225 – 252.

UN Security Council Resolution 817/93.

Wolfrum R., Seršić M. and Šošić T.M. (eds.), *Contemporary Developments in International Law, Essays in Honour of Budislav Vukas,* Brill Nijhoff, Netherlands, 2015.

Wood M., *Participation of Former Yugoslav States in the United Nations and in Multilateral Treaties,* 1 Max Planck Yearbook of United Nations Law, 1997, pp.231-257.

УДК 342.7-053.2-056.26/.36(497.5)

Title:

Access to justice for children with disabilities*

"There can be no keener revelation of a society's soul than the way in which it treats its children."
— Nelson Mandela,
Former President of South Africa

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* *The paper was written for the EU Child Doctoral Conference held within the project Jean Monnet Chair for the Cross-border Movement of a Child in the EU (575451-EPP-1-2016-1-HR-EPPJMO-CHAIR), held at the J. J. Strossmayer University of Osijek, Faculty of Law Osijek, Republic of Croatia on 15-16 March 2018.*

The authors would like to thank all the legal practitioners and professionals (judges from the Municipal (civil) court in Zagreb, Office of the Ombudsman for Children and the Dislocated Unit Osijek of the Centre for Special Guardianship) who participated in the research and provided relevant input and valuable information during the interviews.

ABSTRACT

Ensuring standards of *access to justice* for children addressed by various international, European and national instruments entails both creating conditions for active participation of children in proceedings and adjusting proceedings to their participation. In this sense, equitable *access to justice* for children means that children are efficiently informed of their rights and obligations, adequately represented by parents or other legal representatives, but in some cases, persons other than their legal representatives and that judges, lawyers and other participants are aware of children's needs and equipped with relevant knowledge and skills in order to address them. Also, measures which ensure adequacy of courtrooms or other child-friendly spaces in which children are interviewed, appropriate equipment and services and participation of persons (psychologists, social workers, experts, interpreters etc.), which provide necessary assistance to children in acquiring legal protection, are of relevance. The paper aims to examine the level in which Croatian legal system is able to respond to the imposed requirements in proceedings involving children with disabilities. Along with the review of relevant legal framework at international, European and national level, analysis of the results of a research into court practice, work of the office of the Ombudsman for children, special guardians for children and other persons and bodies included in proceedings involving children with disabilities will be conducted. Based on the results of the research, guidelines for possible interventions which would improve the system in the future will be provided.

Key Words: children with disabilities, *access to justice*, reasonable accommodations, court practice, individual assessment

INTRODUCTION

Children belong to a group of vulnerable persons and their vulnerability originates from their age and immaturity which puts them in a position of dependency towards their parents or other persons. This vulnerability is especially obvious in situations when a child should access court or other authorities in proceedings regarding his/her rights and interests. Hence, the relevant legal framework at international and EU level provides for child-sensitive justice which protects the specific, vulnerable position of a child. The mechanisms which provide it have also been gradually translated into national legal systems, including those of EU Member States.

In order for the rights guaranteed to children to be effectively protected and promoted it is essential to ensure adequate *access to justice* for children.The concept should strengthen the capacity of all children to access relevant information and effective remedies to claim their rights, including through legal and other services, child rights education, counseling or advice, and support from knowledgeable adults.[2] Moreover, *access to justice* for children requires taking into account children's evolving maturity and understanding when exercising their rights.[3] There is a comprehensive legal framework ensuring *access to justice* for children, among which we will focus on relevant European developments.[4] In ensuring standards of *access to justice*the European Convention for the Protection of Human Rights and Fundamental Freedoms[5] (hereinafter: ECHR) is the first successful attempt to ensure a legally binding effect to the rights contained in the Universal Declaration of Human Rights[6]. Article 6 ECHR guarantees a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. At the same time the right to access to court (*access to justice*) was defined in the jurisprudence of the European Court for Human Rights (Golder v the United Kingdom[7]). Hence, *access to justice*pertains to a group of implied rights which stem from the European Court for Human Rights' interpretation of the rights contained in Article 6 ECHR. Although the ECHR does not contain a definition of a child, Article 1 ECHR prescribes an obligation of the states to secure ECHR rights to "everyone" within their jurisdiction. Article 14 guarantees the enjoyment of the rights set out in the ECHR "without discrimination on

2 See UN Common Approach to Justice for Children, 2008, p. 4. URL=https://www1.essex.ac.uk/armedcon/story_id/UNCOMMON.pdf Accessed 3 April 2018.*Access to justice* for children: Report of the United Nations High Commissioner for Human Rights, A/HRC/25/35, 2013, p. 4. URL=http://www.google.hr/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwj27qmA-Z7aAhUmsKQKHUDhD2cQFggmMAA&url=http%3A%2F%2Fwww.ohchr.org%2FEN%2FHRBodies%2FHRC%2FRegularSessions%2FSession25%2FDocuments%2FA-HRC-25-35_en.doc&usg=AOvVaw1GrdB3mkHd-mVlQ0W_3P1z Accessed 2 October 2017.

3 Ibid.

4 All core international human rights treaties are relevant in this context. The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, which also places obligations on States to follow the principles of child-sensitive justice, should be particularly highlighted. Regional human rights treaties – such as the American Convention on Human Rights; European Convention for the Protection of Human Rights and Fundamental Freedoms; Charter of Fundamental Rights of the European Union; Arab Charter on Human Rights; African Charter on Human and Peoples' Rights; and African Charter on the Rights and Welfare of the Child – also guarantee relevant human rights to ensure *access to justice* for children. Relevant international and regional non-binding standards include, inter alia, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice; the United Nations Rules for the Protection of Juveniles Deprived of their Liberty; the United Nations Guidelines on Justice in matters involving Child Victims and Witnesses of Crime; Standard Minimum Rules for the Treatment of Prisoners; Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment;United Nations Rules for the Treatment of Prisoners and Non-custodial Measures for Women Offenders;United Nations Standard Minimum Rules for Non-custodial Measures; Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters; Guidelines for the Alternative Care of Children; United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems; Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice; Guidelines on Action for Children in the Justice System in Africa; Child Friendly Legal Aid in Africa. Ibid., p. 5.

5 European Convention for the Protection of Human Rights and Fundamental Freedoms, Official Gazette, International treaties, No. 18/97, 6/99, 14/02, 13/03, 9/05, 1/06, 2/10.

6 Universal Declaration of Human Rights, Official Gazette, International treaties, No. 12/2009.

7 Case Golder v. United Kingdom, Judgment, Merits and Just Satisfaction, App No 4451/70, A/18, [1975] ECHR 1, (1979) 1 EHRR 524, IHRL 9 (ECHR 1975), 21 February 1975 (Official Case No): A/18.

any ground", including grounds of age. The European Court of Human Rights has accepted applications by and on behalf of children irrespective of their age. In its jurisprudence, it has accepted the Convention on the Rights of the Child[8] (hereinafter: CRC) definition of a child, endorsingthe "below the age of 18 years" notion.[9]

At EU level fundamental rights are guaranteed in the Charter of Fundamental Rights of the European Union[10] (hereinafter: Charter) from 2000. Since the Charter is a part of the Treaty of the European Union (hereinafter: Treaty of the EU) its main aim was to provide a more accessible and visible framework which ensures fundamental rights to EU citizens. Article 47 Charter is among rights contained in the Charter and its content corresponds (to a large extent) to that of Article 6 ECHR. The Charter ensures standards of child protection relevant for *access to justice* for children such as human dignity (Article 1), prohibition of torture and inhuman or degrading treatment or punishment (Article 4), right to liberty and security (Article 6), respect for private and family life (Article 7), protection of personal data (Article 8), non-discrimination (Article 21) and the rights of the child (Article 24). Further, it confirms the status of a child as an independent and autonomous subject as already implied in the CRC. The Charter implemented the rights guaranteed to children from the ECHR and a more restricted number of rights from the CRC, including the 'best interest of the child'. Hence, children are guaranteed the right to protection and care and a right to express their views in proceedings concerning their rights, in accordance with their age and maturity (arg ex Article 12/1 CRC).

The significance of the CRC for ensuring accessto justice for children is in the requirement that effective legislative and administrative procedures and measures should be adopted in the national legislation.[11] CRC does not contain an explicit provision on the right to an effective remedy. Nevertheless, the Committee on the Rights of the Child held that the right to an effective remedy is an implicit requirement of the CRC. According to the Committee the "States need to give particular attention to ensuring that there are effective, child-sensitive procedures available to children and their representatives. These should include the provision of child-sensitive information, adviceand advocacy, including support for self-advocacy, and access to independent complaints procedures and to the courts with necessary legal and other assistance."[12] The Committee emphasized that in case of violations of rights, "there should be appropriate reparation, including compensation, and, where needed, measures to promote physical and psychological recovery, rehabilitation and reintegration, as required by article 39 [of the CRC]".[13] The CRC additionally provides a list of fundamental safeguards to ensure fair treatment of children.[14]

Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice[15] are a document created on the basis of existing standards enshrined in the international

8 Convention on the Rights of the Child, Official Gazette, International treaties, No. 12/1993.
9 Handbook on European law relating to the rights of child, European Union Agency for Fundamental Rights and Council of Europe, 2015., URL=https://www.echr.coe.int/Documents/Handbook_rights_child_ENG.PDF Accessed 26 November 2017.
10 Charter of Fundamental Rights of the European Union, Official Journal of the European Communities, 18 December 2000 (2000/C 364/01), 26 October 2012, 2012/C 326/02, URL=http://www.refworld.org/docid/3ae6b3b70.html Accessed 4 February 2018.
11 Report of the United Nations High Commissioner for Human Rights, *op. cit. note 3*, p.5.
12 UN Committee on the Rights of the Child (CRC),General comment No. 5 (2003): General measures of implementation of the Convention on the Rights of the Child, 27 November 2003, CRC/GC/2003/5, URL= http://www.refworld.org/docid/4538834f11.html Accessed 1 April 2018.
13 Ibid.
14 These include including the rights to information (Article 17), expeditious decisions (Article 10) and prompt access to legal assistance and to prompt decisions by the court (Article 37d). Article 12 of the CRC, which establishes the child's right to be heard and taken seriously, is of particular importance. Paragraph 1 assures, to every child capable of forming his or her own views, the right to express those views freely in all matters affecting the child. It requires that the views of the child be given due weight in accordance with their age and maturity. In addition, paragraph 2 establishes that children shall be provided the right to be heard in any judicial or administrative proceedings affecting them, either directly, or through a representative or an appropriate body. The Committee on the Rights of the Child recognized article 12 as one of the four fundamental principles of the CRC, the others being the right to non-discrimination, the right to life and development, and the primary consideration of the child's best interests, which frame children's access to justice and should be considered in the interpretation and implementation of all other rights.UN Committee on the Rights of the Child (CRC), General comment No. 12 (2009): The right of the child to be heard, 20 July 2009, CRC/C/GC/12, URL= http://www.refworld.org/docid/4ae562c52.html Accessed 1 April 2018.
15 Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice: The Council of Europe programme "Building a Europe for and with chidren", Council of Europe Publishing, 2010. URL=https://rm.coe.int Accessed 4 October 2017.

and European instruments (referred to in the preamble of the Guidelines) and the case law of the European Court of Human Rights. Since the Guidelines are aimed at enhancing *access to justice* for children, they provide rules which the national legal systems should follow in order to ensure that, in any such proceedings, all rights of children, among which the right to information, to representation, to participation and to protection are fully respected with due consideration to the child's level of maturity and understanding and to the circumstances of the case. At the same time, respecting children's rights should not jeopardise the rights of other parties involved.[16] Nevertheless, the empirical research shows that there are significant differences in the level of information provided to children, the moment the information are provided as well as who provides them to children. In comparison to the criminal proceedings, civil proceedings provide less regulation but offer more discretion to legal practitioners in regard to the estimation of the level of information which should be available to children. It is expected that parents should be the first to inform children on proceedings involving or affecting them. However, the practitioners stress the importance of safeguarding that in the process of receiving information children are not influenced by their parents. Also, throughout the process of providing information to children, their maturity and any communication difficulties should be born in mind.[17]

But, are all the procedural mechanisms mentioned above a sufficient guarantee of equitable *access to justice* to children with disabilities as especially vulnerable group of children? Namely, it is common to addressthe matter of *access to justice* for children, while the specifics of proceedings concerning children with disabilities caused by barriers which this group of children faces when accessing justice are seldom discussed. However, in the total population of 4.190.669 Croatian citizens, in the period between 2015 and 2016 there were 39.055 children with disabilities.According to the information from the Croatian registry on persons with disabilities on the date 26.01.2017 there were 511.910 persons with disabilities in Croatia, among who 32.101 children (born in the period from 26.01.1999 until 26.01.2017), 6.2% from the total number of persons with disabilities. Out of the total number of children with disabilities, there are 62 % boys and 38 % girls. The largest number of registered children with disabilities (the 14.969 (46.6%) among them) are at the age between 10 and 14.[18]

According to the information provided by the Office of the Ombudsman for children (hereinafter: Office), on 31.12.2016 there were 118 children placed in institutional care (children homes as well as centres for organized and assisted living). [19]

Hence, the paper aims to explore thelevel in which Croatian legal system is able to respond to specific requirements of proceedings involving children with disabilities, while taking into account the results of a research conducted for EC in 2014, which analyzed *access to justice* for children with mental disabilities in 10 Member States.[20]

16 Ibid, p. 17.

17 Child-friendly justice – perspectives and experiences of children and professionals, European Union Agency for Fundamental Rights,2015.,
URL=http://fra.europa.eu/sites/default/files/fra-2015-child-friendly-justice-professionals-summary_en_0.pdf Accessed 01 March 2018.

18 According to the statistics of the Croatian Bureau of Statistics and the Croatian Institute of Public Health for 2015, 2016 and 2017. More information available at: URL=https://www.dzs.hr/default_e.htm.
Disorders in the vocal and speech communication, damages to the central nerve system and intellectual disorders are the most common causes of disability among children (87 %) in Croatia.The most common diagnosis are dystonia (syndrome), present in 2161 children, infantile cerebral palsy, present in 1627 children and epilepsy present in 1510 children.16,3% of children with disabilities have intellectual disorders (49 % of children with mild intellectual disorders). There are 813 children with deep (heavy) intellectual disorders. Congenital anomalies cause disabilities in 14.6% children. Among congenital anomalies there are malformations of the bone and marrow present in 1323 children, malformations of the cardiovascular system present in 1235 children and Down syndrome present in 675 children. Psychological disorders and behavioral problems cause disabilities in 10% of children. The most common diagnosis causing disabilities due to the disorders in the social functioning of a child are hyperkinetic disorder and behavioral problems in childhood (F90-F98) present in 2933 children. Five children with disabilities and grave difficulties have attempted suicide and 36 children were victims of violence (Y00-Y07, Z61, Z62). Damages of other organs are causes of disabilities in 8.9% children. Also, there are 3.9 % children with pervasive disorders (autism). Around 43.1% has multiple disorders which further endanger their development and functional capabilities. It is necessary to emphasize that all varieties of disability and difficulties are more present in male population, especially autism, behavioral problems and vocal and speech disorders.

19 More information available in the Reports on the work of the Ombudsman for Children. URL=http://www.dijete.hr/www/?page_id=6243Accessed 2 October 2017.

20 Mental Disability Advocacy Center, Access to justice for Children with Mental Disabilities: International Standards and Findings from Ten EU Member States, 2015.URL=http://www.mdac.org/sites/mdac.info/files/access_to_justice_children_ws2_standards_and_findings_english.pdfAccessed 2 October 2017.

A starting point is the question of particularity of the position of a child with disabilities in proceedings concerning his/her rights and interests. An analysis of treatment which is considered as 'disability discrimination'[21] is provided as well as measures which should eliminate it. Although divorce proceedings in which decisions on parental responsibility are brought are the focus of the paper, also other proceedings in which children with disability participate are considered.

For the purposes of this paper, according to Article 1 CRC a child is every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

With regard to Article 1 of the Convention on the Rights of Persons with Disabilities[22] (hereinafter: CRPD), children with disabilities are those children who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

Along with the general obligation of a Member State to facilitate *access to justice* for children deriving from the international and European instruments, additional obligation for Member States, concerning children with disabilities, originates from recital (r) of the CRPD preamble according to which children with disabilities should have full enjoyment of all human rights and fundamental freedoms on an equal basis with other children, and recalling obligations to that end undertaken by States Parties to the CRC.

Thereby, account should be made to the fact that children with disabilities are not distinguished from other children by the mere fact of disability. Instead, the disability should be comprehended as an evolving concept and it should be kept in mind that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others (arg. ex recital (e) CRPD preamble).This perception is a necessary foundation for raising awareness and understanding of the position and the role of all participants to the process of providing legal protection for children with disabilities. Namely, when it comes to proceedings concerning rights and interests of children with disabilities, so far the established practice in Croatian legal system was to determine circumstances of the child's disability, which usually resulted in determination of child's inability to actively participate in proceedings already in the initial stage of the proceedings. This meant that the child was not able to actively take part in proceedings. Such conduct was conditioned by the fact that disability, especially if it does not involve merely physical disability was considered to be linked to the lack of capacity of the child to participate adequately, regardless of the assistance of the parents or guardians in the proceedings.[23]

This might be true in a number of cases, especially due to the age and maturity of children (which can also cause inability of children without disabilities to actively participate in proceedings), physical or mental disability, disorders or similar conditions which prevent verbal communication with children. However, there are cases in which disability should not be viewed as an obstacle. With adequate accommodations children with disabilities could be provided with a possibility to participate in proceedings. Interpretation of relevant instruments which regulate *access to justice* for children supports this view.

Namely, along with an obligation to inform a child as set out in the CRC (arg ex Article 13), the Guidelines additionally provide that „all professionals working with and for children should re-

21 Article 2 of the CRPD, defines 'disability discrimination' as "any distinction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation."

22 Convention of the Right of Persons with Disabilities, Official Gazette, International treaties, No. 6/2007, 3/2008, 5/2008.

23 A view expressed in the interviews conducted with special guardians from the Dislocated Unit Osijek of the Centre for Special Guardianship.

ceive necessary interdisciplinary training on their rights and needs of children of different age groups, and on proceedings that are adapted to them" (arg ex point 14 Guidelines) and that „professionals having direct contact with children should also be trained in communicating with them at all ages and stages of development, and with children in situations of particular vulnerability"(arg. ex point 15 Guidelines).

1. Current state of play –examples of court practice in Croatian legal system

In order to determine how proceedings concerning rights and interests of children with disabilities are conducted and detect approaches which can be considered as barriers to efficient access to justice, research into court practice at the Municipal civil court in Zagreb as well as interviews with judges were conducted, results of which will be presented and analyzed next.[24] Along with views and understanding of judges on certain matters, special guardians for children from Centre for Special Guardianship[25] and the office of Ombudsman for children also contributed with their insight on open issues regarding proceedings concerning rights and interests of children with disabilities during interviews which were conducted with them. Information gathered in the process of conducting these interviews were a basis for a discussion on necessary accommodations in proceedings concerning rights and interests of children with disabilities provided further in the paper.

A divorce proceedings between the parents of a child with disability (age 14)[26], was initiated on January, 7th 2015. The proceedings for divorce in Croatian legal system should result in decisions concerning parental responsibility, contacts and maintenance of the child. Upon initiating divorce proceedings, the mother also requested provisional measure according to which the child should live with the mother and the father is deprived of the right to live with the child until a final and binding judgment is delivered.The request was based on the fact that there was family violence during which the father threatened to commit suicide in the child's presence. Since the father was in psychological treatment but was regularly allowed to spend weekends at home, the provisional measure was supposed to disable the father to live in the same apartment with the child, in order to protect the child from similar events in the future. The parents were referred to obligatory consultation proceedings but they were not able to agree on the matters of parental responsibility. Mediation was not possible due to the fact that there was family violence. Although the child was 14 years old at the time of the proceedings and the child is not non-verbal, meaning that it is able to communicate in ways which people can understand, it did not actively participate in the proceedings. Along with the report on mandatory counselling, the court was provided with an opinion of a psychologist (from December, 29th 2014) according to which the child has reduced intelligence and attention difficulties. From the interview conducted in order to evaluate family circumstances, the psychologist concluded that the child accepts the separation of his parents. Also, the psychologist confirmed that the child witnessed his father's treats of suicide, although it is not possible to reveal if the child understood the meaning of the treats, because he refers to

24 The research offers an insight to the court practice of the Municipal civil court in Zagreb regarding proceedings on divorce and parental responsibility over children with disabilities. Although these cases do not necessarily reflect the court practice of other courts in Croatia, the examples which weregathered and analyzed in the research may be useful for detecting potential open issues and doubts connected to proceeding in such cases.

25 The interview was conducted with guardians from the Dislocated Unit Osijek of the Centre for Special Guardianship.

26 Municipal (civil) court in Zagreb *(Općinskigrađanskisud u Zagrebu)*, P2-14/2015 from 1 June 2015.

the situations as "those in which his father lost himself", as his mother previously explained to him. Since the parties to the proceedings concluded an agreement on divorce, parental responsibility, contacts and maintenance of the child, the court rendered a judgment on July, 1st 2015 according to which the child will live with the mother and contact his father regularly. The father will pay for the maintenance of the child.

On April, 4th 2015 proceedings were initiated by a request of a mother of two children (one of who is a child (15) with disabilities diagnosed with severe intellectual disability and maturity at a level of a 4 year-old) that the amount paid for maintenance be increased because it has become insufficient.[27] The father contested the request. The court assessed that a child with disabilities is not capable of expressing her view, so the mother was interviewed on circumstances of the child's disabilities, welfare and material needs. The court rendered a judgment on increase of the amount for maintenance for children on December, 10th 2015.

First two presented cases were recent, hence Family Act from 2015[28] (hereinafter: Family Act 2015) applied, which brought some significant novelties in regard to the position and procedural rights of children in divorce, parental responsibility and maintenance proceedings. In comparison, in the third case Family Act from 2003[29] (hereinafter: Family Act 2003) applied, which was drafted before the European Convention on the Exercise of Children's Rights[30] (hereinafter: ECECR) and Guidelines, hence the application of Family Act 2003 requires interpretation of its provisions along with provisions on providing information to a child from the ECECR.[31]

Mother of two children (one of who is a child with disabilities diagnosed with autism) initiated divorce proceedings[32] in which also decisions concerning parental responsibility, contacts and maintenance of the children should be brought on February, 20th 2011. The father did not contest the claim for divorce, but he insisted that decisions concerning parental responsibility matters regarding the child with disabilities should be brought jointly by both parents. Given that parents participated in intervention procedure before divorce proceedings was initiated, the Social Care Centre was obligated to give its opinion and recommendation to the court on family circumstances. When issuing its opinion, the Social Care Centre among other, consulted the findings of the Centre for autism which conducted assessment of child's disabilities. According to the Centre for autism, the child has mild intellectual disability. The child was not interviewed before Social Care Centre or the court so he was not able to express his views on matters which concerned him in divorce, parental responsibility and maintenance proceedings. During the proceedings the parents agreed that children will live with their mother and contact their father regularly. The father will pay for the maintenance of the children. The court rendered a judgment on May, 23rd 2011.

Unlike the first three cases in which the parents eventually were able to agree on divorce and/or parental responsibility and maintenance, the following cases reflect difficulties in approaching justice for children with disabilities, occurring in situations where there is a dispute among parents which causes inability to reach an agreement on matters related to the parental responsibility.

In a divorce proceedings initiated by a mother of two children (one of who is a child with disabilities, diagnosed with profound level of impairment) on October, 26th 2015, the mother requested divorce, parental responsibility and maintenance for the children.[33] The father contested the request of the mother based on the fact that the mother wished to institutionalize

27 Municipal (civil) court (Općinski građanski sud u Zagrebu) 144-POb-400/15 from 10 December 2015.
28 Family Act, Official Gazette, No. 103/2015.
29 Family Act, Official Gazette, No. 116/2003, 17/2004, 136/2004, 107/2007, 57/2011, 61/2011, 25/2013, 05/2015.
30 European Convention on the Exercise of the Children's Rights, Official Gazette, International treaties, No. 1/2010.
31 Korać Graovac, A.; Rajhvan Bulat, L., Pravo djeteta na informacije, in: Aras Kramar, S., Korać Graovac, A., Rajhvan Bulat, L., Eterović, I., Vodič za ostvarivanje prava djeteta na: - *informacije, -izražavanje mišljenja, - zastupnika i – prilagođen postupak u sudskim postupcima razvoda braka i o roditeljskoj skrbi,* Hrvatski pravni centar, Zagreb, 2015, pp. 16-28, at p. 22.
32 Municipal (civil) court in Zagreb *(Općinskigrađanskisud u Zagrebu)* P2-2206/11 from 20 February 2011.
33 Municipal (civil) court in zagreb *(Općinski građanski sud u Zagrebu),* POb-1866/2015 from 1 June 2017.

the child with disabilities. The parents were referred to obligatory consultation proceedings and according to the report of the Social care centre on family circumstances from February, 9th 2016,the child was not interviewed because he is diagnosed with cerebral palsy and he is non-verbal. His medical documentation and reports on previously conducted examination and expertise provided by psychologists and doctors were consulted instead. Due to the inappropriate communication among parents, they were referred to the consultation, on which the Social Care Centre drafted a report on April, 22nd 2016. The court rendered a judgment on divorce, parental responsibility and maintenance based on the agreement concluded by the parents. The son (a child with disabilities) will live with the father and the daughter will live with the mother.

In the last case, divorce proceedings were initiated by the mother of a child with disabilities (who was 3 years old at the time, and at that point was only diagnosed with developmental speech problems) on April 30th 2008.[34] The request of the mother regarding parental responsibility and maintenance was contested by the father. According to the first report of the Social Care Centre from July, 25th 2008 on intervention procedure which the parents participated in before initiating divorce proceedings, the parents are not able to agree on parental responsibility. The subsequent report of the Social Care Centre from March, 4th 2009, to the court on family circumstances was given in accordance with its findings which included a psychological expertise for the child. In its opinion and recommendation, the Social care centre supported the suggestion of the parents that the child should live half of the time with the mother and the other half with the father. Although, in the opinion of the Social Care Centre the mother is more fit to live with the child due to his age and profound connection with the mother. However, in the opinion of a speech therapist from January, 29th 2009 and podiatrist from November, 25th 2008 the father is more accurate in keeping appointments and generally more included in child's therapy. Although the father requested preliminary measure in March, 22nd 2010 according to which the child should live with him, the request was denied. In December, 16th 2009 one of the therapist expressed his concern that the child is included in too many therapies and has no quality time with his parents. According to the expertise of the Child and Youth Protection Centre of Zagreb from November, 18th 2010 the child's disabilities are in the range of mild mental retardation. They recommended that the child should continue with the same organisation of life, regardless of which parent the child will live with. First instance judgment was rendered in May, 14th 2012, according to which the child will live with the mother and have regular contacts with the father. The father will pay maintenance for the child. Although the judgment was appealed, the second instance court dismissed both appeals - the appeal of the father and the appeal of the Social Care Centre. In rendering its judgment, the second instance court took into account the provisions of CRC on the best interest of the child.

The conducted research into the court practice in Croatian legal system confirms the views expressed in the interviews with Croatian judges that the approach towards children with disabilities does not differ from the general approach to children in divorce and parental responsibility proceedings. However, according to the recommendations stemming from Mental Disability Advocacy Center research on access to justice for children with disabilities, the approach should be adjusted. First it will be necessary to examine if the child has sufficient understanding and if the information which should be made available to him/her are adapted to his/her age and maturity and cognitive capacity. This would ensure that instead of using the assessment of cognitive capacities in order to establish if the child with disabilities is capable of participating in proceedings and if it is able to give testimony in accordance with the rules on evidence, the emphasize would be on establishing which measures or acts would provide for adequate accommodations, since their absence results in the denial of the right to be heard.[35]

34 Municipal (civil) court in Zagreb *(Općinski građanski sud u Zagrebu)*, P2-765/08-63 from 14 May 2012. County court in Zagreb (Županijski sud u Zagrebu), 15Gž2-416/12-2.
35 Mental Disability Advocacy Center, op.cit. note 21, p. 5.

In Croatia, judicial professional are not used to adapting proceedings to participation of children with disabilities. However, the reasons of a lack of readiness of judicial professionals to enable active participation of children with disabilities cannot be simply attributed to their tendency to treat children with mental disabilities as passive recipients of services who are incapable of forming and expressing their own will and preferences[36]. Instead, often the fear is present among judges as well as legal representatives and guardians that including a child with disability in court proceedings, especially if it will require long or repeated questioning of a child, will traumatize and harm the child, his/her wellbeing and health.[37]

The recent views of legal theorists oppose these views as well as such practice. According to them, whenever the circumstances are such that with adequate accommodations the child with disabilities could be included in proceedings regarding his rights and interests, such practice would be desirable and welcome, because it is empowering for the child. Otherwise, the child with disability might feel excluded, discriminated and helpless.[38] Hence, in order to ensure participation of children with disabilities in divorce and parental responsibility proceedings, more attention should be given to "reasonable accommodations", as forms of individualised supports and adjustments necessary to ensure that people with disabilities, including children, can enjoy and exercise their fundamental rights, without imposing an undue burden on the organisation providing the adjustments in accordance with Article 2 CRPD. The place and the role which reasonable accommodations should take in Croatian legal system will be analyzed next.

2. Reasonable accommodations - a guarantee of procedural rights for children with disabilities in Croatian legal system

If undertaken, which measures would be able to provide reasonable accommodation to children with disabilities in proceedings before Croatian courts and other qualified entities? General accommodations suggested in the legal literature which include undertaking accessibility audits of courts and judicial rules and implementing national accessibility plans; providing information to the public about justice systems and processes in accessible formats (including easy-read and pictorial formats); using modern information communication technology systems and assistive devices; introducing mandatory provisions to establish procedural accommodations to judicial processes for persons with disabilities; and rolling out general and targeted public awareness campaigns to strengthen awareness are systematic changes.[39] Although during the last reform of the Croatian family legislation[40] some changes were introduced to the legal framework, to the greatest extent they refer to the regulation of procedural rights of children, while only subsidiarily taking into account the specific position of children with disabilities.[41]

36 Ibid.
37 Croatian judges who participated in the research also confirmed this view. However, according to some judges the fear and reluctance is equally present in all proceedings involving children because judges in Croatia still lack the relevant knowledge on how to conduct interviews with children.
38 Mental Disability Advocacy Center, op.cit. note 19, p.22.
39 Ibid., p. 27.
40 Ibid., p. 19.
41 Eterović, I., Predgovor, in: Aras Kramar, S.; Korać Graovac, A.; Rajhvan Bulat, L.; Eterović, I., Vodič za ostvarivanje prava djeteta na: - *informacije, -izražavanje mišljenja, - zastupnika i – prilagođen postupak u sudskim postupcima razvoda braka i o roditeljskoj skrbi,* Hrvatski pravni centar, Zagreb, 2015, pp. 5-7, at p. 5.

In regard to participation of a child, parents and other persons in family proceedings (arg. ***ex*** Article 358-363), Family Act 2015 provides the child with standing in all proceedings concerning his/her rights and interests (arg. ***ex*** Article 358). Hence, the child is a party in divorce or separate proceedings concerning the plan on joint parental responsibility, decisions on which parent the child will live with, exercise of parental responsibility, child's personal relationships with the other parent and maintenance. In proceedings in which a court examines the plan on joint parental responsibility, both parents represent the child (Article 461/2). If a claim in parental responsibility proceedings is brought by one parent against the other, regardless whether it is connected to the divorce, the child is represented by a special guardian from the Centre for special guardianship (arg. ex Article 414).[42] In proceedings, information which is provided to a child is adapted to his/her age and maturity. Providing information to young children should be entrusted to persons with adequate knowledge on child psychology in order to ensure that child's best interest is considered. Information should be provided in a language that a child understands (foreign language, Brail or other) while the formal legal terminology should be explained so the child understands its meaning.[43] The child should be informed on the subject matter, the course and the outcome of proceedings in a manner appropriate to the age and maturity of the child, providing that it does not endanger the development, upbringing and health of the child (arg ex Article 360/5). Special guardians of the child, the court or other competent persons from the Social Care Centre are obligated to inform the child (arg ex Article 360/6).[44]

Obviously, the presented national legal framework is harmonized with the international and European standards for protection of procedural rights of children. Hence, setting the Croatian legal system to become appropriate for administration of justice for children with disabilities will not require too many adjustments of the legal framework. However, in regard to the methods of application of provisions of Family Act 2015 it is merely suggested in the legal literature that there should be no discrimination of children on the basis of their cognitive capacities, if the case concerns children with disabilities, or obstacles which could impair the understanding of information (for vulnerable group of children who do not understand the official language).[45] Given that such an obligation is not provided in the relevant legal framework, its introduction should be advocated for. At the same time, systematic measures which should act as a safeguard of general accommodations, which are suggested by the Mental Disability AdvocacyCenterresearch, are also not provided under Croatian law.[46] In order to examine the validity of opting for its introduction, the experience of legal practitioners in administrating justice for children with disabilities in Croatia are presented and analyzed next. Thereby, the question whether legal practitioners have adequate means to accommodate proceedings in Croatia to participation of children with disabilities was in the focus of the research.

As to whether they can accommodate proceedings to participation of a child with disabilities, Croatian judges feel that this matter is connected to the technical capacities of each court. For example, one judge said that her court is accessible to children with disabilities, but it is not adequately equipped. There are no child-friendly interview rooms and there is a lack of use of modern information communication technology systems and assistive devices in order to enable interviews with children with disabilities in an environment familiar to them. For now, there was no specific training of judges on how to conduct proceedings involving children with disabilities. However, judges can request assistance of psychologists from the Social Care Centres in assessment of child's capacities and/or in conducting interviews with children. Judges find this possibility as crucial for enabling children to be heard because it provides them with an opportunity to rely on the specific knowledge and approach of psy-

42 Aras Kramar, S., Glavna obilježja obiteljskopravne reforme u Hrvatskoj: postupci radi razvoda braka i o roditeljskoj skrbi te postupovna prava djece, in: Aras Kramar, S.; Korać Graovac, A.; Rajhvan Bulat, L.; Eterović, I., Vodič za ostvarivanje prava djeteta na: - *informacije, -izražavanje mišljenja, - zastupnika i – prilagođen postupak u sudskim postupcima razvoda braka i o roditeljskoj skrbi*, Hrvatski pravni centar, Zagreb, 2015, pp. 11-15, at p. 14.
43 Mental Disability Advocacy Center, op.cit. note 21, p. 18.
44 Ibid.,p. 23.
45 Korać Graovac, A.; Rajhvan Bulat, L.,op. cit. note 32, p. 19.
46 Mental Disability Advocacy Center, op.cit. note 21, p. 27.

chologists towards children. According to judges, lawyers and special guardians for children (who act as legal representatives of children in certain proceedings) also lack such specific knowledge and skill set. Namely, it should be kept in mind that special guardians are also lawyers and they were not educated on how to deal with children with disabilities.

Apart from judges, there is a significant role of special guardians for children in providing access to justice for children with disabilities. As Article 240 Family Act 2015 sets out, special guardians participate and represent children in divorce, parental responsibility, contacts and maintenance proceedings in which there is a dispute among parents; proceedings in which maternity or paternity is disputed; proceedings concerning provisional measures for the protection of personal rights and best interest of the child; proceedings which substitute the consent for adoption; in proceedings concerning property matters in dispute among children and their legal representatives and for proceedings concerning unaccompanied children who are foreign citizens (they are usually represented by the Social Care Centres). According to Article 240(2) Family Act 2015, in these proceedings special guardians are legal representatives of children and they are obligated to inform children on the subject matter of the dispute and the decision in a way that is appropriate to their age and if necessary, contact parents or other close relatives or persons close to children.

From the interviews conducted with special guardians it seems that in proceedings concerning children with disabilities they are represented in the manner equal to all children. Special guardians make efforts in order to communicate with children with disabilities and inform them in appropriate manner. In most proceedings special guardians are certain that a child with disabilities is not capable of understanding the meaning of the proceedings. In order to be able to represent a child with disabilities, special guardian usually interviews parents, legal guardians or foster parents in order to establish child's views on matters affecting him/her. Special guardian then communicates the lack of capacity of a child with disabilities to form his/her views and to express those views independently to the court.

In the interview conducted with special guardians, absence of special knowledge and training on dealing with children with disabilities was emphasized as one of the main obstacles to providing access to justice to children with disabilities. Also, Centres for Special Guardianship are not equipped with interview rooms adapted to children with disabilities. Special guardians do not seek assistance from psychologists or other experts in providing accommodations to children with disabilities.

According to the Office there were no complaints concerning the treatment of children with disabilities in the court proceedings in Croatia. However, this should not be automatically attributed to the in existence of barriers for children with disabilities in accessing justice in Croatian legal system. Also, as to the procedural position of children with disabilities in court proceedings, the Office considers it to be equal to the position of all children. In regard to the possibility of accommodating proceedings to participation of children with disabilities, the Office presented information concerning criminal proceedings. Although criminal proceedings are not the focus of the paper, provided information may be used as a relevant basis for the comparison with the information gathered in regard to civil proceedings. According to the Office, in criminal proceedings the judge has discretion in rendering all decisions aimed at providing assistance to the child with disabilities. These include decisions on assistance of an expert for the child with disabilities during the main hearing as well as decisions regarding availability of courtrooms. Along with the possibility of judges to request advice and input from the expert (usually a social pedagogue), the judge can also request participation and advice of experts from other relevant institutions. In the opinion of the Office, one of the main obstacles for children with disabilities in accessing justice is the fact that only a small number of advocates have the relevant knowledge for adequate representation of children with disabilities. In criminal proceedings, children as perpetrators of a criminal offence are appointed an advocate *ex officio*. Nevertheless, in order to be able to safeguard their children's rights, parents are also participants to the criminal proceedings. As to the sensitivity of

judicial institutions towards children with disabilities, the Office considers almost all available facilities as not child-friendly and inadequate for interviewing children, including children with disabilities. Also, whether child-friendly information and advice will be available to children with disabilities depends on the sensibility of a particular judge conducting proceedings in question. Hence, as the necessary adjustment to the participation of children with disabilities in court proceedings the Office suggests education of judges, advocates and guardians as well as introduction of accessibility measures such as conduct of proceedings without delay and providing child-friendly rooms and assistance.

Given the delicate situation of providing a possibility for children with disability to participate in proceedings, along with general accommodations, certain specific adaptations in terms of legal processes which should allow for a degree of flexibility which are responsive to the needs of individual children and the provision of individualised supports are suggested by Croatian legal experts and practitioners. Also, in the legal literature, measures such as sign language, augmentative and alternative communication (including interpreters trained in communicating with children with mental disabilities) and other accessible means, modes and formats of communication of their choice are advised.[47] Hence, building on the results of research into the court practice and experience of legal experts, in the concluding remarks we will try to indicate certain operational guidelines which could be useful for resolving observed problems and obstacles in enabling children with disabilities to obtain justice before Croatian courts.

3. Concluding remarks

The first difficulty encountered in the research of the topic was gathering of relevant information. However, the lack of relevant information has to be considered in the light of the transformation which the Croatian family legislation has undergone recently. Namely, the recent reform was aimed at harmonization of proceedings involving children with the procedural standards prescribed in international and EU instruments. Although the imposed requirements of the new legal framework seek adjustments and intense efforts of legal practitioners in conducting proceedings which affect children with disabilities, in the most part they have been implemented successfully. Still, there is insufficient coordination among authorities which participate in the proceedings and a lack of an integral infrastructural support for judges. For now, only a small number of courts started to establish child-friendly interview rooms. Also, Croatian courts are not equipped with modern technology tools and communication devices which ensure that the child is interviewed only once and his responses recorded for further use in the proceedings. Having in mind all the systemic deficiencies, it comes as no surprise that similar to the EU Member States included in the EC research, there is no monitoring on how many children with disabilities come into contact with the judiciary or participate in court proceedings or on the outcome of the proceedings in Croatian legal system.[48] Therefore, the first recommendation would concern establishment of mechanisms for monitoring proceedings involving children with disabilities. This would provide for a possibility of a regular assessment if measures to ensure reasonable accommodations and adjustments to the needs of the individual child are taken in the course of the judicial proceedings. Although the conducted research did not ensure a comprehensive overview

47 Children's Rights for All! Implementation of the United Nations Convention on the Rights of the Child for children with intellectual disabilities (2009-2011), p. 33. URL= http://www.childrights4all.eu/wp-content/uploads/2015/01/CRC_EU_report.pdf Accessed 4 April 2018.
48 Mental Disability Advocacy Center, *op.cit. note 21*, p. 5.

of the court practice, still the included cases can be considered as representative of proceedings involving children with disabilities. The analysis of the cases before the Municipal civil court in Zagreb revealed a consistency in the conduct of proceedings involving children with disabilities. Namely, in most cases proceedings were conducted in the manner in which proceedings involving children are regularly conducted. Usually, at the initial stage the court established that the case involves a child with disabilities due to which the child is not able to actively participate in proceedings. Even though this is true in a large number of cases, more efforts should be undertaken to assess whether with certain accommodations a child with disabilities could be heard and his opinion acknowledged (even if it is non-verbal). Hence, in order to set up Croatian justice system to grant immediate access to courts to children with disabilities, there are three categories of obstacles which should be removed:

- No regulatory framework for access to justice for children with disabilities
- Inadequate administration of justice (exclusionary attitudes)
- Insufficient accessibility measures

In this sense, there is a range of interventions which should be considered:

- There are no provisions on proceedings involving children with disabilities in Croatian national legislation. Attention should be paid to providing a framework on proceedings involving children with disabilities in which reasonable accommodations would be ensured along with definition of methods to facilitate it.

- A more clear division of competence between the Office of the Ombudsman for children and the Ombudsman for persons with disabilities should be envisaged in order to ensure a mandate of one of them for representing a child with disabilities in proceedings before national and international courts.

- Education and training on conducting proceedings involving children with disabilities should be available to legal practitioners. Emphasis should be on the measures which they need to take in order to uphold the rights of children with disabilities in court proceedings. A distinction between an assessment of the evolving capacities of a child with disabilities in order to provide individual adjustments for his participation in proceedings and the established practice of the mere determination that due to the child's disabilities he/she is unable to participate in the proceedings should be made.

- Technical adjustments such as establishing child-friendly interview rooms and communication technologies should be accelerated.

- Special guardians from the Centre for special guardianship who act as representatives in proceedings involving children should be provided with additional training in order to be able to assist children with disabilities in accessing justice.

- To conclude, reaching the objective of increasing access to justice for children with disabilities definitely calls for changes in regulatory framework and national plans in Croatian legal system. But more importantly, it makes it imperative to adopt changes in the approach, work towards better inclusion and overall raising of awareness of all participants in the process of providing equitable justice on the capacities, the needs and the abilities of children with disabilities.

Bibliography

References

1. Aras Kramar, S., Korać Graovac, A., Rajhvan Bulat, L., Eterović, I., *Vodič za ostvarivanje prava djeteta na: - informacije, -izražavanje mišljenja, - zastupnika i – prilagođen postupak u sudskim postupcima razvoda braka i o roditeljskoj skrbi,* Hrvatski pravni centar, Zagreb, 2015.

List of regulations, acts and court decisions

1. Charter of Fundamental Rights of the European Union, Official Journal of the European Communities, 18 December 2000 (2000/C 364/01), 26 October 2012, 2012/C 326/02, URL=http://www.refworld.org/docid/3ae6b3b70.html Accessed 4 February 2018.

2. Convention of the Right of Persons with Disabilities, Official Gazette, International treaties, No. 6/2007, 3/2008, 5/2008.

3. European Convention for the Protection of Human Rights and Fundamental Freedoms, Official Gazette, International treaties, No. 18/97, 6/99, 14/02, 13/03, 9/05, 1/06, 2/10.

4. European Convention on the Exercise of the Children's Rights, Official Gazette, International treaties, No. 1/2010.

5. Universal Declaration of Human Rights, Official Gazette, International treaties, No. 12/2009.

6. Family Act, Official Gazette, No. 116/2003, 17/2004, 136/2004, 107/2007, 57/2011, 61/2011, 25/2013, 05/2015.

7. Family Act, Official Gazette, No. 103/2015.

8. Case Golder v. United Kingdom, Judgment, Merits and Just Satisfaction, App No 4451/70, A/18, [1975] ECHR 1, (1979) 1 EHRR 524, IHRL 9 (ECHR 1975), 21 February 1975 (Official Case No): A/18.

9. Municipal (civil) court in Zagreb *(Općinski građanski sud u Zagrebu)*, P2-14/2015 from 1 June 2015.

10. Municipal (civil) court *(Općinski građanski sud u Zagrebu)* 144-POb-400/15 from 10 December 2015.

11. Municipal (civil) court in Zagreb *(Općinski građanski sud u Zagrebu)* P2-2206/11 from 20 February 2011.

12. Municipal (civil) court in Zagreb (Općinski građanski sud u Zagrebu), P2-765/08-63 from 14 May 2012. County court in Zagreb (Županijski sud u Zagrebu), 15Gž2-416/12-2.

Website references

1. Access to justice for children: Report of the United Nations High Commissioner for Human Rights, A/HRC/25/35, 2013, p. 4. URL=http://www.google.hr/url?sa=t&rct=-j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwj27qmA-Z7aAhUmsKQKHUDhD2cQFggmMAA&url=http%3A%2F%2Fwww.ohchr.org%2FEN%2FHRBodies%2FHRC%2FRegularSessions%2FSession25%2FDocuments%2FA-HRC-25-35_en.doc&usg=AOvVaw1GrdB3mkHd-mVlQ0W_3P1z Accessed 2 October 2017.

2. Children's Rights for All! Implementation of the United Nations Convention on the Rights of the Child for children with intellectual disabilities (2009-2011), p. 33. URL= http://www.childrights4all.eu/wp-content/uploads/2015/01/CRC_EU_report.pdf Accessed 4 April 2018.

3. Child-friendly justice – perspectives and experiences of children and professionals, European Union Agency for Fundamental Rights, 2015.,URL=http://fra.europa.eu/sites/default/files/fra-2015-child friendlyjusticeprofessionalssummary_en_0.pdf Accessed 01 March 2018.

4. Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice: The Council of Europe programme "Building a Europe for and with chidren", Council of Europe Publishing, 2010. URL=https://rm.coe.int Accessed 4 October 2017.

5. Handbook on European law relating to the rights of child, European Union Agency for Fundamental Rights and Council of Europe, 2015., URL=https://www.echr.coe.int/Documents/Handbook_rights_child_ENG.PDF Accessed 26 November 2017.

6. Mental Disability Advocacy Center, Access to justice for Children with Mental Disabilities: International Standards and Findings from Ten EU Member States, 2015. URL=http://www.mdac.org/sites/mdac.info/files/access_to_justice_children_ws2_standards_and_findings_english.pdfAccessed 2 October 2017.

7. UN Common Approach to Justice for Children, 2008, p. 4. URL=https://www1.essex.ac.uk/armedcon/story_id/UNCOMMON.pdf Accessed 3 April 2018.

8. UN Committee on the Rights of the Child (CRC),General comment No. 5 (2003): General measures of implementation of the Convention on the Rights of the Child, 27 November 2003, CRC/GC/2003/5, URL= http://www.refworld.org/docid/4538834f11.html Accessed 1 April 2018.

9. UN Committee on the Rights of the Child (CRC), General comment No. 12 (2009): The right of the child to be heard, 20 July 2009, CRC/C/GC/12, URL= http://www.refworld.org/docid/4ae562c52.html Accessed 1 April 2018.

УДК 343.436:343(497.11)(094.5)
343.436:004

Title:

VICTIMS AND PERPETRATORS OF STALKING AND CYBER STALKING: WHAT HAS CHANGED IN THE CRIMINAL LEGISLATION OF SERBIA?

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ABSTRACT

Daily use of the Internet and the expansion of social networks created an enormous number of opportunities to get to know people, to acquire and develop personal and professional relationships, to create a different kind of communications. In addition to the benefits provided by the Internet and social networks, there has been an increase in virtual space-related abuse. Some of the most dangerous forms of cyber abuse are sexual harassment and stalking using virtual communications. The Criminal Code of the Republic of Serbia has recently regulated and sanctioned these deviant behaviors only if it takes place in a "real" life, merely passed on without precise legal regulations when it comes to the cyber performance of these routines.

The subject of this paper is to point to various definitions of stalking and cyberstalking, similarities and differences between stalking and sexual harassment that occur in the "real" and the virtual world, the emerging forms of cyberstalking, as well as the basic characteristics of both victims and perpetrators. The ultimate goal of the paper is to emphasize the preventive action and prevention of all forms of cyber victimization such as cyberstalking and online sexual harassment, by creating appropriate legal mechanisms and legal possibilities for their effective and successful suppression.

Creating precise criminal law legislation is a prerequisite for proper consideration of the social danger and the unlawfulness of harassment and stalking on the Internet and via social networks, better protection of victims and more efficient work of professionals in state bodies and institutions. The criminal law that incriminates these behaviors must be very flexible and able to follow the daily development of computer technology and innovation in the field of telecommunications.

Key Words: Internet, social networks, harassment, stalking, cyber stalking, victimization

INTRODUCTION

Daily use of the Internet and the expansion of social networks created a range of possibilities for people to virtually meet, acquiring and developing personal and professional relationships and mutual communication. Apart from the advantages that the Internet and social networks provide, there is also a series of virtual space-related abuses.

The enormous possibilities for use of modern technologies, especially the Internet, have influenced the adoption of a number of significant legislative regulations on the international level. In 2001, the Council of Europe adopted the Convention on Cybercrime and the Additional Protocol. On 16 April 2005, the Republic of Serbia signed both of these documents in Helsinki, and the National Assembly of the Republic of Serbia ratified by in March 2009. These documents served as a basis for the adoption of national legal and cyber crime standards, as well as the establishment of special state authorities specialized in the fight against computer crime.

Amendments to the Criminal Code of the Republic of Serbia,[1] which entered into force and began to apply from June 1, 2017, established, inter alia, two new criminal offenses: stalking (Article 138a) and gender harassment (Article 182a), which are completely related to behavior in the "real" life. However, the description of these criminal offense does not explicitly envisage an enforcement action related to stalking and gender harassment using the tools of information technology, in particular by using the Internet and social networks, as the most widespread form of stalking and harassment in modern times. Precise legislative regulation of these forms of Internet and social networks abuse and misuse is necessary for the successful detection and proofing, as well as for effective protection of victims.

1 Amendments to the Criminal Code of the Republic of Serbia (Official Gazzette of Republic of Serbia no. 94/2016)

1. Defining stalking and cyber stalking

In the real world, the victim is being stalked "from the vicinity" - the perpetrators want to be seen by the victim and to make the victim aware of their presence.[2] In cyberspace, the proximity gets a new meaning, because the users have an illusion that the perpetrators are somewhere near the although they are physically distant.

The term "stalking" was during the 1980s used to denote "a more permanent form of abuse against the same person, by imposing a communication or contact that person does not want." [3] Defined in this manner, stalking involves the repetition of certain actions that last for a long time and it is manifested as: frequent telephone calls to the victim, sending the letters or gifts of various contents to the victim, permanent monitoring and observation of the victim, staying in the victim's own personal space, making contacts with the family, friends or associates of the victim.[4] Stalking is, thus, also defined as a repeatedly manifested way of behavior, by which one person imposes unwanted communication or encounters with another, which results in the victim's fear of being unsafe.[5]

Cyber stalking can often represent a "continuation" of classical stalking in the "real" life,[6] and can be also defined as persistent and targeted abuse by an individual through electronic communications[7] or by using new technologies to molest another person.[8] This behavior can only be "virtual" and limited only to communication in cyberspace, but it could be transferred from the "virtual" to the "real" world, representing an introduction to the most dangerous forms of victimization. Cyberstalking is the repeated use of the Internet, e-mail or other electronic tools of communication, for the purpose of "criminal intimidation, harassment, fear, and suggestive violence where individuals use the Internet as a tool to stalk another person." [9]

Paul Bocij has formulated one of the first comprehensive definition of cyber stalking, stating that this often represents a set of behavior that individuals, groups of people or organizations use to use information and communication technologies to abuse another individual, group of people or organization.[10] According to the another one definition of cyberstalking given by Bocij, this offense is mostly connected to the use of the Internet, e-mail, or any form of electronic communication that creates a criminal level of intimidation, abuse and feelings of fear in one or more victims. This behavior can range from harmless but boring messages, to potentially dangerous and deadly encounters between the stalker and the victim.[11]

One of the obvious differences between stalking and cyberstalking is the geographical distance between the stalker and the victim. A cyber stalker can abuse his victim from both "the house across the street or from a coffee shop in another state".[12] When stalking online, any physical contact is rare, which is one of the reasons why the police do not pay much attention to reporting such behavior and often does not respond to the reports of the victims.[13]

2 Gilbert, Pamela. "On Sex, Cyberspace, and Being Stalked". Women and Performance 9, No.1 (1996): 125-149
3 Yar, Majid. „Cybercrime and society". Sage Publications Ltd, 2006, p. 123
4 McGuire, Brian E., and Wraith, Anita. "Legal and psychological aspects of stalking: A review". Journal of Forensic Psychiatry 11, No. 2 (2000), p. 317
5 Purcell, Pathe, Mullen, 2004: 157 cited in Clough, Jonathan. Principles of Cybercrime. Cambridge University Press, 2010, p. 365
6 Vilić, Vida. "Proganjanje putem interneta – ko su izvršioci i žrtve?". Godišnjak Pravnog fakulteta u Istočnom Sarajevu 3, No. 2 (2012), p.125
7 Yar, Majid, *op. cit.,* p. 122
8 Clough, Jonathan, *op.cit.,* p. 366
9 D'Ovidio, Robert, and Doyle, James. „Cyberstalking: Understanding the Investigative Hurdles". FBI Law Enforcement Bulletin 72, No.3 (2003), p. 10
10 Bocij, Paul. „Cyberstalking: harrasment in the Internet age and how to protect your family". Praeger Publications: Westport Connectict London, 2004, p. 10
11 Bocij, Paul, *loc.cit.,* p. 14
12 Reno, 1999, cited in Pittaro, Michael. "Cyber stalking: An Analysis of Online Harrasment and Intimidation". International Journal of Cyber Criminology (IJCC) 1 (2007), p.184
13 Pittaro, Michael, loc.cit., p. 185

Cyber stalking does not have to be motivated by some kind of sexual obsession with the victim. It can be motivated by the existence of some kind of intolerance between the stalker and the victim, or by the aggression that arose as a result of inequality of power and reputation in society, more often than material gain or sexual obsessions. Internet persecution is, like stalking in general, driven by feelings of anger, power or control awakened by acts of victims in the eyes of the stalker. These behaviors "may include, but not limited to the transmission of threats and false accusations, identity theft, data theft, damage to data or equipment, computer monitoring, solicitation of minors for sexual purposes and any form of aggression",[14] as well as or false representation of the victim's name that motivate and influence to other people to mistreat the victim, ordering and purchasing various goods on the victim's name and the account, physical encounters with the victim and physical attacks on the victim.

2. Forms of cyber stalking

Stalking assumes that there have been at least two contacts between the perpetrator and the victim. Mechanisms of cyber stalking can be classified into two categories: stalking that is carried out completely over the Internet and a "mixed" type of stalking, which starts in cyberspace and as such lasts for several weeks, after which it begins to happen in the "real" world.[15]

The forms of cyber stalking depend on the goal and motive of the stalker.[16] Internet stalking can be manifested through some of the following behaviors: collecting data about the victim via the internet for the purpose of abuse, intimidation or blackmail; sending or publishing inaccurate allegations about the victim; stealing someone's identity in a cyber environment; publishing extremely personal information about the victim; sending computer viruses and malicious programs to the victim. The most common forms of cyber stalking are: communicating with the victim, publishing / making available personal information about the victim, attacking the victim's computer, and constant monitoring of victim's activities / putting the victim under surveillance.[17]

3. Who are the perpetrators and who are the victims?

A research of cyberstalking in Serbia showed that the victims of stalking were in most cases female (58.4%) and most often were faced with "insisting on unwanted communication", "spreading negative comments and rumors", "sending infected files" and "infiltration and monitoring of the computer system". This research, among other things, showed that e-mail (62.5%), telephone (25%) and social networking sites were used as the main tools for stalking.[18]

14 Bocij, Paul, *op.cit.*, p. 14
15 Sheridan, Lorraine P., and Grant, Tim. "Is cyberstalking different?". Psychology, Crime & Law 13, No.6 (2007): 627-640
16 Vilić, Vida. "Viktimizacija proganjanjem putem interneta", Temida No.1 (2013), 2013, p.155
17 Clough, Jonathan, *op.cit.,* p. 375
18 Kovačević-Lepojević, Marina, and Lepojević, Borko. „Žrtve sajber proganjanja u Srbiji". Temida No.3/12 (2009), p. 91

Relative anonymity in cyberspace can cause a lack of social inhibition and moral constraints, affecting the stalker to easily find the new victim. The perpetrator may pretend to be a completely different person, which is freed from fear of being discovered, charged and punished. [19] Similar to stalkers in the "real" life, cyber stalkers try to track the activities of their victims, find as much information as possible about them and to contact people close to the victim. As a result, the victim becomes insecure, frightened, intimidated, and does not see the way in which it can affect the termination of harassment or stalking.

By reducing demotivation factors, such as shame and fear of rejection, the Internet can encourage individuals to engage in harmful communication and to do some acts that would rarely or never happens in "real" communication. The lack of inhibition may "force" the stalker to be falsely represented in virtual communication: it is not a rare phenomenon that the stalker takes over the identity of victims's friend or relative in order to find out as much information as possible, or even to represent himself/herself by the victim's name in order to spread different falsehoods.[20] The lack of a personal contact between the stalker and the victim can lead to different projections, which is why the victim can be exposed to rejection, humiliation or anger.[21]

The stalker always wants to feel superior to the victim. The person chosen to be the victim is never as strong as the stalker. This is precisely the reason why the most often victims of cyber stalking are new users of social networks (eg. children) and emotionally unstable persons. The literature states that most of the cyber stalkers have already had previous criminal activity, a history of violent behavior or a behavioral disorder, that directly or indirectly increases the possibility that a person will act in a sociopathic way.[22] Most of the studies conducted on the personality of the cyber stalkers have shown that they have a personality disorder that can vary from a high level of paranoia to various obsessive thoughts and behaviors.[23]

The relationship between the conduct of the perpetrator and the victim's feelings can be described as:[24]

Model of behavior	Actions to be taken	Implications
Deliberately and continuously harassment, sexual harassment or intimidation of a person.	Violating one persons' privacy: - unwanted presence or proximity (physical, visual or virtual). - unwanted communication (personal or indirect). - threats (direct or indirect, in oral or written form). - a combination of previously listed behaviors.	- Serious threat. - Lack of safety.

Every Internet or social network user can become a victim of cyber stalking, but there are still some of the groups of users that are more vulnerable than others who are at greater risk, like women, children and minors and new Internet and social network users.[25] Statistics showed that most of the victims of cyber stalking are female while the most of the cyber stalkers are male,[26] but there are also cases where the victim and the stalker are of the same sex.[27] Unlike male stalkers, females rarely pursue the strangers, but mostly their former partners

19 Bowker & Gray (2004) cited in Pittaro, Michael, *op.cit.,* p.181
20 Ellison, Louise: "Cyberstalking: Tackling harrasment on the Internet", Crime and the internet, London: Routledge, 2001, p. 141
21 McGrath, Michael, and Casey, Eoghan . „Forensic psychiatry and the Internet: Practical perspectives on sexual predators and obsessional harassers in cyberspace". 30. journal of the American Academy of Psychiatry and the Law 81 (2002), p. 86
22 Hutton, Haantz, 2003; Reno, 1999, cited in Pittaro, Michael, *op.cit.,* p.184
23 Mullen et.al, 1999, cited in Pittaro, Michael, *op.cit.,* p.184
24 Benschop, Albert. "CyberStalking: menaced on the internet". SocioSite-Social & Behavioral Sciences Sociology & Anthropology University of Amsterdam. (2003). Accessed July 14, 2018, http://www.sociosite.org/cyberstalking_en.php
25 Hutton, Haantz, 2003; Reno, 1999, cited in Pittaro, Michael, op.cit., p.184
26 Pittaro, Michael, *op.cit.,* p.188.
27 Pittaro, Michael, *loc.cit.*

or their current partners.[28] Similarly to the "real" stalkers, cyber stalkers usually try to monitor the activities of their victim, to find as much information as possible about the victim, to contact the person with whom the victim is close, to illegally read the e-mail messages and correspondence of their victim and to track the victims' online activities. The victims become insecure, with lack of the self esteem, worried about their safety, frightened and intimidated by the impossibility of perceiving the way they the stalking can influence the termination of harassment and stalking.

In the literature, there are various data on the prevalence of cyber stalking and the most common victims of this type of social networks' abuse. Some research showed that victims of stalking and cyber stalking are mostly females: victims of cyber stalking are 52% females, while when it comes to real-life-stalking, this number is significantly greater and wary between 75-80% of all victims.[29] About 80% of Internet stalkers are male, which is equal to the percentage of the stalkers in general.[30] The highest percentage of both victims and abusers is aged between 18 to 24 years old.[31]

Assuming that around 6,00,000 cases of stalking annually occur worldwide, it is estimated that about 60% of all acts are committed in a virtual / cyber environment.[32] It is also estimated that, for example, in the United States, one out of 1,250 people is the potential stalker, that one out of 12 women and one out of 45 men were victims of stalking at least once in their lives.[33]

Statistics for January 2008 showed that in period from 2005 - 2006, some 3.4 million people reported being victims of cyber stalking; 50% of them said that they had at least one unwanted contact per week with the stalker, 11% had been abused for five years or more, and one in seven victims had to change the place of residence due to the suffered persecution.[34] Surveys showed that three out of four victims knew their stalker: in 22% of cases the stalker was a former partner of a victim, and in 16% the stalker was a friend, a roommate or neighbor of the victim. Only one in 10 victims says that the stalker was a complete stranger.[35]

According to the Internet survey conducted by Bocij, [36] the most frequently reported form of cyber stalking are threats and violent behavior in chat rooms (47.62%), and then threatening by e-mail communication (39.88%). Most of the respondents who completed this survey were from Great Britain (45.5%), USA (39.9%), Canada (7.2%) and Australia (2.4%).

When observing the gender representation in the number of incidents that occurred in the earlier partnership relations between the stalker and the victim, we can conclude that stalking is a continuation of domestic violence and previous abuse. This way, the stalker attempts to "punish" the victim or to force the victim to continue already ended relationship, whereby the stalker believes that the victim will regard the constant presence as evidence of devotion and loyalty.[37]

An interesting survey was conducted in September 2013 by the Women's Aid, and the results highlighted the link between domestic violence and partner violence with violence that occurs

28 Purcell, Pathe, Mullen, 2001 cited in Pittaro, Michael, op.cit., p. 184.
29 Pittaro, Michael, *loc.cit.*
30 Yar, Majid, *op.cit.*, p. 128.
31 „Corporate Alliance to End Partner Violence – Stalking," last modified March 16, 2012, http://www.caepv.org/getinfo/facts_stats.php?factsec=9
32 Tjapa, Anju, and Kumar, Raj. „Cyberstalking: Crime and Challenge at the Cyberspace". International journal of Computing and Business Research, vol.2 issue 1. (2011), p. 11. Accessed March 12, 2018, http://www.researchmanuscripts.com/PapersVol2N1Jan2011/1.pdf
33 Tjapa, Anju, and Kumar, Raj, *loc.cit.*
34 „Corporate Alliance to End Partner Violence – Stalking," last modified March 16, 2012, http://www.caepv.org/getinfo/facts_stats.php?factsec=9
35 For more see Vilić, Vida. "Violation of right to privacy on social networks as a form of cyber criminality". PhD diss., University of Niš, 2016
36 Cited in Bocij, Paul, *op.cit.,* p. 13
37 McGuire, Brian E., and Wraith, Anita, *op.cit.,* p. 318.

in cyberspace.[38] Out of the 307 women victims of domestic violence, 45% said that besides domestic violence during the emotional relationship they survived some form of violence and via social networks or e-mail, 48% reported having experienced some kind of abuse in cyberspace and 38% reported that they were victims of cyber stalking after the termination of a partnership relationship, 75% reported that the police did not know how to respond to the reported cyber violence, and 12% even said that the police did not even want to react to this kind of reported violence.[39]

Cyber stalking is mostly related to women as victims and to the violence suffered by the former partner, so there is a clear connection with partner violence or domestic violence, where the duration of the stalking were as long as the relationship lasted.[40] Women who have survived domestic violence are at even greater risk of becoming victims of stalking and cyber stalking because the perpetrator know a lot of personal information about the victim and where they can "intercept" the victim and to abuse her/him in the cyber space.[41] According to this, stalking and abuse in cyberspace are only a continuation of real-life domestic or partner violence.[42]

As there are different types of cyber stalkers, there are also different types of victims chosen by this kind of stalkers. Certain authors[43] classify potential victims of cyber stalking, according to victims' previous relationship with the stalker and the circumstances under which the motive of persecution arose. Based on these criteria, victims of stalking can be classified as:

1. Former partners - in this case, the victim is mostly female stalked by an ex-partner or spouse, although there have also been cases of stalking of former male partners by the former female partner. Cases of stalking among the partners of the same sex are rare. These victims usually feel overly guilty because of a poor choice of the partner, which is most often supported and supported by the closest members of the family or victims' friends or a professional who deals with the victim in seeking help. This category of victims can suffer the broadest spectrum of forms of violent behavior that lasts for a long period of time, and they are mostly endured with both physical violence.

2. Acquaintances and friends - this is the category where the victims are most commonly male, and the trigger for the emergence of stalking behavior is the occasional encounter or the date between the victim and the perpetrator. The period of stalking is relatively short and the possibility of creating any severe violence has been reduced.

3. Persons who deal with a particular profession or occupations that often come into contact with people who are mentally ill, problematic or too isolated and / or lonely are in danger of being stalked by a potential perpetrator in seeking the refuge from other problems (eg. Health workers, lawyers, educational workers). The breakdown of a professional relationship that has brought the perpetrator and the victim together may cause the stalking, which is in the domain of the pathology of an outraged or predatory model of behavior.

38 "Women's Aid conference links online abuse to off-line violence against women". (2013). last modified March 21, 2015. www.womensaid.org.uk/stalking-links
39 Ibid.
40 Mullen, Paul E.., Pathé, Michele, and Purcell, Rosemary. Stalkers and their Victims. Cambridge University Pres, 2009
41 Perry, Jennifer. Digital Stalking: A guide to technology risks for victims. Network for Surviving Stalking and Women's Aid Federation of England, 2012
42 Perry, Jennifer, *loc.cit.*
43 Pathé, Michele, Mullen, Paul E., and Purcell, Rosemary. "Management of victims of stalking". Advances in Psychiatric Treatment, Volume 7, Issue 6 (2001), 399-406

4. Colleagues and professional associates - victims of stalking from the workplace are most often stalked by a socially unadjusted colleague or associate, a former colleague, a client or a service user. This type of stalking most commonly occurs when there are major organizational changes in the working process or after a conducting certain sanctions against an employee who has become a stalker. The stalker considers that some rights has been taken away from him or that some of his rights has been deprived, and that the victim of stalking is the one responsible for that or has benefited from the situation. This behavior is very dangerous because it very often escalates to extreme violence, which is not only limited to the primary victim, but can also have an impact on other people that the victim is close with.

5. Unknown people - victims of any persecutors who do not know one another. The possibility of violence to occur in such relationship is relatively small, immeasurably less than the risk that exists when it comes to the case of so called "predator stalker" or violence between former emotional partners. The victim feels fear and confusion, because he/she cannot determine who the stalker is and what is the cause of stalking.

6. Celebrities - for this type of victim, the most frequently associated are stalkers who seek intimacy, socially unadjusted and resentful stalkers, as well as predator stalkers.

7. False victims of stalking - sometimes it happens that the stalkers accuse the victims of stalking them, most often as a form of revenge for the attention they wanted and did not receive, or to remain in contact with the victim.

The consequences of stalking can be very difficult for the victim, despite the fact that physical violence did not occur. Fear and anxiety are the most common and inevitable reactions, but sleep disorders, depression and suicidal thoughts can also occur. Some research has shown that one-third of the victims seek psychological help due to the consequences of stalking, one-fifth of them lose their jobs, while 7% of victims are unable to return to work at all.[44] The victim is also "forced" to adjust his/her life to the situation and to do everything in his/her power to avoid the stalker: change the phone number, provide additional space for living, have certain tools that can use for self-defense or to attend the self-defense course, change the vehicle, to move, change jobs, change personal identity (name, last name), even move to another country.[45]

The effects o the stalking are very complex and cause changes in victims' behavior, psychological wellbeing and social life and everyday habits and routine. There is a particularly high risk of losing a sense of personal safety, loss of work, loss of friends, insomnia and changes in the regular social habits that the victim has.

There are several factors that are recognized as causers that lead to a high level of intimidation in the victim.[46] Stalking is not one act of violence, but it is an act of violence that repeats itself many times, it is lengthy and unpredictable. This behavior leads to fear and the development of a feeling of mistrust, which in combination, has destructive consequences for the interpersonal relationships that the victim has with other people. Feelings of abandonment and inability to manage their lives are very strong among the victims, and can be further enhanced by improper responses by competent authorities, when the victim reported the violence through which it passes.

44 Tjaden, Patricia. „The crime of stalking: How big is the problem?". National Institute of Justice - Research preview, Washington DC, National Institute of Justice (1997), p. 2
45 McGuire, Brian E., and Wraith, Anita, *op.cit.,* p. 323
46 Pathé, Michele, Mullen, Paul E., and Purcell, Rosemary, *op.cit.*

4. New legal solutions in the criminal legislation of the Republic of Serbia

Amendments to the Criminal Code of the Republic of Serbia,[47] which entered into force on June 1, 2017, as new criminal offenses introduced stalking and gender harassment.

In the case of the criminal offense of stalking (Article 138a of Chapter XIV - Criminal offenses against the freedom and rights of man and citizen), several acts of commision are prescribed. Stalking, as a criminal offense, exists if the stalker repeats following actions aganst the victim for a specified period of time: unauthorized monitoring of a person or taking actions to be physically near to someone against the will of that person; establishing the unwanted contact with someone, directly, with the assistance of a third party or through means of communication; misuse of personal information of another person or a person close to him/her for the purpose of offering goods or services; threatened by an attack on a person's life, body or freedom of another person or person close to a certain person, as well as taking other similar actions in a manner that can significantly jeopardize the personal life of the person according to which the said action is taken. For the commission of these acts, the law provided a fine or imprisonment of up to three years.

The severe form of this offense exists (1) if the perpetrator caused the threat to the life, health or body of the endangered person or to the person close to this person (provided sentence is an imprisonment of three months to five years), or (2) if the offense caused the death of another person or the death occurred (provided sentence is an imprisonment of up to ten years).

When listing the acts of the criminal offense of stalking, it is necessary to include one of the nowadays widespread form of stalking – stalking via the Internet and the use of social networks. Describing the acts of stalking as a criminal offense, it is stated that stalking can be carried out *through different ways of communication*, without specifically quoting what ways of communication are. In this way, precision has been omitted in formulating and emphasizing the prohibition of Internet and social network abuse. Explanation of the meaning of *different ways of communication* does not exist in Art. 112 of the Criminal Code, although this article defines the terms of the computer data, the network, the computer program, the computer virus and the computer system.

The Chapter XVIII ("Criminal offenses against sexual freedom") especially incriminate sexual/gender harassment (Art.182a). This is also a newly introduced criminal offense, which defines sexual/gender harassment as *any verbal, non-verbal or physical behavior that aims or constitutes of a violation of the dignity of a person in the field of sexual life, that causes fear or creates an enmity, degrading or offensive environment.* The criminal prosecution for this criminal offense is based on the proposal of the injured party/victim, and the proposed penalty is a fine or imprisonment sentence of up to six months for the commission of this offense. The severe form of this criminal offense is when the victim is a minor, providing the sentence of imprisonment of three months to three years. As with the criminal offense of stalking, even in this criminal offense, it is not foreseen that a criminal offense can be committed by using the Internet or through social networks. The legislator also failed in protecting the most exposed category of victims of this crime - minors.

47 Amendments to the Criminal Code of the Republic of Serbia (Official Gazzette of Republic of Serbia no. 94/2016)

CONCLUSION

The use of the Internet and the increased use of global social networks have contributed to the creation of a new, sophisticated, inexparable, technically perfect form of online criminal offenses that are difficult to confront, because of their "invisibility" and "intangibility". Due to the extremely increased number of users, accessibility of data, openness in communication, but also to the non-legal solutions of this deviant behaviors both on the national and international level, social networks represent an excellent shelter for the perpetrators of this type of crime and significantly aggravate the protection of victims.

A particular form of widespread abuse by using the Internet and social networks is cyber stalking. This deviant behavior also occurs in a "real" environment, but it is especially dangerous in its appear in the "virtual" world, because the victim is not aware who the stalker really is, because of the cyber anonimity. Both theoretical and empirical studies clearly emphasize the difference between stalking and harassment in the "real"and in "vrtual" world, but the legislation is really poor concerning these devianl behaviors, which are rarely provided in the legislation as particular criminal offences. The effects that stalking might have on the victim are very complex and can cause changes in the behavior, the psychological state and the social life of the victim. There is a particularly high risk of losing a sense of personal safety, loss of work and in unemployment due the fear of the perpetrators' next action, loss of friends, insomnia, changes in the regular social habits that the victim has.

Nowadays, increasingly widespread Internet victimization by stalking represents a serious and growing threat to individuals and to the society in general, but, within the framework of criminal law, there is not enough attention payed to this problem. Numerous estimations show that the act of cyber stalking is an increasingly serious and more frequent threat to the security of Internet users, with evermore tragic consequences for the victims. Cyber offenders abuse new technologies in order to create new contacts and social relationships, thus overcoming all the boundaries of culture and having a decent communication. However, the lack of provisions in existing natiolan criminal legislation which would specify and incriminate the most common forms of cyber stalking is evident.

Preventive action and protection from cyber stalking includes many different approaches, including personal preventive strategies, legislative solutions and new legal regulations, as well as finding technological solutions for the current overcoming of technical disadvantages of social networks. Victims of cyber stalking should be considered as a special category of victims, which requires a specific approach of professionals, both in state bodies and institutions, and in organizations dealing with the suppression of high-tech criminality. The fact is that the increase of Internet users and the users of different social networks, result also in the increase of the number of victims of cyber stalking. Since the Internet has become an inseparable part of the daily life of a large number of people, it is impossible to simply turn off the computer and thus provide protection: Internet users must learn how to protect themselves from all kinds of potentially dangerous behavior in the cyberspace. The IT experts and professionals must also be included in preventive action, such as education, but also in protection of victims in cyber environment.

Bibliography

1. Amendments to the Criminal Code of the Republic of Serbia (Official Gazzette of Republic of Serbia no. 94/2016)

2. Benschop, Albert. "CyberStalking: menaced on the internet". SocioSite-Social & Behavioral Sciences Sociology & Anthropology University of Amsterdam. (2003). Accessed July 14, 2018, http://www.sociosite.org/cyberstalking_en.php

3. Bocij, Paul. „Cyberstalking: harrasment in the Internet age and how to protect your family". Praeger Publications: Westport Connectict London, 2004

4. Clough, Jonathan. Principles of Cybercrime. Cambridge University Press, 2010

5. „Corporate Alliance to End Partner Violence – Stalking," last modified March 16, 2012, http://www.caepv.org/getinfo/facts_stats.php?factsec=9

6. D'Ovidio, Robert, and Doyle, James. „Cyberstalking: Understanding the Investigative Hurdles". FBI Law Enforcement Bulletin 72, No.3 (2003)

7. Ellison, L., Cyberstalking: Tackling harrasment on the Internet, Crime and the internet, London: Routledge, 2001

8. Gilbert, Pamela. "On Sex, Cyberspace, and Being Stalked". Women and Performance 9, No.1 (1996): 125-149

9. Kovačević-Lepojević, Marina, and Lepojević, Borko. „Žrtve sajber proganjanja u Srbiji". Temida No.3/12 (2009): 89-108

10. McGrath, Michael, and Casey, Eoghan . „Forensic psychiatry and the Internet: Practical perspectives on sexual predators and obsessional harassers in cyberspace". 30. journal of the American Academy of Psychiatry and the Law 81 (2002), 81-94

11. McGuire, Brian E., and Wraith, Anita. "Legal and psychological aspects of stalking: A review". Journal of Forensic Psychiatry 11, No. 2 (2000): 316-327

12. Mullen, Paul E.., Pathé, Michele, and Purcell, Rosemary. Stalkers and their Victims. Cambridge University Pres, 2009

13. Pathé, Michele, Mullen, Paul E., and Purcell, Rosemary. "Management of victims of stalking". Advances in Psychiatric Treatment, Volume 7, Issue 6 (2001), 399-406

14. Perry, Jennifer. Digital Stalking: A guide to technology risks for victims. Network for Surviving Stalking and Women's Aid Federation of England, 2012

15. Pittaro, Michael. "Cyber stalking: An Analysis of Online Harrasment and Intimidation". International Journal of Cyber Criminology (IJCC) 1 (2007) pp. 180-197.

16. Sheridan, Lorraine P., and Grant, Tim. "Is cyberstalking different?". Psychology, Crime & Law 13, No.6 (2007): 627-640

17. Tjaden, Patricia. „The crime of stalking: How big is the problem?". National Institute of Justice - Research preview, Washington DC, National Institute of Justice (1997)

18. Tjapa, Anju, and Kumar, Raj. „Cyberstalking: Crime and Challenge at the Cyberspace". International journal of Computing and Business Research, vol.2 issue 1. (2011), p. 11. Accessed March 12, 2018, http://www.researchmanuscripts.com/PapersVol2N1Jan2011/1.pdf

19. Vilić, Vida. "Proganjanje putem interneta – ko su izvršioci i žrtve?". Godišnjak Pravnog fakulteta u Istočnom Sarajevu 3, No. 2 (2012), 123-143

20. Vilić, Vida. "Viktimizacija proganjanjem putem interneta", Temida No.1 (2013): 151-162

21. Vilić, Vida. "Violation of right to privacy on social networks as a form of cyber criminality". PhD diss., University of Niš, 2016

22. "Women's Aid conference links online abuse to off-line violence against women". (2013). last modified March 21, 2015. www.womensaid.org.uk/stalking-links

23. Yar, Majid. „Cybercrime and society". Sage Publications Ltd, 2006


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